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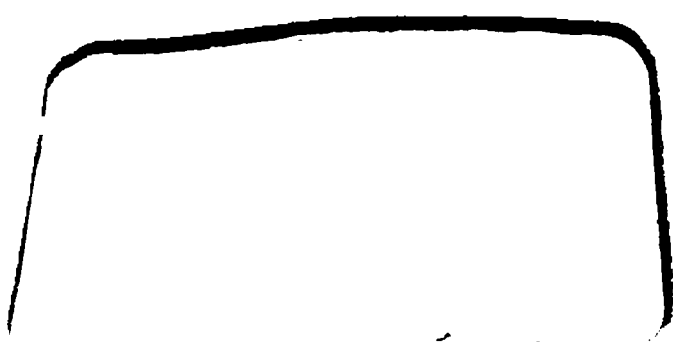
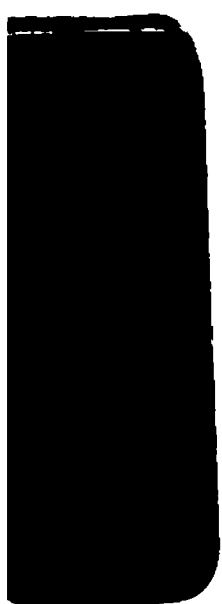
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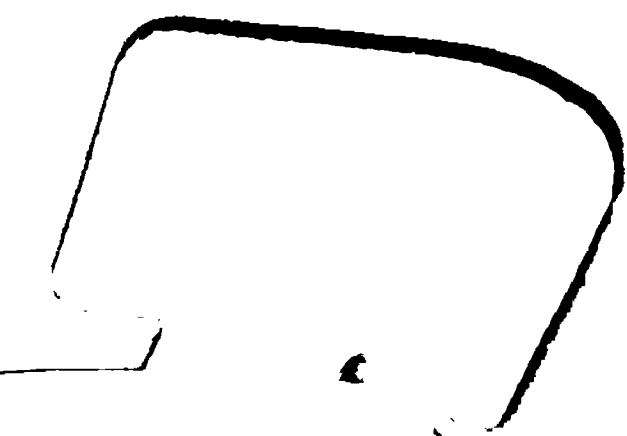
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Volume
26
A

DIGEST
Gift of Senator
OF

The Decisions of the Supren

OF THE

STATE OF CALIFORNIA

CONTAINED IN THE SIXTEEN VOLUMES O

FROM THE FORMATION OF THE COURT, IN 1850, UNTIL JANUARY, 1861,

WITH A COMPLETE LIST OF

**CASES AFFIRMED, REVERSED, QUALIFIED, COMMENTED
UPON, OR ABROGATED BY STATUTE.**

IN TWO VOLUMES--VOL. I.

BY HENRY J. LABATT,
COUNSELOR AT LAW.

SAN FRANCISCO:
H. H. BANCROFT & COMPANY.
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INTRODUCTION.

It has been the labor of the compiler of this digest to collect the decisions of the Supreme Court of California, giving such references thereto as would enable the profession to review all that has been judicially decided in this State.

It was considered to be the purpose of the digest to guide to the very page on which the point of law was found, rather than to the case in which it was enunciated, and therefore the page of the point decided is given. This obviates the necessity of searching through a lengthy opinion for a particular authority; yet, when that is reached, the surrounding circumstances and attendant reasoning can be immediately used.

All cases overruled are printed in *italic*, and under those decisions which have been abrogated by change of the statutory law, what change exists has been noted.

A correct list of cases affirmed, reversed, qualified, commented on, or abrogated by statute is furnished; also a list of cases digested, and the Judges and Reporters of the Supreme Court.

Such decisions as were rendered since the commencement of the January Term, 1861, are not incorporated in this digest.

HENRY J. LABATT.

SAN FRANCISCO, May, 1861.

JUDGES OF THE SUPREME COURT

OF THE STATE OF CALIFORNIA.

1. HON. S. CLINTON HASTINGS, elected by the Legislature, March, 1850; drew the first class to serve until January, 1852.

2. HON. HENRY A. LYONS, elected by the Legislature, March, 1850; drew the second class to serve until January, 1854; resigned April, 1852.

3. HON. NATHANIEL BENNETT, elected by the Legislature, March, 1850; drew the third class to serve until January, 1856; resigned October, 1851.

3. HON. HUGH C. MURRAY, appointed October, 1851, to fill unexpired term of Judge Bennett, until January, 1852; elected in 1851, at general election, to fill unexpired term of the third class until January, 1856; and then elected for full term of the third class, from January, 1856, until January, 1862. Died September, 1857.

1. HON. SOLOMON HEYDENFELT, elected for full term of the first class, from January, 1852, to January, 1858; resigned January, 1857.

2. HON. ALEXANDER ANDERSON, appointed April, 1852, to fill unexpired term of Judge Lyons, until January, 1853.

2. HON. ALEXANDER WELLS, elected in 1852, at general election, to fill unexpired term of the second class, until 1854; and then elected for full term of the second class, from January, 1854, to January, 1860. Died October, 1854.

2. HON. CHARLES H. BRYAN, appointed October, 1854, to fill unexpired term of Judge Wells, until January, 1855.

2. HON. DAVID S. TERRY, elected in 1854, at general election, to fill unexpired term of the second class, until January, 1860; resigned November, 1859.

1. HON. PETER H. BURNETT, appointed January, 1857, to fill unexpired term of Judge Heydenfelt, until January, 1858; resigned this appointment September, 1857.

1. HON. STEPHEN J. FIELD, appointed September, 1857, to fill unexpired term of Judge Heydenfelt, until January, 1858, and elected in September, 1857, at general election, for full term of the first class, from January, 1858, to January, 1864.

3. HON. PETER H. BURNETT, appointed September, 1857, to fill unexpired term of Judge Murray, until January, 1858.

3. HON. JOSEPH G. BALDWIN, elected in 1858, at general election, to fill unexpired term of the third class, from January, 1859, to January, 1862.

2. HON. W. W. COPE, appointed November, 1859, to fill unexpired term of Judge Terry, until January, 1860; elected in September, 1859, at general election, to fill the full term of the second class, from January, 1860, until January 1866.

REPORTERS OF THE SUPREME COURT

OF THE STATE OF CALIFORNIA.

EDWARD NORTON, Esq., appointed by the Court in 1850, whose manuscripts were destroyed by fire.

NATHANIEL BENNETT, Esq., appointed by the Court in 1850; reported volume 1.

RUFUS A. LOCKWOOD, Esq., appointed by the Court in 1852; reported part of volume 2.

H. P. HEPBURN, Esq., appointed by the Court in 1852; reported part of volume 2 and volumes 3 and 4.

JOSEPH G. BALDWIN, Esq., appointed by the Court in 1855.

WILLIAM G. MORRIS, Esq., authorized by J. G. Baldwin, Esq.; reported volume 5.

B. C. WHITMAN, Esq., appointed by the Governor in 1856.

H. TOLER BOORAEM, Esq., authorized by B. C. Whitman, Esq.; reported volumes 6, 7, and 8.

HARVEY LEE, Esq., appointed by the Governor in 1858; reported volumes 10, 11 and 12.

JOHN B. HARMON, Esq., appointed by the Governor in 1860, under a special act of 1860, to report back volumes; reported volumes 13, 14 and 15.

DAVID T. BAGLEY, Esq., appointed by the Governor in 1860; reported volume 16.

CASES

AFFIRMED, REVERSED, MODIFIED, COMMENTED UPON, OR ALTERED BY
STATUTORY ENACTMENT.

Abell v. Calderwood, 4 Cal. 90, affirmed in *Lee v. Evans*, 8 Cal. 433, that an unwritten contract for the sale of land is void by the statute of frauds; explained in *Halleck v. Guy*, 9 Cal. 196, as not referring to sales made by order of probate courts; and restricted in *Arguello v. Edinger*, 10 Cal. 158, to cases where no part performance of the contract is shown, and to facts of the original case alone.

Adams v. City of Oakland, 8 Cal. 510, affirmed in *Wing v. Owen*, 9 Cal. 247, requiring a statement on motion for a new trial to be filed in statute time.

Adams v. Gorham, 6 Cal. 68, affirmed in *Goodwin v. Scannell*, 6 Cal. 543, as to segregation of goods in a warehouse under the statute of frauds.

Adams v. Hackett, 7 Cal. 187, affirmed in *Adams v. Woods*, 8 Cal. 158; in *Naglee v. Minturn*, 8 Cal. 544; in *Adams v. Woods*, 9 Cal. 26, as to the right to levy upon the assets of an insolvent copartnership before dissolution by a decree of the court; affirmed in *Piercy v. Sabin*, 10 Cal. 28, as to the simplicity of pleading under our code; and limited in *Crandall v. Blen*, 13 Cal. 22, as to sale of a chose in action on execution.

Adams v. Haskell, 6 Cal. 113, 475, referred to in *Yuba County v. Adams*, 7 Cal. 37; in *Adams v. Hackett*, 7 Cal. 204, as deciding that money in the hands of a receiver cannot be attached; affirmed in *Adams v. Woods*, 8 Cal. 158; in *Naglee v. Minturn*, 8 Cal. 544, as deciding that receivers cannot refuse to pay over mon-

ey in their hands, alleging the same are attached.

Adams v. Woods, 8 Cal. 152, referred to in *Ludlum v. Fourth District Court*, 9 Cal. 13; in *Adams v. Woods*, 9 Cal. 25; and in *Naglee v. Lyman*, 14 Cal. 456, as deciding that creditors may intervene in the distribution of assets of an insolvent copartnership to enforce their liens.

Adams v. Woods, 9 Cal. 24, referred to in *Ludlum v. Fourth District Court*, 9 Cal. 12, as deciding that creditors of an insolvent copartnership may intervene in the distribution of assets to enforce their liens.

Ah Thaie v. Quan Wan, 3 Cal. 216, affirmed in *Prader v. Grim*, 13 Cal. 588, relative to counsel fees as damages in an undertaking on remedial process.

Aiken v. Quartz Rock Mariposa G. M. Co., 6 Cal. 186, affirmed in *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 344, as to service of summons on a corporation.

Algier v. Steamer Maria, 14 Cal. 167, affirmed in *Parker v. Hinds*, 14 Cal. 418, as to the proper time to object to the form of a verdict.

Alvarez v. Brannan, 7 Cal. 503, affirmed in *Taaffe v. Josephson*, 7 Cal. 355; and in *Seligman v. Kalkman*, 8 Cal. 215, that whether a party knew a material fact to be false or not, if it were false, is immaterial; and in *Dunn v. Tozer*, 10 Cal. 170, that a defect of parties must be taken advantage of by demurrer.

Ames v. Hoy, 12 Cal. 11, affirmed in

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<p><i>Stuart v. Lander</i>, 16 Cal. 375, that an action will lie on a judgment.</p> <p><i>Andrews v. Mokelumne Hill Co.</i>, 7 Cal. 330, affirmed in <i>Dunn v. Tozer</i>, 10 Cal. 170, that a defect of parties must be taken advantage of by demurrer.</p> <p><i>Anthony v. Dunlap</i>, 8 Cal. 26, affirmed in <i>Uhlfelder v. Levy</i>, 9 Cal. 614, as to the comity of courts, and the right to enjoin each other's proceedings.</p> <p><i>Anthony v. Wessel</i>, 9 Cal. 103, affirmed in <i>Reynolds v. Harris</i>, 14 Cal. 680, relative to the equities derived from a sheriff's deed under an execution sale.</p> <p><i>Argenti v. City of San Francisco</i>, 6 Cal. 677, referred to in <i>Hart v. Burnett</i>, 15 Cal. 608, relative to the inadequate consideration of the purchase of pueblo lands on execution.</p> <p><i>Argenti v. City of San Francisco</i>, 16 Cal. 255, affirmed in <i>Seale v. City of San Francisco</i>, 16 Cal. 284, and referred to in <i>Martin v. City of San Francisco</i>, 16 Cal. 286, relative to contracts of the corporation of the city of San Francisco.</p> <p><i>Arguello v. Edinger</i>, 10 Cal. 150, referred to in <i>Pierce v. Robinson</i>, 13 Cal. 132, as to parol evidence to state the purpose of a written contract.</p> <p><i>Armstrong v. Hayward</i>, 6 Cal. 183, affirmed in <i>Griffith v. Grogan</i>, 12 Cal. 324, as to the effect of release of one joint debtor.</p> <p><i>Attorney General v. Squires</i>, 14 Cal. 12, affirmed in <i>People v. Supervisors of Santa Barbara Co.</i>, 14 Cal. 103, relative to the powers of a Board of Supervisors.</p> <p><i>Averill v. Steamer Hartford</i>, 2 Cal. 308, affirmed in <i>Taylor v. Steamer Columbia</i>, 5 Cal. 272, that the State courts have admiralty jurisdiction; in <i>Meiggs v. Scannell</i>, 7 Cal. 408; and in <i>Fisher v. White</i>, 8 Cal. 422, as to the service of process by statute being equivalent to an actual seizure of the vessel.</p> <p><i>Bacon v. Scannell</i>, 9 Cal. 272, overruled in <i>Stevens v. Irwin</i>, 15 Cal. 507, relative to continued possession under the statute of frauds.</p> <p><i>Bagley v. Eaton</i>, 10 Cal. 126, affirmed in <i>Fallon v. Dougherty</i>, 12 Cal. 105; and in <i>Landis v. Turner</i>, 14 Cal. 575, when plaintiff's affidavit of the search for a lost instrument is admitted in his own behalf.</p> <p><i>Bagley v. McMickle</i>, 9 Cal. 430, affirmed in <i>Bagley v. Eaton</i>, 10 Cal. 148, that the cause of the destruction of an instrument</p>	<p>is the controlling fact to allow second evidence thereof.</p> <p><i>Bailey v. Steamer New World</i>, 2 Cal. 370, affirmed in <i>Goodwin v. Garr</i>, 8 Cal. 617, that possession is prima facie evidence of ownership.</p> <p><i>Baker v. Bartol</i>, 6 Cal. 483; 7 Cal. 5 referred to in <i>Riddle v. Baker</i>, 13 Cal. 3 without comment.</p> <p><i>Baldwin v. Bennett</i>, 4 Cal. 392, affirmed in <i>Coffee v. Meiggs</i>, 9 Cal. 364, that price agreed to be paid is the measure of damages for obstructing the fulfillment of a contract.</p> <p><i>Baldwin v. Kramer</i>, 2 Cal. 582, explained in <i>Lurvey v. Wells</i>, 4 Cal. 1; that a motion for a new trial stays the operation of a judgment; and affirmed in <i>Carpentier v. Hart</i>, 5 Cal. 407, that judgment cannot be set aside after adjournment of a term.</p> <p><i>Barrett v. Tewksbury</i>, 15 Cal. 357, affirmed in <i>Reynolds v. Lawrence</i>, 15 Cal. 361, and in <i>Dobbins v. Dollarhide</i>, 15 Cal. 375, relative to the necessity in a statement on appeal of setting forth the grounds of error.</p> <p><i>Bartlett v. Hogden</i>, 3 Cal. 55, affirmed in <i>Brooks v. Lyon</i>, 3 Cal. 114, as to newly discovered evidence.</p> <p><i>Bear River Co. v. York Mining Co.</i>, 10 Cal. 327, affirmed in <i>Hill v. King</i>, 8 Cal. 339; and in <i>Mokelumne Hill Co. v. Woolbury</i>, 10 Cal. 187, as to appropriation of water in the mines.</p> <p><i>Beard v. Knox</i>, 5 Cal. 252, referred to in <i>Guttman v. Scannell</i>, 7 Cal. 459; <i>Smith v. Smith</i>, 12 Cal. 225, and in <i>Secord v. Ward</i>, 13 Cal. 469, as to rights of the wife in common property.</p> <p><i>Beckett v. Selover</i>, 7 Cal. 215, affirmed in <i>Haynes v. Meeks</i>, 10 Cal. 118, as to the jurisdiction necessary to give an administrator of an estate; and in <i>Rogers v. Hoberlein</i>, 11 Cal. 128, that letters of administration must be issued to a public administrator; but this last provision has been abrogated, in counties other than San Francisco and Sacramento, by the statute of 1860, 105.</p> <p><i>Belloc v. Rogers</i>, 9 Cal. 123, affirmed in <i>McMillan v. Richards</i>, 9 Cal. 410, as to the defeasance of a mortgage; and in <i>Hentsch v. Porter</i>, 10 Cal. 559, that district courts have jurisdiction of mortgages against estates of deceased persons; and referred to in <i>Cowell v. Buckelew</i>, 14 Cal.</p>

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642, that the opinion in that case received a special and limited concurrence, and is only authority to that extent; and explained in *Goodenow v. Ewer*, 16 Cal. 469, as to the sale of mortgaged property on foreclosure.

Bennett v. Solomon, 6 Cal. 134, affirmed in *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 402, that an assignment of a mortgage may be proven by parol evidence.

Bennett v. Taylor, 5 Cal. 502, affirmed in *Phelan v. Olney*, 6 Cal. 483; in *McMillan v. Richards*, 9 Cal. 410, that a mortgage is a mere incident to the debt.

Bequette v. Caulfield, 4 Cal. 278, affirmed in *Bird v. Lisbros*, 9 Cal. 5, that possession gives a right of action against a trespasser; and in *Gregory v. Haynes*, 13 Cal. 595, that a trespasser cannot set up title in a third person.

Bernard v. Mullot, 1 Cal. 368, referred to in *Piercy v. Sabin*, 10 Cal. 30, that new matter must be set up in the answer.

Bidleman v. Kewen, 2 Cal. 248, referred to in *People v. Lafarge*, 3 Cal. 134; and in *Robb v. Robb*, 6 Cal. 22, as to the power of the court to set aside a judgment after the term is adjourned.

Bigelow v. Gove, 7 Cal. 133, explained in *Weaver v. Conger*, 10 Cal. 237, that the complaint prayed for too general an equitable remedy.

Billings v. Billings, 2 Cal. 107, explained in *Smith v. Morse*, 2 Cal. 541, as to the right of appellate courts to interfere with verdicts of fraud; and affirmed in *Chenery v. Palmer*, 6 Cal. 122, as to questions of fraud in law.

Billings v. Hall, 7 Cal. 1, affirmed in *Ex parte Newman*, 9 Cal. 509, as to the construction of sec. 1, art. 1, of the State constitution.

Billings v. Harvey, 6 Cal. 381, affirmed in *Billings v. Hall*, 7 Cal. 3, and in *Morton v. Folger*, 15 Cal. 284, as to the implied repeal of the limitation act of 1850.

Billings v. Morrow, 7 Cal. 171, affirmed in *Davidson v. Dallas*, 8 Cal. 244; and in *Dupont v. Wertheman*, 10 Cal. 367, as to ratification of acts of agent by principal; and in *De Rutte v. Muldrow*, 16 Cal. 510, relative to the particular power of attorney there passed upon.

Bird v. Dennison, 7 Cal. 297, affirmed in *Ellis v. Jeans*, 7 Cal. 416, that a deed is not evidence of possession; in *Bryan v.*

Ramirez, 8 Cal. 467, the equity of a party to land will be protected; in *Bird v. Lisbros*, 9 Cal. 6, and in *Partridge v. McKinney*, 10 Cal. 184, that adverse possession by another is notice of title.

Bird v. Lisbros, 9 Cal. 1, affirmed in *Piercy v. Sabin*, 10 Cal. 30, that possession in a third party cannot be set up in ejectment by defendant; in *Partridge v. McKinney*, 10 Cal. 183, as to the presumption of abandonment of real estate.

Birrell v. Shie, 9 Cal. 104, affirmed in *Swift v. Kraemer*, 13 Cal. 530, relative to the mortgage on a homestead, but abrogated by the statute of 1860, p. 311.

Blanding v. Burr, 13 Cal. 343, affirmed in *People v. Seymour*, 16 Cal. 345, as to the constitutionality of a special tax.

Boggs v. Merced Mining Co., 14 Cal. 279, affirmed in *Henshaw v. Clark*, 14 Cal. 464, relative to mineral lands in this State; in *Yount v. Howell*, 14 Cal. 469, relative to the patent for a Mexican grant; and in *McCracken v. City of San Francisco*, 16 Cal. 626, as to the doctrine of estoppel.

Boles v. Weifenback, 15 Cal. 144, affirmed in *Boles v. Cohen*, 15 Cal. 151; and in *Payne v. Treadwell*, 16 Cal. 247, relative to the necessary allegations in ejectment.

Bottomly v. Grace Church, 2 Cal. 90, affirmed in *Houghton v. Blake*, 5 Cal. 240, that materials must be used in the construction of the building to enforce a mechanic's lien, but abrogated by the statute of 1856, 203, and affirmed in *McAlpin v. Duncan*, 16 Cal. 127, that this law must be strictly construed.

Brannan v. Mesick, 10 Cal. 95, referred to in *Tewksbury v. Provizzo*, 12 Cal. 25, as to the condition precedent of a contract.

Bray v. Redman, 6 Cal. 287, affirmed in *People v. Harris*, 9 Cal. 573, that a justice may waive payment of his fees on an appeal.

Bridges v. Paige, 13 Cal. 640, affirmed in *Hawkins v. Borland*, 14 Cal. 415, relative to proof under a general denial of indebtedness.

Brock v. Bruce, 5 Cal. 279, affirmed in *Williams v. Walton*, 9 Cal. 146, as to the jurisdiction of the county court.

Brown v. Covillaud, 6 Cal. 566, affirmed in *Green v. Covillaud*, 10 Cal. 322, as to contracts to give good and sufficient deeds for land; and explained in *Farley v.*

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Vaughn, 11 Cal. 237, that the delay in complying with payment will waive the right to a deed.

Brown v. Graves, 2 Cal. 118, affirmed in Smith v. Phelps, 2 Cal. 120, that the supreme court will not review facts unless a new trial is demanded; and explained in Brown v. Tolles, 7 Cal. 399, to refer only to facts in the case and not to law.

Bryan v. Berry, 6 Cal. 394, affirmed in Sayre v. Nichols, 7 Cal. 538; and in Kritzer v. Mills, 9 Cal. 23, that one who signs as surety does not mean to bind himself as principal, and overruled in Aud v. Magruder, 10 Cal. 289, on this point; and affirmed in Ex parte Newman, 9 Cal. 505, relative to the law of decisions.

Bryan v. Berry, 8 Cal. 130, affirmed in Cunningham v. Hopkins, 8 Cal. 33, and in Hastings v. Halleck, 11 Cal. 31, that a new undertaking on appeal may be filed when the former was insufficient; and in Franklin v. Reiner, 8 Cal. 340, that the transcript must show that the undertaking on appeal was given.

Bryan v. Ramirez, 8 Cal. 461, affirmed in Henderson v. Grewell, 8 Cal. 584, as to the fact of acknowledgment of a deed, but abrogated by the statutes of 1860, pp. 179, 357.

Bryant v. Mead, 1 Cal. 441, doubted in Haight v. Joyce, 2 Cal. 66, but affirmed in Gahan v. Neville, 2 Cal. 81, and in Carrier v. Brannan, 3 Cal. 329, as to recovery at law of gaming contracts.

Buchanan's Estate, 8 Cal. 507, affirmed in Smith v. Smith, 12 Cal. 225, and Scott v. Ward, 13 Cal. 469, as to common property.

Burdge v. Smith, 14 Cal. 380, affirmed in Smith v. Doe, 15 Cal. 105, relative to occupancy of mineral lands.

Burdge v. Underwood, 6 Cal. 45, affirmed in Weimer v. Lowery, 11 Cal. 112, as to possession of mining lands.

Burgoyne v. Supervisors of San Francisco, 5 Cal. 9, affirmed in Exline v. Smith, 5 Cal. 113; Dickey v. Hurlbut, 5 Cal. 334; Thompson v. Williams, 6 Cal. 89; People v. Town of Nevada, 6 Cal. 144; Tuolumne County v. Stanislaus County, 6 Cal. 442; Phelan v. San Francisco County, 6 Cal. 540; and in People v. Bircham, 12 Cal. 55, that courts have no legislative jurisdiction; and in People v. Applegate, 5 Cal. 295, that courts of sessions have no appellate jurisdiction.

Burt v. Scranton, 1 Cal. 416: The c of April 29, 1851, extended the time answer in the State and without the court to forty days.

Cahoon v. Levy, 4 Cal. 243, 6 Cal. 2 referred to in same case, 10 Cal. 216 being more fully presented to the court and affirmed in Brennan v. Marsh, 10 Cal. 435, without comment, relative to garnishment.

California Steam Nav. Co. v. Wrigg 6 Cal. 258, referred to in the same case 8 Cal. 589; affirmed in Nash v. Herrsilla, 9 Cal. 587, and in Fisk v. Fowler 10 Cal. 517, as to liquidated damages breach of a contract.

Call v. Hastings, 3 Cal. 179, affirmed in Chamberlain v. Bell, 7 Cal. 294; E v. Dennison, 7 Cal. 304, and in Staff v. Lick, 7 Cal. 487, as to constructive notice of registration of conveyances.

Carpentier v. Hart, 5 Cal. 406, affirmed in Shaw v. McGregor, 8 Cal. 521, that courts cannot open a judgment after adjournment of the term.

Carr v. Caldwell, 10 Cal. 380, affirmed in Swift v. Kraemer, 13 Cal. 530, relative to the mortgage on a homestead; and referred to in Guy v. Du Uprey, 16 Cal. 199, as being peculiar in the facts, but abrogated by the statutes of 1860, p. 311.

Cary v. Tice, 6 Cal. 625, affirmed in Rix v. McHenry, 7 Cal. 91; in Benedict v. Bunnell, 7 Cal. 246, and in Pfeiffer v. Rhein, 14 Cal. 649, as to the domicile of the wife to acquire a homestead, but abrogated by the statutes of 1860, p. 311.

Castro v. Castro, 6 Cal. 158, affirmed in Grimes' Estate v. Norris, 6 Cal. 62, and in Tevis v. Pitcher, 10 Cal. 477, that a will is a conveyance unless the statute otherwise provides.

Castro v. Gill, 5 Cal. 40, affirmed in Merced Mining Co. v. Fremont, 7 Cal. 319, that possession is prima facie evidence of title, and in Stanley v. Green, 10 Cal. 166, that a conveyance should contain a sufficient description.

Caulfield v. Hudson, 3 Cal. 389, affirmed in People v. Peralta, 3 Cal. 37; Reed v. McCormick, 4 Cal. 342; Townsend v. Brooks, 5 Cal. 52; and in People v. Fowler, 9 Cal. 86, that district courts have no appellate jurisdiction; referred to in Parsons v. Tuolumne County Water Co., 5 Cal. 43; and in People v. Heston, 6 Cal. 681, as to the jurisdiction of

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various courts ; in *People v. Applegate*, 5 Cal. 295, that the court of sessions has no appellate jurisdiction ; and in *Zander v. Coe*, 5 Cal. 230, that the district courts have exclusive original jurisdiction over two hundred dollars.

Chenery v. Palmer, 5 Cal. 131, affirmed in *Thornburgh v. Hand*, 7 Cal. 567, that defendant could cross-examine plaintiff's witness as to the kind of possession relied on.

Chever v. Hays, 3 Cal. 471, affirmed in *Cohen v. Barrett*, 5 Cal. 210, 213 ; *Groschen v. Page*, 6 Cal. 139 ; *McAllister v. Strode*, 7 Cal. 430 ; *Judson v. Atwill*, 9 Cal. 478 ; *Dana v. Stanfords*, 10 Cal. 277 ; and in *Naglee v. Lyman*, 14 Cal. 456, as to voluntary assignments.

Chipman v. Bowman, 14 Cal. 157, affirmed in *Logan v. Hillegass*, 16 Cal. 202, as to enjoining executions on an irregular judgment.

Chipman v. Hibbard, 8 Cal. 268, referred to in *Pixley v. Huggins*, 15 Cal. 134, as not applicable to cases on injunctions of executions.

City of Marysville v. Buchanan, 3 Cal. 212, affirmed in *McMillan v. Richards*, 12 Cal. 468, as to the filing of a remittitur and issuing execution.

City of San Francisco v. Hazen, 5 Cal. 169, affirmed in *Holland v. City of San Francisco*, 7 Cal. 375, 380, and in *McCracken v. City of San Francisco*, 16 Cal. 618, relative to the defect of the ordinance passed for the sale of the city slip property in San Francisco.

City of San Francisco v. Scott, 4 Cal. 114, affirmed in *McCauley v. Weller*, 12 Cal. 528, that compensation must be made for private property.

Clark v. Baker, 14 Cal. 612, referred to in *Clark v. Boyreau*, 14 Cal. 635, relative to the mortgage foreclosed upon ; and in *Goodenow v. Ewer*, 16 Cal. 468, that a mortgage must be foreclosed.

Clark v. Perry, 5 Cal. 58, affirmed in *Belloc v. Rogers*, 9 Cal. 129 ; and in *Deck v. Gherke*, 12 Cal. 438, as to the jurisdiction of the probate courts.

Clary v. Hoagland, 5 Cal. 476, referred to in same case, 6 Cal. 687 ; and in *Davidson v. Dallas*, 15 Cal. 82, that a judgment in a case is the law of that case ; in *Coulter v. Stark*, 7 Cal. 245, that the county court exceeded its jurisdiction.

Clary v. Hoagland, 6 Cal. 685, referred

to in *Hastings v. Halleck*, 13 Cal. 211 ; and in *Davidson v. Dallas*, 15 Cal. 82, as to reviewing the law of a case on appeal the second time.

Clay v. Walton, 9 Cal. 328, affirmed in *Ellison v. Jackson Water Co.*, 12 Cal. 553, as to the consideration of paying another's debt.

Clayton v. West, 2 Cal. 381, affirmed in *Morgan v. Hugg*, 5 Cal. 410, that errors which are immaterial will be disregarded on appeal.

Coffinberry v. Horrill, 5 Cal. 493, affirmed in *Peabody v. Phelps*, 7 Cal. 53, that a judgment entered in vacation is void.

Cohas v. Raisin, 3 Cal. 443, affirmed in *Touchard v. Touchard*, 5 Cal. 307 ; *Seale v. Mitchell*, 5 Cal. 402 ; *Dewey v. Lambier*, 7 Cal. 348 ; and in *Welch v. Sullivan*, 8 Cal. 200 ; and referred to in *Treadwell v. Payne*, 15 Cal. 498, and in *Hart v. Burnett*, 15 Cal. 558, 589, as to Spanish grants in San Francisco.

Cohen v. Barrett, 5 Cal. 195, affirmed in *Meyer v. Kohlman*, 8 Cal. 47, that an application in insolvency must be strictly construed.

Conant v. Conant, 10 Cal. 249, affirmed in *Dumphy v. Guindon*, 13 Cal. 30, as to the jurisdiction of appeal to the supreme court.

Conger v. Weaver, 6 Cal. 548, affirmed in *Merced Mining Co. v. Fremont*, 7 Cal. 327 ; and in *Hill v. King*, 8 Cal. 338, that vested rights cannot be impaired ; in *Thompson v. Lee*, 8 Cal. 280, that notice of evidence of possession is only one act to be considered with others.

Connally v. Peck, 3 Cal. 75, referred to in same case, 6 Cal. 353, as being remanded for further proof.

Connolly v. Goodwin, 5 Cal. 220, affirmed in *Hastings v. Vaughn*, 5 Cal. 318, that an impression on paper with a pen is a seal.

Conrad v. Lindley, 2 Cal. 173, affirmed in *Jamson v. Quivey*, 5 Cal. 491, that courts must give or refuse instructions.

Cook v. McChristian, 4 Cal. 32, affirmed in *Taylor v. Hargous*, 4 Cal. 272, that a specific act is necessary to indicate the selection of a homestead ; in *Poole v. Gerard*, 6 Cal. 73, that husband and wife must assent to conveyance ; in *Reynolds v. Pixley*, 6 Cal. 167 ; *Dorsey v. McFarland*, 7 Cal. 345 ; *Stafford v. Lick*, 7 Cal.

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490; and in *Harper v. Forbes*, 15 Cal. 204, that residence is the test of dedication of a homestead; in *Holden v. Pinney*, 6 Cal. 235, as reconciling imperfections in the homestead law; and in *Moss v. Warner*, 10 Cal. 297, that the act is retrospective in its operation, but abrogated by the statute of 1860, p. 311.

Cordier v. Schloss, 12 Cal. 143, affirmed in *Bostic v. Love*, 16 Cal. 73, that an answer in equity is not evidence for the defendant.

Covillaud v. Tanner, 7 Cal. 38, affirmed in *Letter v. Putney*, 7 Cal. 423, that objections to evidence must be taken in the court below; and in *Kiler v. Kimball*, 10 Cal. 268; *Martin v. Travers*, 12 Cal. 245, and in *Payne v. Treadwell*, 16 Cal. 248, that objections to evidence must be pointed out on appeal.

Cowell v. Doub, 12 Cal. 274, affirmed in *People v. Seymour*, 16 Cal. 344, as to the constitutionality of legalizing an irregular assessment.

Crandall v. Woods, 6 Cal. 449, affirmed in *Leigh v. Independent Ditch Co.*, 8 Cal. 323; and in *Partridge v. McKinney*, 10 Cal. 183, as to diversion of water courses.

Crane v. Brannan, 3 Cal. 192, affirmed in *Alderson v. Bell*, 9 Cal. 321; and in *Montgomery v. Tutt*, 12 Cal. 317, that a presumption exists in favor of the jurisdiction of the court.

Curtis v. Richards, 9 Cal. 33, affirmed in *Tissot v. Darling*, 9 Cal. 285; and in *City of Sacramento v. Dunlap*, 14 Cal. 423, that an undertaking need not be signed by the principal; in *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 473; *McCormick v. Bailey*, 10 Cal. 232, and in *Ord v. Steamer Uncle Sam*, 13 Cal. 371, as to controverting allegations in a verified complaint.

Dabovich v. Emeric, 7 Cal. 209, referred to in same case, 12 Cal. 178, as being remanded to amend the complaint.

Dana v. Stanfords, 10 Cal. 269, affirmed in *Randall v. Buffington*, 10 Cal. 494; *Wellington v. Sedgwick*, 12 Cal. 474, and in *Gladwin v. Gladwin*, 13 Cal. 332, as to preference of creditors.

Daumiel v. Gorham, 6 Cal. 43, affirmed in *Taylor v. Seymour*, 6 Cal. 514, that in replevin against an officer he is entitled to a demand; explained in *Wellington v. Sedgwick*, 12 Cal. 476, and in *Paige v. O'Neal*, 12 Cal. 495, as to segregation of

goods in a warehouse, under the statute of frauds.

Davidson v. Dallas, 8 Cal. 227, referred to in same case, 15 Cal. 79, as having carefully and correctly reported; on page 80, the principle overruled as to several liabilities of the sureties on rate bonds.

De Barry v. Lambert, 10 Cal. 509, affirmed in *Baker v. Baker*, 10 Cal. 481, that interlocutory orders can be revised on appeal.

Deidesheimer v. Brown, 8 Cal. 339, affirmed in *Gray v. Hawes*, 8 Cal. 56, as to appearance of parties to set aside defective summons.

Dewey v. Bowman, 8 Cal. 145, affirmed in *Payne v. Bensley*, 8 Cal. 267, and in *Smith v. '49 and '56 Quartz M. Co.*, 14 Cal. 246, that an assignment of a note can be the mortgage; in *Thompson v. Lee*, 8 Cal. 280, as to issues made by a denial in answer; and in *Duff v. Fisher*, 15 Cal. 387, relative to jury trials.

Dewey v. Gray, 2 Cal. 374, affirmed in *Gunter v. Laffan*, 7 Cal. 592, and in *Davidson v. Dallas*, 15 Cal. 82, that the law being the same, the law of the case is changed on appeal the second time.

Dewey v. Lambier, 7 Cal. 347, referred to in *Welch v. Sullivan*, 8 Cal. 201, relative to alcalde titles in San Francisco.

Dewey v. Latson, 6 Cal. 130, referred to in *Chapin v. Broder*, 16 Cal. 420, relative to an undertaking on appeal.

Dewitt v. Hays, 2 Cal. 463, affirmed in *Robinson v. Gaar*, 6 Cal. 275, that equity cannot relieve from an illegal tax imposed but overruled in *Palmer v. Boling*, 8 Cal. 388, that the statute of 1857, 334, making a tax deed prima facie evidence of title gives the right to an equitable remedy.

Dickey v. Hurlbut, 5 Cal. 343, referred to in *People v. Town of Nevada*, 6 Cal. 481, and in *Upham v. Supervisors of San Francisco County*, 8 Cal. 384, as to the legislative powers of the county court.

Dillon v. Byrne, 5 Cal. 455, affirmed in *Birrell v. Schie*, 9 Cal. 107; *Carr v. Cwell*, 10 Cal. 385; and in *Swift v. Kemer*, 13 Cal. 530, and referred to in *People v. Du Uprey*, 16 Cal. 199, as to mortgage on a homestead, but abrogated by statute of 1860, p. 311.

Dore v. Covey, 13 Cal. 502, referred to in *Chapin v. Broder*, 16 Cal. 470, relative to an undertaking on appeal.

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Dorsey v. McFarland, 7 Cal. 279, affirmed in *Van Reynigom v. Revalk*, 8 Cal. 76; and in *Dunn v. Tozer*, 10 Cal. 172, as to mortgage on a homestead, but abrogated by the statute of 1860, p. 311.

Downer v. Lent, 6 Cal. 94, affirmed in *People v. Supervisors Marin County*, 10 Cal. 345, as to the powers of a legislative board to perform judicial functions.

Drake v. Eakin, 10 Cal. 312, affirmed in *Tuolumne Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 396, as to examination of an adverse party.

Drake v. Palmer, 2 Cal. 177, affirmed in *Cook v. Stewart*, 2 Cal. 253; and in *Hastings v. Steamer Uncle Sam*, 10 Cal. 341, that the appellate court will not disturb an order for a new trial.

Dunbar v. City of San Francisco, 1 Cal. 355, affirmed in *Correas v. City of San Francisco*, 1 Cal. 452, as to the liability of the city for destroying buildings to stop a conflagration.

Dupont v. Wertheman, 10 Cal. 854, affirmed in *Clark v. McElvy*, 11 Cal. 160, that a bill of sale without a seal does not pass title; and in *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 234, that the court failed to pass on the fact of a deed executed by an agent; and in *Mott v. Smith*, 16 Cal. 557, relative to a deed executed by an agent under a power of attorney.

Eddy v. Simpson, 3 Cal. 249, affirmed in *Kelly v. Natoma Water Co.*, 6 Cal. 108; in *Hoffman v. Stone*, 7 Cal. 49; and in *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 151, as to appropriation of water courses.

Egery v. Buchanan, 5 Cal. 53, affirmed in *Johnson v. Gorham*, 6 Cal. 196; and in *Wilson v. Broder*, 10 Cal. 489, as to recovery of a penalty against sheriff; and in *Gregory v. Ford*, 14 Cal. 143, relative to traversing a sheriff's return.

Ellis v. Janes, 7 Cal. 409, affirmed in *Walker v. Sedgwick*, 8 Cal. 402; and in *O'Keiffe v. Cunningham*, 9 Cal. 590, that defendant is estopped from controverting title under which he entered.

Elliott v. Chapman, 15 Cal. 383, affirmed in *Shaw v. Randall*, 15 Cal. 386, relative to an undertaking on appeal.

Ellissen v. Halleck, 6 Cal. 386, affirmed in *Falkner v. Folsom's Ex'rs*, 6 Cal. 412; *McCann v. Sierra County*, 7 Cal. 124; and in *Hentsch v. Porter*, 10 Cal. 558,

that the complaint must aver presentation to the proper parties for allowance; and in *Piercy v. Sabin*, 10 Cal. 30, in practice stare decisis must be adhered to.

Emeric v. Tams, 6 Cal. 155, affirmed in *McCann v. Lewis*, 9 Cal. 247; and in *Mount v. Chapman*, 9 Cal. 297, as to interest on a judgment.

Engels v. Lubeck, 4 Cal. 31, referred to in *Uhlfelder v. Levy*, 9 Cal. 615, as to one court enjoining proceedings of another court.

Evoy v. Tewksbury, 5 Cal. 285, affirmed in *Hazeltine v. Larco*, 7 Cal. 34, relative to a guarantee to pay another's debt.

Ex parte Attorney General, 1 Cal. 85, referred to in *People v. Gillespie*, 1 Cal. 343; and in *Caulfield v. Hudson*, 3 Cal. 390, as to the jurisdiction of courts.

Ex parte Cohen, 6 Cal. 318, affirmed in *Ex parte Rowe*, 7 Cal. 177, that a party cannot be compelled to do a vain act; and in *Low v. Henry*, 9 Cal. 552, that the complaint must be filed before remedial process can issue.

Ex parte Holdforth, 1 Cal. 438, affirmed in *Ex parte Prader*, 7 Cal. 240, that imprisonment on civil process can only be had in cases of fraud.

Ex parte Kyle, 1 Cal. 331, affirmed in *Mansfield v. Dorland*, 2 Cal. 509; and in *Russell v. Conway*, 11 Cal. 103, as to lien of attorneys on a judgment for costs.

Ex parte Perkins, 2 Cal. 424, explained in *Ex parte Archy*, 9 Cal. 169, as to fugitive slaves.

Ex parte Rowe, 7 Cal. 175, referred to in *Ware v. Robinson*, 9 Cal. 111, as to review of orders of contempts on appeal.

Farrell v. Enright, 12 Cal. 450, affirmed in *People v. Rogers*, 13 Cal. 165, as to the right of aliens to inherit in this state.

Ferris v. Coover, 10 Cal. 589, affirmed in *Manson v. Koppikus*, 11 Cal. 92; *Watterman v. Smith*, 13 Cal. 410; *Kelsey v. Abbott*, 13 Cal. 619; *Morton v. Folger*, 15 Cal. 277; *Seaward v. Mallot*, 15 Cal. 306, and in *Cornwall v. Culver*, 16 Cal. 425, as to the Sutter title in Sacramento; and in *Lachman v. Clark*, 14 Cal. 133, relative to tax titles.

Fisher v. Dennis, 6 Cal. 577, referred to in *Visher v. Webster*, 8 Cal. 112, as to the alteration of a note.

Fitzgerald v. Gorham, 4 Cal. 289, affirmed in *Stewart v. Scannell*, 8 Cal. 83; *Vance v. Boynton*, 8 Cal. 561; and in

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<p><i>Bacon v. Scannell</i>, 9 Cal. 273, as to delivery of goods in a warehouse.</p>	<p><i>Gates v. Buckingham</i>, 4 Cal. 286, affirmed in <i>Ritter v. Mason</i>, 11 Cal. 2 and in <i>Moore v. Semple</i>, 11 Cal. 361, that a statement should contain requisite pay on appeal.</p>
<p><i>Fitzgerald v. Urton</i>, 5 Cal. 308, affirmed in <i>Burdge v. Underwood</i>, 6 Cal. 46; and in <i>Boggs v. Merced Mining Co.</i>, 14 Cal. 377, as to mining claims.</p>	<p><i>Gates v. Kieff</i>, 7 Cal. 124, affirmed <i>Marius v. Bicknell</i>, 10 Cal. 224; and <i>Weaver v. Conger</i>, 10 Cal. 237, that misjoinder of parties must be urged demurrer.</p>
<p><i>Flint v. Lyon</i>, 4 Cal. 17, referred to in <i>Moore v. McKinley</i>, 5 Cal. 474, as to implied guarantee of sale by sample.</p>	<p><i>Gates v. Nash</i>, 6 Cal. 192, affirmed <i>Turner v. McIlhaney</i>, 8 Cal. 579, that party cannot testify for his codefendant coplaintiff.</p>
<p><i>Folsom v. Root</i>, 1 Cal. 374, affirmed in <i>McFadden v. Jones</i>, 1 Cal. 453, as to want of statement of facts on appeal.</p>	<p><i>Gavin v. Annan</i>, 2 Cal. 494, affirmed <i>Piercy v. Sabin</i>, 10 Cal. 30, that a general denial makes a general issue.</p>
<p><i>Folsom's Ex'rs v. Scott</i>, 6 Cal. 460, affirmed in <i>Macy v. Goodwin</i>, 6 Cal. 581, as to secondary evidence of lost instruments.</p>	<p><i>Gee v. Moore</i>, 14 Cal. 472, affirmed <i>Guiod v. Guiod</i>, 14 Cal. 508; <i>Broadway Nelson</i>, 16 Cal. 81, and in <i>Bowman Norton</i>, 16 Cal. 216, relative to abandonment of homestead, but qualified by statute of 1860, p. 311.</p>
<p><i>Fowler v. Pierce</i>, 2 Cal. 165, affirmed in <i>McCauley v. Brooks</i>, 16 Cal. 46, that a mandamus may issue to an executive officer.</p>	<p><i>Gerke v. California Steam Navigation Co.</i>, 9 Cal. 251, affirmed in <i>Garfield Knight's Ferry and Table Mountain Co.</i>, 14 Cal. 37, as to the admissions of agent to bind the principal; and in <i>Alvord v. Steamer Maria</i>, 15 Cal. 171, relative to the liability of vessels for fire on the bank of a river.</p>
<p><i>Fowler v. Smith</i>, 2 Cal. 568, affirmed in <i>Macleota v. Packard</i>, 14 Cal. 179, relative to interest on contracts.</p>	<p><i>Gibbons v. Scott</i>, 15 Cal. 284, affirmed in <i>Logan v. Hillegass</i>, 16 Cal. 202, relative to enjoining an execution on an irregular judgment.</p>
<p><i>Frank v. Doane</i>, 15 Cal. 302, affirmed in <i>Green v. Doane</i>, 15 Cal. 304, relative to the abandonment of a motion for a new trial.</p>	<p><i>Gilman v. Contra Costa County</i>, 5 Cal. 426, affirmed in <i>Placer County v. Astor</i>, 15 Cal. 315, that a county may sue and be sued.</p>
<p><i>Franklin v. Reiner</i>, 8 Cal. 340, affirmed in <i>Whipley v. Mills</i>, 9 Cal. 641; <i>Hastings v. Halleck</i>, 10 Cal. 31, and in <i>Hildreth v. Gwindon</i>, 10 Cal. 491, relative to notice and undertaking on appeal.</p>	<p><i>Gilman v. Contra Costa County</i>, 8 Cal. 52, affirmed in <i>Emeric v. Gilman</i>, 10 Cal. 410, that a creditor of a county must look to a county; also, in the same case, 10 Cal. 508, affirmed without comment.</p>
<p><i>Gallagher v. Delaney</i>, 10 Cal. 410, explained in <i>Thornton v. Borland</i>, 12 Cal. 440; and in <i>Smith v. Yreka Water Co.</i>, 14 Cal. 202, that it lays down no general rule.</p>	<p><i>Godeffroy v. Caldwell</i>, 2 Cal. 489, affirmed in <i>McMillan v. Richards</i>, 9 Cal. 409, that a mortgage is a mere security for a debt.</p>
<p><i>Gardner v. Perkins</i>, 9 Cal. 553, affirmed in <i>Burnett v. Whitesides</i>, 13 Cal. 158, that where an answer denies the equities of a complaint, the injunction should be dissolved.</p>	<p><i>Godwin v. Stebbins</i>, 2 Cal. 103, referred to in <i>Payne v. Treadwell</i>, 5 Cal. 312, stated to be incorrectly reported; and referred to in <i>Payne v. Treadwell</i>, 16 Cal. 246, relative to a complaint in ejectment.</p>
<p><i>Garner v. Marshall</i>, 9 Cal. 268, affirmed in <i>Hentsch v. Porter</i>, 10 Cal. 559, as to defective allegations; and in <i>Burke v. Table Mountain W. Co. v. Lafarge</i>, 12 Cal. 409, relative to possession; and in <i>Noé v. Card</i>, 14 Cal. 609, relative to a judgment in ejectment; <i>Garrison v. Sampson</i>, 15 Cal. 93, affirmed in <i>Coryell v. Cain</i>, 16 Cal. 573, relative to possessory claims under the statute.</p>	<p><i>Gonzales v. Huntley</i>, 1 Cal. 32, affirmed in <i>Palmer v. Brown</i>, 1 Cal. 42, that the regular judgment will be affirmed; explained in <i>Ringgold v. Haven</i>, 1 Cal. 100.</p>
<p><i>Gaskill v. Trainer</i>, 3 Cal. 334, affirmed in <i>Chipman v. Emeric</i>, 3 Cal. 283; and in <i>Gaskill v. Moore</i>, 4 Cal. 234, that non-payment of rent works a forfeiture of the lease.</p>	

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116, as being commonly, though not universally, correct.

Goodenow v. Ewer, 16 Cal. 461, affirmed in *Boggs v. Hargrave*, 16 Cal. 563, relative to a decree in a foreclosure suit when the mortgagor has transferred his interest in the estate prior to the institution of the action.

Gordon v. Ross, 2 Cal. 156, overruled in *Dumphy v. Guindon*, 13 Cal. 30, as to appeals to the supreme court, where the costs added to the judgment amount to two hundred dollars.

Gordon v. Searing, 8 Cal. 49, affirmed in *Bagley v. Eaton*, 10 Cal. 148, as to secondary evidence of lost instrument.

Gorham v. Toomy, 9 Cal. 77, referred to in *Pixley v. Huggins*, 15 Cal. 34, as not applicable to cases in injunction of execution.

Gouldin v. Buckelew, 4 Cal. 107, affirmed in *Ellis v. Janes*, 7 Cal. 415, as to equitable lien for purchase money on land.

Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413, affirmed in *Bagley v. Eaton*, 10 Cal. 148, that a party himself may testify as to loss of original documents.

Gray v. Eaton, 5 Cal. 448, affirmed in *Still v. Saunders*, 8 Cal. 286; and qualified in *Duff v. Fisher*, 15 Cal. 380, relative to granting a new trial.

Gray v. Palmer, 9 Cal. 616, affirmed in *Laffan v. Naglee*, 9 Cal. 678, relative to copartnership in ownership of lands.

Green v. Covillaud, 10 Cal. 317, explained in *Farley v. Vaughn*, 11 Cal. 237, that a delay in tender of payment for a contract for a deed varies the contract; and in *Gregory v. Ford*, 14 Cal. 143, that a complainant's equity must be shown in the bill.

Green v. Wells, 2 Cal. 584, affirmed in *Beach v. Covillaud*, 4 Cal. 316; *Whiting v. Heslep*, 4 Cal. 330; and in *McDonald v. Mountain Lake Water Co.*, 4 Cal. 336, relative to parol agreement for the sale of lands.

Greenfield v. Steamer Gunnell, 6 Cal. 67, affirmed in *Kohlman v. Wright*, 6 Cal. 231, that a want of verification is cured by answer.

Gregory v. Ford, 14 Cal. 138, affirmed in *Gibbons v. Scott*, 15 Cal. 286; and in *Logan v. Hillegass*, 16 Cal. 202, relative to opening a judgment by default where

the party alleges he was not regularly served with a summons.

Gregory v. Haynes, 13 Cal. 591, overruled in *Payne v. Treadwell*, 16 Cal. 246, relative to the decree in that case.

Gregory v. McPherson, 13 Cal. 562, doubted in *Stuart v. Allen*, 16 Cal. 501, upon the necessary statement in a petition by the administrator for the sale of real estate.

Grimes' Estate v. Norris, 6 Cal. 624, affirmed in *Tevis v. Pitcher*, 10 Cal. 477, that a will is a conveyance, unless otherwise regulated by statute; and in *Ingholdsby v. Juan*, 12 Cal. 579, that the statute on wills is not retrospective.

Griswold v. Sharpe, 2 Cal. 17, affirmed in *Taaffe v. Rosenthal*, 7 Cal. 518, that a wrongful issuance of an attachment could be inquired into on appeal.

Grogan v. Ruckle, 1 Cal. 158, affirmed on rehearing, 1 Cal. 193; and in *Youngs v. Bell*, 4 Cal. 202, that an endorsement need not be denied under oath; in *Mateer v. Brown*, 1 Cal. 231, that a remittitur not being sent to the court below, the appellate court has still control of it; referred to in *Piercy v. Sabin*, 10 Cal. 30, that new matter must be set up in the answer.

Gronfier v. Minturn, 5 Cal. 492, explained in *Carrière v. Minturn*, 5 Cal. 435, as to counsel fees for costs on foreclosure of a mortgage.

Groschen v. Page, 6 Cal. 138, referred to in *Dana v. Stanfords*, 10 Cal. 277, as to voluntary assignments.

Guiod v. Guiod, 14 Cal. 506, affirmed in *Broadus v. Nelson*, 16 Cal. 81, and in *Bowman v. Norton*, 16 Cal. 218, as to the dedication of a homestead, but qualified by the statutes of 1860, p. 311.

Gunn v. Bates, 6 Cal. 203, overruled in *Ferris v. Coover*, 10 Cal. 621, in accordance with opinion of the United States supreme court, concerning Mexican grants in California.

Gunter v. Geary, 1 Cal. 462, affirmed in *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 570, that compensation must be made for lands held in possession; and in *Castro v. Armesti*, 15 Cal. 82, as to statement on appeal.

Gunter v. Laffan, 7 Cal. 588, affirmed in *Davidson v. Dallas*, 15 Cal. 82, that the facts being the same, the law of a case remains unchanged.

Guy v. Franklin, 5 Cal. 416, affirmed

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in *Emeric v. Tams*, 6 Cal. 156; in *McCann v. Lewis*, 9 Cal. 247; and in *Mount v. Chapman*, 9 Cal. 297, as to interest on judgments.

Guy v. Ide, 6 Cal. 99, affirmed in *McMillan v. Richards*, 9 Cal. 400, as to receiver of rents and profits on mortgaged premises sold under execution pending redemption.

Guy v. Middleton, 5 Cal. 392, affirmed in *Harlan v. Smith*, 6 Cal. 174; and in *Reynolds v. Lathrop*, 7 Cal. 46, as to redemption of mortgaged premises sold under execution.

Haffley v. Maier, 13 Cal. 13, affirmed in *Goodenow v. Ewer*, 16 Cal. 468, that a mortgage must be foreclosed.

Haight v. Gay, 8 Cal. 297, affirmed in *Howland v. Vaughn*, 9 Cal. 52, as to writs of error to supreme court.

Haight v. Joyce, 2 Cal. 64, affirmed in *Thorne v. Yontz*, 4 Cal. 323, as to promissory notes in the hands of innocent third parties.

Hames v. Castro, 5 Cal. 109, affirmed in *Scott v. Ward*, 13 Cal. 470, relative to the common property of husband and wife under the Mexican law.

Hardy v. Hunt, 11 Cal. 343, affirmed in *Walling v. Miller*, 15 Cal. 40, relative to payment of moneys to an officer after notice of claim by third party.

Harlan v. Smith, 6 Cal. 173, affirmed in *McMillan v. Richards*, 9 Cal. 412, as to redemption of mortgaged premises sold under execution.

Harley v. Young, 4 Cal. 284, referred to in *Dickinson v. Van Horn*, 9 Cal. 210, as having been decided before section 339 of the code was amended in 1855.

Harper v. Forbes, 15 Cal. 202, affirmed in *Broadus v. Nelson*, 16 Cal. 81, relative to the dedication of a homestead, but qualified by the statute of 1860, p. 311.

Harris v. Brown, 1 Cal. 98, affirmed in *Hoen v. Simmons*, 1 Cal. 121, that a verbal contract for the sale of land is void.

Harris v. Reynolds, 13 Cal. 514, referred to in *Reynolds v. Harris*, 14 Cal. 676, as a part of that case.

Hart v. Burnett, 15 Cal. 530, referred to in *Holladay v. Frisbie*, 15 Cal. 634, as not applying to the water lots in San Francisco; affirmed in *Payne v. Treadwell*, 16 Cal. 225, and *Wheeler v. Hampson*, 16 Cal. 291; and commented on in *Brown v. City of San Francisco*, 16 Cal.

457, 461, relative to grants in San Francisco by the Mexican governors of California.

Hart v. Moon, 6 Cal. 161, affirmed in *Freeman v. Powers*, 7 Cal. 105, as to jurisdiction of justices of the peace.

Hastings v. Vaughn, 5 Cal. 315, statutes of 1860, p. 179, provide for rectifying defective acknowledgments, and 357, make them notice to third parties.

Hayes v. Bona, 7 Cal. 158, affirmed in *Stafford v. Lick*, 10 Cal. 17, that a contract for the sale of land is void in *Stanley v. Green*, 12 Cal. 166, the sufficiency of description in a contract.

Hays v. Hogan, 5 Cal. 243, referred to in *Falkner v. Hunt*, 16 Cal. 270, taxes not justly due, paid under protest, may be recovered back.

Headley v. Reed, 2 Cal. 322, affirmed in *Peabody v. Phelps*, 9 Cal. 225; and in *Grayson v. Guild*, 4 Cal. 125, as to exceptions to the report of a referee.

Heath v. Lent, 1 Cal. 410, overruled in *Ah Thare v. Quan Wan*, 3 Cal. 21, counsel fees are a measure of damages recoverable on a remedial undertaking.

Henderson v. Grewell, 8 Cal. 50, overruled by the statutes of 1860, p. 357, relative to defective acknowledgments.

Henley v. Hastings, 3 Cal. 34, referred to in *Gilman v. Contra Costa County*, 57 Cal. 57, that a party should appeal from a wrongful order, not from an order directing to vacate that which is wrongful.

Hensley v. Tarpey, 7 Cal. 288, affirmed in *Bagley v. Eaton*, 10 Cal. 147; and in *Fallon v. Dougherty*, 12 Cal. 105, proof of lost instruments.

Heslep v. City of San Francisco, 1 Cal. 1, overruled in *Carsley v. Linda*, 395 Cal. 395, that the opinion as to the jurisdiction of the court being necessary to the judgment of arbitration is mere error and erroneous.

Heyneman v. Dannenberg, 6 Cal. 403, affirmed in *Walker v. Sedgwick*, 403, that to prove insolvency an executor need not be returned nulla bona; and in *Scales v. Scott*, 13 Cal. 78, that in equity exists by virtue of an assignment.

Hickman v. O'Neal, 10 Cal. 2, affirmed in *Chipman v. Bowman*, 158, relative to the jurisdiction of the superior court; and in *Pixley v. H*

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15 Cal. 133, relative to enjoining sales under executions.

Hickox v. Lowe, 10 Cal. 197, referred to in *People v. Irwin*, 14 Cal. 436, as being different in the facts which constitute a deed a mortgage.

Hicks v. Bell, 3 Cal. 219, affirmed in *Stoakes v. Barrett*, 5 Cal. 39; *Irwin v. Phillips*, 5 Cal. 145; *Conger v. Weaver*, 6 Cal. 557; *Merced Mining Co. v. Fremont*, 7 Cal. 324, and in *Boggs v. Merced Mining Co.*, 14 Cal. 305, 314, 373, as to appropriation of lands for mining purposes.

Hill v. King, 8 Cal. 336, referred to in *Bear River Co. v. York Mining Co.*, 8 Cal. 334, as to the appropriation of water for mining purposes.

Hill v. White, 2 Cal. 306, referred to in *Brown v. Tolles*, 7 Cal. 399; and in *Hart v. Burnett*, 10 Cal. 66, as to the mode of appeal from an order granting a new trial.

Hoer v. Simmons, 1 Cal. 119, affirmed in *Tohler v. Folsom*, 1 Cal. 210; *Hayes v. Bona*, 7 Cal. 158; *Ellis v. Jones*, 7 Cal. 416; *Stafford v. Lick*, 7 Cal. 490; and in *Walker v. Sedgwick*, 8 Cal. 402, that a verbal contract for the sale of land is null and void; and in *Noe v. Card*, 14 Cal. 604, relative to taxation upon lands.

Hoffman v. Stone, 7 Cal. 46, affirmed in *Merced Mining Co. v. Fremont*, 7 Cal. 325; and in *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 150, as to appropriation of water for mining purposes.

Hoffman v. Tuolumne Water Co., 10 Cal. 413, affirmed in *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 544, as to injury by the breaking of a dam.

Holladay v. Frisbie, 15 Cal. 630, affirmed in *Wheeler v. Miller*, 16 Cal. 125, as to the sale on execution of the beach and water lots in San Francisco.

Holland v. City of San Francisco, 7 Cal. 361, referred to in *Lucas v. City of San Francisco*, 7 Cal. 468; and in *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 468; in *Argenti v. City of San Francisco*, 16 Cal. 270; and in *McCracken v. City of San Francisco*, 16 Cal. 621, as to the powers of the corporation of the city; and affirmed in *McMillan v. Richards*, 9 Cal. 421, that an appellate court in ejectment may order the court below to enter the proper judgment.

Holmes v. Rogers, 13 Cal. 191, affirmed

in *Gregory v. Ford*, 14 Cal. 143, when a judgment may be enjoined for want of notice after once being properly entered.

Hoppe v. Robb, 1 Cal. 373, affirmed in *Griswold v. Sharpe*, 2 Cal. 23, that a verdict rendered on conflicting evidence will not be set aside.

Harker, 6 Cal. 489, 8 Cal. 613, in same case, 11 Cal. 402, as to goods sold.

Keiser, 8 Cal. 499, affirmed in *r. Maguire*, 9 Cal. 48, as to possession to maintain forcible detainer.

Harman, 5 Cal. 78, affirmed in *Stark*, 7 Cal. 245, as to the a new undertaking in county court on appeal, in lieu of one previously filed, which was deficient.

Humphreys v. Crane, 5 Cal. 173, explained in *Bryan v. Berry*, 6 Cal. 397, that the decision was as to the pleadings and allegations as to alteration of the word "surety;" and affirmed in *May v. Hanson*, 6 Cal. 643, that an administrator cannot be joined with a survivor upon a joint contract; in *Kritzer v. Mills*, 9 Cal. 23; *Hartman v. Burlingame*, 9 Cal. 561; and in *Aud v. Magruder*, 19 Cal. 289, as to the liability of a surety.

Humphreys v. McCall, 9 Cal. 59, affirmed in *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 473; in *McCormick v. Bailey*, 10 Cal. 232; and in *Ord v. Steamer Uncle Sam*, 13 Cal. 370, as to denial of a verified complaint.

Hunter v. Watson, 12 Cal. 363, referred to in *Smith v. Dall*, 13 Cal. 512, as to the effect of the registration act; and in *De Rutte v. Muldrow*, 16 Cal. 512, relative to the acts of an agent under a power of attorney.

Hutchinson v. Bours, 6 Cal. 383, affirmed in *Glidden v. Lucas*, 7 Cal. 30; and in *Horr v. Barker*, 11 Cal. 402, as to the power of factors to pledge.

Hutchinson v. Burr, 12 Cal. 103, affirmed in *Patterson v. Supervisors of Yuba county*, 12 Cal. 160, as to the issuance of bonds by a corporation.

Hutchinson v. Perley, 4 Cal. 33, affirmed in *Winans v. Christy*, 4 Cal. 78; *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 579; and in *Nagle v. Macy*, 9 Cal. 427, that possession is prima facie evidence of title.

Hyatt v. Argenti, 3 Cal. 151, affirmed

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<p>in <i>Dewey v. Bowman</i>, 8 Cal. 150, that mortgages and pledges may be made in terms which suit the parties.</p>	<p>in <i>Baker v. Baker</i>, 10 Cal. 528, as to appeals from interlocutory orders.</p>
<p><i>Imlay v. Carpentier</i>, 14 Cal. 173, affirmed in <i>Chipman v. Bowman</i>, 14 Cal. 159, relative to judgment erroneously entered by the clerk.</p>	<p><i>Jones v. Post</i>, 4 Cal. 14, affirmed; <i>Griffin v. Alsop</i>, 4 Cal. 408, that a signee cannot testify for his assignor.</p>
<p><i>Ingoldsby v. Juan</i>, 12 Cal. 564, referred to in <i>Morrison v. Wilson</i>, 13 Cal. 497, as to conveyances of married women of their separate estates.</p>	<p><i>Jones v. Post</i>, 6 Cal. 102, affirmed; <i>Hazletine v. Larco</i>, 7 Cal. 34, as to guarantee of a contract.</p>
<p><i>Ingraham v. Gildermeester</i>, 2 Cal. 88, rehearing granted, 2 Cal. 161, and affirmed in <i>Castro v. Armesti</i>, 14 Cal. 38, as to statement on appeal; and referred to in <i>Schloss v. White</i>, 16 Cal. 68, as to defendants not served with process.</p>	<p><i>Juan v. Ingoldsby</i>, 6 Cal. 439, affirmed in <i>Baker v. Baker</i>, 10 Cal. 528, as to appeals from interlocutory orders.</p>
<p><i>Innis v. Steamer Senator</i>, 1 Cal. 459, referred to in <i>Dopman v. Hoberlin</i>, 5 Cal. 414, as to the examination of an expert for witness; in <i>Gherke v. California Steam Nav. Co.</i>, 9 Cal. 256; and in <i>Garfield v. Knight's Ferry and Table Mountain Co.</i>, 14 Cal. 37, as to the declarations of the agent after <i>res gestæ</i>.</p>	<p><i>Karth v. Light</i>, 15 Cal. 324, affirmed in <i>Chamberlin v. Reed</i>, 16 Cal. 20, as to a dismissal of an appeal.</p>
<p><i>Irwin v. Phillips</i>, 5 Cal. 140, affirmed in <i>Conger v. Weaver</i>, 6 Cal. 558; <i>Merced Mining Co. v. Fremont</i>, 7 Cal. 324; and in <i>Crandall v. Woods</i>, 8 Cal. 141, as to the appropriation of water for mining purposes.</p>	<p><i>Kashaw v. Kashaw</i>, 3 Cal. 312, referred to in <i>Moffatt v. Moffat</i>, 5 Cal. 49, and in <i>Beard v. Knox</i>, 5 Cal. 257, as to the domicil of the wife.</p>
<p><i>Johnson v. Gordon</i>, 4 Cal. 368, explained in <i>Taylor v. Columbia</i>, 5 Cal. 273; and referred to in <i>Gunn v. Bates</i>, 6 Cal. 271; and in <i>Warner v. Steamer Uncle Sam</i>, 9 Cal. 710, as to judicial powers of the State and federal governments.</p>	<p><i>Kelly v. Cunningham</i>, 1 Cal. 34, affirmed in <i>Innis v. Steamer Senator</i>, 1 Cal. 461, referred to as the case of the "<i>Curtis</i>," relative to collisions.</p>
<p><i>Johnson v. Gorham</i>, 6 Cal. 195, affirmed in <i>Wilson v. Broder</i>, 10 Cal. 489, as to the penalty of a sheriff in not paying over moneys in his hands; and referred to in <i>Crandall v. Blen</i>, 13 Cal. 22, relative to the sale of a chose in action on execution.</p>	<p><i>Kelly v. Natoma Water Co.</i>, 6 Cal. 49, referred to in <i>Hoffman v. Stone</i>, 5 Cal. 49; and in <i>Maeris v. Bicknell</i>, 7 Cal. 49, as to appropriations of water for purposes.</p>
<p><i>Johnson v. Sepulveda</i>, 5 Cal. 149, affirmed in <i>People v. Lockwood</i>, 6 Cal. 205, relative to instructions; and in <i>Parke v. Kellam</i>, 8 Cal. 79, that for injuries to property tenants in common could all be joined.</p>	<p><i>Kelsey v. Abbott</i>, 13 Cal. 609, affirmed in <i>Brown v. Winter</i>, 14 Cal. 34, as to equitable right to possession of land in <i>People v. Seymour</i>, 16 Cal. 34, as to the constitutionality of legalizing a local assessment.</p>
<p><i>Johnson v. Sherman</i>, 15 Cal. 287, affirmed in <i>Goodenow v. Ewer</i>, 16 Cal. 468, that a mortgage must be foreclosed.</p>	<p><i>Kelsey v. Dunlap</i>, 7 Cal. 160, affirmed in <i>Henderson v. Grewell</i>, 8 Cal. 58, as to the requisite of acknowledgment to conveyance, but abrogated by the statute of 1860, pp. 179, 357.</p>
<p><i>Johnson v. Totten</i>, 3 Cal. 343, affirmed in <i>Williams v. Bowers</i>, 15 Cal. 321, as to the dissolution of a copartnership.</p>	<p><i>Kent v. Laffan</i>, 2 Cal. 595, affirmed in <i>McMillan v. Richards</i>, 9 Cal. 41, as to the statutory right of redemption.</p>
<p><i>Johnston v. Dopkins</i>, 6 Cal. 83, affirmed</p>	<p><i>Kilburn v. Ritchie</i>, 2 Cal. 145, affirmed in <i>Morgan v. Hugg</i>, 5 Cal. 410, that facts which are relied on must be affirmatively shown on appeal.</p>
	<p><i>Kiler v. Kimball</i>, 10 Cal. 267, affirmed in <i>Martin v. Travers</i>, 12 Cal. 245; <i>Garrity v. Byington</i>, 12 Cal. 429; <i>Payne v. Treadwell</i>, 16 Cal. 248, as to errors which are relied on must be affirmatively shown on appeal.</p>
	<p><i>King v. Hall</i>, 5 Cal. 82, referred to in <i>Smith v. Sparrow</i>, 13 Cal. 597, relative to actions brought by adverse parties.</p>
	<p><i>Knight v. Fair</i>, 9 Cal. 117, affirmed in <i>McMillan v. Richards</i>, 9 Cal. 41, as to the statutory right of redemption.</p>

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Knowles v. Inches, 12 Cal. 212, affirmed in *Barrett v. Tewksbury*, 15 Cal. 357, relative to statements on appeal not setting forth the errors relied on.

Knowles v. Joost, 13 Cal. 620, affirmed in *McAlpin v. Duncan*, 16 Cal. 127, as to payment to the contractor under the lien law.

Kock v. Briggs, 14 Cal. 256, affirmed in *Goodenow v. Ewer*, 16 Cal. 468, that a mortgage must be foreclosed.

Kohler v. Smith, 2 Cal. 597, affirmed in *Guy v. Franklin*, 5 Cal. 417, as to interest on contracts.

Kramer v. Revalk, 8 Cal. 74, affirmed in *Cook v. Klink*, 8 Cal. 353, relative to the homestead, but abrogated by the statutes of 1860, p. 311.

Ladd v. Stevenson, 1 Cal. 18, referred to in *Piercy v. Sabin*, 10 Cal. 30, that new matter must be set up in the answer.

Laffan v. Naglee, 9 Cal. 662, referred to in *Hitchcock v. Page*, 14 Cal. 444, as being different in the facts; and affirmed in *De Rutte v. Muldrow*, 16 Cal. 513, relative to the right of preëmption in a lease.

Landecker v. Houghtaling, 7 Cal. 391, affirmed in *Visher v. Webster*, 8 Cal. 113, as to the fraudulent intent of the parties to a sale; and referred to in *Cohn v. Mulford*, 15 Cal. 52, that only the admissions of the vendor made before the sale is completed are competent in evidence.

Ledley v. Hays, 1 Cal. 160, affirmed in *Goodwin v. Garr*, 8 Cal. 617, that possession is prima facie evidence of ownership; and in *Paige v. O'Neal*, 12 Cal. 495, when possession is lawful a demand is required in unlawful detainer.

Lee v. Evans, 8 Cal. 424, affirmed in *Low v. Henry*, 9 Cal. 548; and in *Gray v. Palmer*, 9 Cal. 640, but overruled in *Pierce v. Robinson*, 13 Cal. 124, that parol evidence is admissible to prove the purpose of a written contract; and affirmed in *People v. Whitman*, 10 Cal. 45; and in *Perkins v. Thornburgh*, 10 Cal. 191, that exceptions of a statute are governed by the statute.

Leech v. Allen, 2 Cal. 95, referred to in *People v. Martin*, 6 Cal. 478, as to the requisite of a bill of exceptions on appeal.

Leese v. Clark, 3 Cal. 17, referred to in *Vanderslice v. Hanks*, 3 Cal. 46; and affirmed in same case, 3 Cal. 48; but overruled in *Gunn v. Bates*, 6 Cal. 263; in *Ferris v. Coover*, 10 Cal. 616; and re-

ferred to in *Welch v. Sullivan*, 8 Cal. 198, and in *Hart v. Burnett*, 15 Cal. 598, relative to Mexican grants in California.

Leet v. Wadsworth, 6 Cal. 404, affirmed in *Hutchinson v. Bours*, 6 Cal. 385, as to power of factors to pledge goods.

Leonard v. Darlington, 6 Cal. 123, referred to in *Welch v. Sullivan*, 8 Cal. 201, as to Mexican grants.

Lewis v. Tobias, 10 Cal. 574, affirmed in *Smith v. Sparrow*, 13 Cal. 597, that equity will not interfere to cancel a note past due, against which there is a legal defense.

Lightstone v. Laurencel, 4 Cal. 277, referred to in *Bryan v. Berry*, 6 Cal. 397; *Sayre v. Nichols*, 7 Cal. 538; and in *Kritzer v. Mills*, 9 Cal. 23, as to the liability of a surety.

Lineker v. Ayeshford, 1 Cal. 75, commented upon in *Santillan v. Moses*, 1 Cal. 94, as to rights of agent to sue in his own name.

Linn v. Twist, 3 Cal. 89, referred to in *Dickenson v. Van Horn*, 9 Cal. 210, and restricted in its extent as to requisites of a statement on appeal.

Loring v. Illsley, 1 Cal. 24, explained in *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 35, as to appeals from orders and judgments; and in *Belt v. Davis*, 1 Cal. 126, the opinion on "final judgment" enlarged.

Low v. Adams, 6 Cal. 277, affirmed in *Cloud v. El Dorado County*, 12 Cal. 133, that a judgment cannot be attacked collaterally which is regularly entered.

Low v. Henry, 9 Cal. 538, overruled in *Pierce v. Robinson*, 13 Cal. 124, that parol evidence cannot vary a written contract except for fraud, accident or mistake.

Love v. Alexander, 15 Cal. 296, referred to in *Fagg v. Clements*, 16 Cal. 392, relative to the service of summons by a constable.

Lower v. Knox, 10 Cal. 480, affirmed in *Burdge v. Gold Hill and Bear River Co.*, 15 Cal. 198, relative to appeals from motions denying a new trial.

Lucas v. City of San Francisco, 7 Cal. 463, commented on in *Argenti v. City of San Francisco*, 16 Cal. 272, relative to the contracts of a municipal corporation.

Lucas v. Payne, 7 Cal. 92, affirmed in *Turner v. McIlhaney*, 8 Cal. 579; in *Domingo v. Getman*, 9 Cal. 103; and in *Perlberg v. Gorham*, 10 Cal. 124, that a party cannot be a witness for a coplaintiff

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<p>or codefendant; and in <i>People v. Wells</i>, 11 Cal. 338, that statutes on the same matter must be construed together.</p>	<p>in <i>Fisher v. White</i>, 8 Cal. 42 attaches to vessels on service</p>
<p><i>Macondray v. Simmons</i>, 1 Cal. 393, affirmed in <i>Stowell v. Simmons</i>, 1 Cal. 452, as to the mechanic's lien.</p>	<p><i>Mena v. Le Roy</i>, 1 Cal. 50 in <i>Panaud v. Jones</i>, 1 Cal. 50 wills under the civil law.</p>
<p><i>Macy v. Goodwin</i>, 6 Cal. 579, affirmed in <i>Fallon v. Dougherty</i>, 12 Cal. 105, as to the proof of lost instruments.</p>	<p><i>Merced Mining Co. v. Fre</i> 130, affirmed in <i>Hicks v. Mic</i> 110, relative to a stay of pro appeal from an injunction.</p>
<p><i>Maeris v. Bicknell</i>, 7 Cal. 261, referred to in the same case, 10 Cal. 224, as to appropriation of water for mining purposes.</p>	<p><i>Merced Mining Co. v. Fre</i> 317, affirmed in <i>Tuolumne v Chapman</i>, 8 Cal. 397; and in <i>Conger</i>, 10 Cal. 238, as to in ejectment suits for mining cla</p>
<p><i>Magee v. Mokelumne Hill C. & M. Co.</i>, 5 Cal. 258, affirmed in <i>Smith v. Eureka Flour Mills</i>, 6 Cal. 7, as to powers of a corporation to issue bills.</p>	<p><i>Keon v. Bisbee</i>, 9 Cal. 142, priation of mining claims; in <i>McKinney</i>, 10 Cal. 183; in <i>St</i> 12 Cal. 70, and in <i>Boggs v. l</i></p>
<p><i>Mahoney v. Wilson</i>, 15 Cal. 42, affirmed in <i>Frank v. Doane</i>, 15 Cal. 302; and in <i>Green v. Doane</i>, 15 Cal. 304, relative to the abandonment of a motion for a new trial.</p>	<p><i>ing Co.</i>, 14 Cal. 313, that the mining claim has a vested t and in <i>Curtis v. Sutter</i>, 15 Cal. 313, relative to bills of peace.</p>
<p><i>Mansfield v. Dorland</i>, 2 Cal. 507, affirmed in <i>Russell v. Conway</i>, 11 Cal. 103, as to lien of attorneys on a judgment for costs.</p>	<p><i>Merrill v. Gorham</i>, 6 Cal. 313, to in <i>People v. Edwards</i>, 9 Cal. 313, in <i>People v. Squires</i>, 14 Cal. 313, constitutionality of one person offices.</p>
<p><i>Marlow v. Marsh</i>, 9 Cal. 259, affirmed in <i>People v. Edwards</i>, 9 Cal. 291; and in <i>Skillman v. Riley</i>, 10 Cal. 300, as to amendments to statement on appeal.</p>	<p><i>Mesick v. Sunderland</i>, 6 Cal. 313, affirmed in <i>Bird v. Dennison</i>, and in <i>Stafford v. Lick</i>, 7 Cal. 313, purchaser of a legal title sho</p>
<p><i>Marziou v. Pioche</i>, 8 Cal. 522, referred to in same case, 10 Cal. 546, as being remanded for the purpose of having an account taken.</p>	<p>tected against equities; and in <i>Mesick</i>, 10 Cal. 107, as to a in fee or in præsent.</p>
<p><i>Mateer v. Brown</i>, 1 Cal. 221, referred to in <i>Gerke v. California Steam Navigation Co.</i>, 9 Cal. 256, that the declarations of an agent after <i>res gestæ</i> are not binding on the principal.</p>	<p><i>Meyer v. Gorham</i>, 5 Cal. 313, to in same case, 11 Cal. 392, a sented in a different form.</p>
<p><i>Matoon v. Eder</i>, 6 Cal. 57, affirmed in <i>Nickerson v. Chatterton</i>, 7 Cal. 570, that a condition precedent, apparent on the instrument, must be construed with reference to the law under which it was given.</p>	<p><i>Meyer v. Kalkmann</i>, 6 Cal. 313, ruled in <i>Hickman v. O'Neal</i>, and in <i>Chipman v. Bowman</i>, as to the jurisdiction of the su of San Francisco.</p>
<p><i>May v. Hanson</i>, 5 Cal. 360, affirmed in <i>Battelle v. Connor</i>, 6 Cal. 141, as to terms on granting new trials; and in <i>Finn v. Vallejo Street Wharf Co.</i>, 7 Cal. 255, as to ordinary care in cases of accident.</p>	<p><i>Meyer v. Kinzer</i>, 12 Cal. 21, in <i>Smith v. Smith</i>, 12 Cal. 21; <i>v. Ward</i>, 13 Cal. 470; in <i>Pix gins</i>, 15 Cal. 131, and in <i>Mo</i> 16 Cal. 557, as to the po property by husband and wife erture.</p>
<p><i>Mayo v. Madden</i>, 4 Cal. 27, referred to in <i>Gates v. Kieff</i>, 7 Cal. 126, as to joinder of an action in tort with one in equity.</p>	<p><i>Minturn v. Fisher</i>, 4 Cal. 313, cated upon in same case, 7 Cal. 313, relative to bankers' checks.</p>
<p><i>Meerholz v. Sessions</i>, 9 Cal. 277, affirmed in <i>Brotherton v. Hart</i>, 11 Cal. 405, that a stipulation by consent cannot be questioned on appeal.</p>	<p><i>Mitchell v. Reed</i>, 9 Cal. 20, in <i>McGee v. Stone</i>, 9 Cal. 60, toppel by declarations of parti</p>
<p><i>Meiggs v. Scannell</i>, 7 Cal. 405, affirmed</p>	<p><i>Monroe v. Thomas</i>, 5 Cal. 41, in <i>Thomas v. Armstrong</i>, 7 Cal. 41</p>

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a ferry license is not subject to a sale under execution.

Montgomery v. Tutt, 11 Cal. 307, affirmed in *Horn v. Volcano Water Co.*, 13 Cal. 70, as to intervention; and in *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 527, relative to redemption; and in *Skinner v. Beatty*, 16 Cal. 158, that a writ of assistance may issue to put a party in possession of premises sold under foreclosure; and in *Goodenow v. Ewer*, 16 Cal. 468, relative to the necessary parties in a foreclosure suit.

Moore v. Goslin, 5 Cal. 266, explained in *Frazier v. Hastler*, 5 Cal. 159, as to the statute of forcible entry and detainer.

Moore v. Patch, 12 Cal. 265, affirmed in *Cowell v. Doub*, 12 Cal. 274; and in *People v. Seymour*, 16 Cal. 344, relative to legalizing the assessments for taxes.

Moore v. Wilkinson, 13 Cal. 478, affirmed in *Moore v. Roff*, 13 Cal. 489, relative to preëemption claims; in *Boggs v. Merced Mining Co.*, 14 Cal. 361; in *Yount v. Howell*, 14 Cal. 469, and in *Stark v. Barrett*, 15 Cal. 366, relative to patents for public lands.

Morley v. Dickinson, 12 Cal. 561, referred to in *Mitchell v. Hackett*, 14 Cal. 666, relative to the effect of taking a note in satisfaction of an execution.

Morrison v. Dapman, 3 Cal. 255, affirmed in *Branger v. Chevalier*, 9 Cal. 173, as to amending judgments after the adjournment of the term.

Morton v. Folger, 15 Cal. 275, affirmed in *Cornwall v. Culver*, 16 Cal. 426, as to the Vioget survey of the Sutter grant of Sacramento.

Moss v. Warner, 10 Cal. 296, affirmed in *Horn v. Volcano Water Co.*, 13 Cal. 70, as to intervention of third parties.

Muldrow v. Norris, 2 Cal. 78, affirmed in *Tyson v. Wells*, 2 Cal. 130; in *Grayson v. Guild*, 4 Cal. 125; in *Peachy v. Ritchie*, 4 Cal. 207, and in *Carsley v. Lindsay*, 14 Cal. 394, that awards may be set aside for fraud, mistake or accident; and in *Williams v. Walton*, 9 Cal. 146, that an award may be good in part and bad in part; and in *Muldrow v. Norris*, 12 Cal. 343, without comment.

Murdock v. Murdock, 7 Cal. 511, affirmed in *Swartz v. Hazlett*, 8 Cal. 123, relative to the necessary proof of a contract which appears inconsistent, between relatives.

Murphy v. Wallingford, 6 Cal. 648, affirmed in *Bird v. Dennison*, 7 Cal. 309, that a survey and marking out boundaries is not a legal possession.

Musgrove v. Perkins, 9 Cal. 211, affirmed in *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162, that granting or refusing a continuance is in the discretion of the court below.

Myers v. South Feather Water Co., 10 Cal. 580, referred to in same case, 14 Cal. 274, and the contract discussed.

McAllister v. Strode, 7 Cal. 428, affirmed in *Judson v. Atwill*, 9 Cal. 478, relative to requirements of the insolvent law, but abrogated by the statute of 1860, p. 283.

McAuley v. York Mining Co., 6 Cal. 80, affirmed in *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 266, relative to the corporator as a witness.

McCann v. Beach, 2 Cal. 25, affirmed in *Macy v. Goodwin*, 6 Cal. 581; in *Folsom's Ex'r v. Scott*, 6 Cal. 462; and in *Bagley v. Eaton*, 10 Cal. 147, as to proof of lost instruments.

McCann v. Sierra County, 7 Cal. 121, affirmed in *Colton v. Rossi*, 9 Cal. 599; in *McCauley v. Weller*, 12 Cal. 528; and in *Bensley v. Mountain Lake Water Co.*, 13 Cal. 316, that compensation must be made for private property when used.

McCarron v. O'Connell, 7 Cal. 152, abrogated by the statute of 1860, p. 175, allowing sales of mining claims to be made without seal.

McCauley v. Weller, 12 Cal. 500, affirmed in *Bensley v. Mountain Lake Water Co.*, 13 Cal. 314, that compensation must be made for private property when used.

McClintock v. Bryden, 5 Cal. 97, affirmed in *Fitzgerald v. Urton*, 5 Cal. 310; in *Burdge v. Underwood*, 6 Cal. 46; in *Merced Mining Co. v. Fremont*, 7 Cal. 324; and in *Martin v. Browner*, 11 Cal. 14, as to appropriation of public lands for mining purposes.

McDermott v. Douglass, 5 Cal. 89, affirmed in *Bray v. Redman*, 6 Cal. 287, relative to payment of costs in a justice's court on appeal.

McDonald v. Griswold, 4 Cal. 352, referred to in *Taylor v. Brooks*, 5 Cal. 334, and in *McCauley v. Brooks*, 16 Cal. 34, relative to the state revenue and payment of warrants.

McDonald v. Maddux, 11 Cal. 187, re-

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ferred to in <i>McCauley v. Brooks</i> , 16 Cal. 34, relative to the state revenue and payment of warrants.	<i>son v. Sherman</i> , 15 Cal. 293, that a mortgage is a mere security for a debt.
<i>McEwen v. Johnson</i> , 7 Cal. 258, affirmed in <i>Park v. Hinds</i> , 14 Cal. 418, relative to the finding necessary to support a judgment.	<i>Nagle v. Minturn</i> , 8 Cal. 540, affirmed in <i>Marye v. Jones</i> , 9 Cal. 337, relative to counter claims.
<i>McKenty v. Gladwin</i> , 10 Cal. 227, affirmed in <i>Scales v. Scott</i> , 13 Cal. 79; and in <i>Gladwin v. Gladwin</i> , 13 Cal. 334, as to the invalidity of including interest in an antedated note.	<i>Natoma Water and M. Co. v. Clark</i> , 14 Cal. 544, affirmed in <i>Curtis v. Sullivan</i> , 15 Cal. 264, relative to the parties defendant in an ejectment suit; in <i>Hicks v. Mael</i> , 15 Cal. 117; and in <i>Natoma W. M. Co. v. Parker</i> , 16 Cal. 84, on the solution of a temporary injunction.
<i>McKeon v. Bisbee</i> , 9 Cal. 137, affirmed in <i>State v. Moore</i> , 12 Cal. 70, that a mining claim is property, and can be sold on execution.	<i>Nelson v. Nelson</i> , 6 Cal. 430, affirmed in <i>Lehmaier v. King</i> , 10 Cal. 374, relative to the statute of limitations.
<i>McKune v. McGarvey</i> , 6 Cal. 497, affirmed in <i>Guttman v. Scannell</i> , 7 Cal. 458, relative to <i>femme sole</i> traders being independent of the husband.	<i>Nickerson v. Chatterson</i> , 7 Cal. 390; affirmed in <i>Chambers v. Waters</i> , 7 Cal. 390; in <i>Ginaca v. Atwood</i> , 8 Cal. 390; and in <i>Hunt v. Robinson</i> , 11 Cal. 390, that the condition precedent in a status bond must be shown in the complaint for recovery; and in <i>Tissot v. Darling</i> , 9 Cal. 285, that the nonpayment of a judgment may be shown without issuing an execution thereon.
<i>McLarren v. Spaulding</i> , 2 Cal. 510, affirmed in <i>Piercy v. Sabin</i> , 10 Cal. 30, that a new matter must be set up in the answer.	<i>Nims v. Palmer</i> , 6 Cal. 8, affirmed in <i>Nims v. Johnson</i> , 7 Cal. 112; and in <i>Nims v. Jeans</i> , 7 Cal. 417, relative to status land warrants and their location.
<i>McMillen v. Richards</i> , 9 Cal. 365, affirmed in <i>Nagle v. Macy</i> , 9 Cal. 428; and in <i>Goodenow v. Ewer</i> , 16 Cal. 467, that a mortgage must be foreclosed; in <i>Cummings v. Coe</i> , 10 Cal. 531; <i>Montgomery v. Tutt</i> , 11 Cal. 317; in <i>McMillan v. Vischer</i> , 14 Cal. 240; and in <i>People v. Irwin</i> , 14 Cal. 434, relative to redemption of property sold under execution; in <i>Gregory v. Higgins</i> , 10 Cal. 340, relative to garnishment of a promissory note; in <i>Haffley v. Maier</i> , 13 Cal. 14; and in <i>Johnson v. Sherman</i> , 15 Cal. 293, that a mortgage is merely a security for a debt; in <i>Reynolds v. Harris</i> , 14 Cal. 680, relative to the equities derived from a sheriff's deed; and in <i>Falkner v. Hunt</i> , 16 Cal. 170, that money paid under protest, not justly due, can be recovered back.	<i>Norris v. Farmers' and Teamsters' Ass'n</i> , 6 Cal. 590, affirmed in <i>Ward v. Sever</i> , 7 Cal. 129, that a party aggrieved by a violation of a ferry privilege must sue in equity for relief; and in <i>Waukena v. Chauncey</i> , 13 Cal. 13, that a judgment against supervisors cannot be attacked collaterally for irregularity.
<i>McMillan v. Richards</i> , 12 Cal. 467, affirmed in <i>Hutchinson v. Bours</i> , 13 Cal. 52, relative to entering a judgment in vacation.	<i>Norris v. Russell</i> , 5 Cal. 249, affirmed in <i>Ford v. Holton</i> , 5 Cal. 321, that to maintain a tax title every prerequisite to the exercise of the power of sale must be shown, but abrogated by the statute of 1859, p. 334, which makes a tax deed prima facie evidence of title.
<i>McMinn v. Mayes</i> , 4 Cal. 209, affirmed in <i>Bird v. Lisbros</i> , 9 Cal. 5, relative to the possession necessary to maintain ejectment.	<i>Norton v. Jackson</i> , 5 Cal. 262, relative to in <i>Jackson v. Norton</i> , 6 Cal. 189, relative to rescinding a contract for the purchase of land; and in <i>Reynolds v. Ford</i> , 9 Cal. 340, that an action will not lie for a warranty of title to land until eviction.
<i>McNally v. Mott</i> , 3 Cal. 235, affirmed in <i>Smith v. Curtis</i> , 7 Cal. 587, relative to a misnomer.	<i>Nougues v. Douglass</i> , 7 Cal. 65, relative to in <i>McCauley v. Brooks</i> , 16 Cal. 43, and in <i>Koppikus v. State Capitol Commissioners</i> , 16 Cal. 253, relative to the status of a debtor.
<i>Nagle v. Macy</i> , 9 Cal. 428, affirmed in <i>Cowell v. Buckelew</i> , 14 Cal. 641; and in <i>Goodenow v. Ewer</i> , 16 Cal. 468, relative to foreclosure of mortgages; and in <i>Johnson</i>	<i>O'Callaghan v. Booth</i> , 6 Cal. 63, affirmed in <i>Hart v. Moon</i> , 6 Cal. 162, relative to

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to actions for forcible entry in justices' courts.

O'Connor v. Corbitt, 3 Cal. 370, affirmed in *Ramirez v. Murray*, 5 Cal. 223, that a party cannot recover rent where the possession is adverse and tortuous.

Ord v. McKee, 5 Cal. 515, affirmed in *Phelan v. Olney*, 6 Cal. 483; and in *McMillan v. Richards*, 9 Cal. 410, that a mortgage is a mere incident to the debt.

Osborn v. Endicott, 6 Cal. 149, referred to in *Peralta v. Castro*, 6 Cal. 358, as to parol evidence to prove a trust.

Osborn v. Hendrickson, 6 Cal. 175, affirmed in *Karth v. Light*, 15 Cal. 327, relative to appeals.

Osborn v. Hendrickson, 7 Cal. 282, referred to in same case, 8 Cal. 31, and in *Boggs v. Merced Mining Co.*, 14 Cal. 307, that parol evidence is not admissible to vary a written contract; and in *California Steam Nav. Co. v. Wright*, 8 Cal. 591, relative to the acts of a mere agent, who assumes to be the principal.

Pacheco v. Hunsacker, 14 Cal. 120, referred to in *Chaffin v. Doub*, 14 Cal. 386, as to a legal delivery of a harvest crop under the statute of frauds.

Page v. Warner, 4 Cal. 395, referred to in *Weaver v. Page*, 6 Cal. 684, without comment.

Paige v. O'Neal, 12 Cal. 483, affirmed in *Cohn v. Mulford*, 15 Cal. 52, relative to admissions of fraud after sale.

Palmer v. Boling, 8 Cal. 384, affirmed in *Patten v. Green*, 13 Cal. 328, as to taxable property.

Palmer v. Woodbury, 14 Cal. 43, affirmed in *Flynn v. Abbott*, 16 Cal. 366, relative to the pilot law of San Francisco.

Palmer v. Melvin, 6 Cal. 651, affirmed in *Nickerson v. Chatterton*, 7 Cal. 570; in *Curtis v. Richards*, 9 Cal. 37; and in *Williamson v. Blattan*, 9 Cal. 501, that a complaint on the recovery of a statutory bond must show the conditions precedent.

Panand v. Jones, 1 Cal. 488, affirmed in *Castro v. Castro*, 6 Cal. 160; in *Tevis v. Pitcher*, 10 Cal. 478; and in *Dye v. Dye*, 11 Cal. 169, relative to wills under the Mexican law; in *Scott v. Ward*, 13 Cal. 479; and referred to in *Noe v. Card*, 14 Cal. 612, relative to common property after the death of the wife.

Parsons v. Davis, 3 Cal. 421, referred to in *Whitwell v. Barbier*, 7 Cal. 64; and

in *Schloss v. White*, 16 Cal. 68, relative to setting aside informal judgments.

Parsons v. Tuolumne Water Co., 5 Cal. 43, affirmed in *Brock v. Bruce*, 5 Cal. 280; in *People v. Fowler*, 9 Cal. 89; and in *Williams v. Walton*, 9 Cal. 146, as to the jurisdiction of county courts.

Partridge v. McKinney, 10 Cal. 181, affirmed in the same case, 13 Cal. 159.

Pattison v. Supervisors of Yuba Co., 13 Cal. 175, affirmed in *People v. Seymour*, 16 Cal. 345, as to the constitutionality of the road taxes.

Payne v. Bensley, 8 Cal. 260, affirmed in *Robinson v. Smith*, 14 Cal. 98; and in *Naglee v. Lyman*, 14 Cal. 454, relative to the transfer of commercial paper before maturity.

Payne v. City of San Francisco, 3 Cal. 122, affirmed in *Hart v. Plum*, 14 Cal. 155, relative to the time of an incumbent in office to perform official acts.

Payne v. Pacific Mail S. S. Co., 1 Cal. 33, affirmed in *Lawrence v. Collier*, 1 Cal. 38; in *Payne v. Jacobs*, 1 Cal. 41; and in *George v. Law*, 1 Cal. 364, as to the interference of courts with verdicts of a jury.

Payne v. Treadwell, 5 Cal. 310, affirmed in *Watson v. Zimmerman*, 6 Cal. 47, that an actual ouster must be proven to maintain ejectment; and overruled, in part, in *Payne v. Treadwell*, 16 Cal. 246, as to the statement of the circumstances of withholding possession.

Peabody v. Phelps, 9 Cal. 213, affirmed in *Baker v. Baker*, 10 Cal. 527; and in *Allen v. Hill*, 16 Cal. 118, relative to appeal from an order setting aside report of a referee.

Peachy v. Ritchie, 4 Cal. 205, affirmed in *Carsley v. Lindsay*, 14 Cal. 394, that an award of an arbitrator cannot be set aside as contrary to law and evidence.

Pearson v. Snodgrass, 5 Cal. 478, affirmed in *Letter v. Putney*, 7 Cal. 423, that an exception must be taken in the court below to be urged on appeal.

People v. Ah Chung, 5 Cal. 103, affirmed in *People v. Barbour*, 9 Cal. 234, that the associate justices of the courts of sessions must be present at the trial.

People v. Ah Fong, 12 Cal. 345, affirmed in *People v. Woppner*, 14 Cal. 438, that oral instructions are improper in criminal cases.

People v. Apple, 7 Cal. 289, affirmed in *People v. Glenn*, 10 Cal. 37, that the

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defendant cannot be permitted to make an objection for the first time on appeal to admissions of declarations.

People v. Applegate, 5 Cal. 295, affirmed in *People v. Shear*, 7 Cal. 140; and in *People v. Vick*, 7 Cal. 166, that the court of sessions has no appellate jurisdiction.

People v. Aro, 6 Cal. 207, affirmed in *People v. Hood*, 6 Cal. 238; in *People v. Wallace*, 9 Cal. 31; in *People v. Lloyd*, 9 Cal. 56; and in *People v. Steventon*, 9 Cal. 275, that an indictment must contain facts sufficient to constitute an offense.

People v. Ball, 14 Cal. 101, referred to in *People v. Green*, 15 Cal. 513, as being different in the facts.

People v. Beatty, 14 Cal. 566, affirmed in *People v. Cuintano*, 15 Cal. 329; in *People v. Moice*, 15 Cal. 331; and in *People v. Arnold*, 15 Cal. 479, relative to impanneling a jury for trial.

People v. Beeler, 6 Cal. 246, affirmed in *People v. Payne*, 8 Cal. 344; and in *People v. Demint*, 8 Cal. 424, that in criminal cases it is error to charge a jury orally.

People v. Bell, 4 Cal. 177, affirmed in *Merced Mining Co. v. Fremont*, 7 Cal. 133; in *People v. Fogg*, 11 Cal. 359; and in *McCauley v. Brooks*, 16 Cal. 46, that a mandamus will lie to an executive officer who has no discretion.

People v. Board of Delegates of the San Francisco Fire Department, 14 Cal. 479, affirmed in *Lowe v. Alexander*, 15 Cal. 301, relative to writs of certiorari.

People v. Bond, 10 Cal. 563, affirmed in *People v. Tillinghast*, 10 Cal. 584; in *People v. Supervisors of San Francisco County*, 12 Cal. 300; and in *Thornton v. Hooper*, 14 Cal. 12, relative to the commissioners of the funded debt of San Francisco; and in *McCauley v. Brooks*, 16 Cal. 34, relative to the contract of indebtedness by a county or State.

People v. Boring, 8 Cal. 406, affirmed in *Anthony v. Wessel*, 9 Cal. 104, as to the proper officer to execute a deed for property sold on execution.

People v. Brenham, 3 Cal. 477, referred to in *Payne v. City of San Francisco*, 3 Cal. 126; in *Dickey v. Hurlbut*, 5 Cal. 344; in *People v. Porter*, 6 Cal. 28; and in *People v. Weller*, 11 Cal. 63, relative to elections and the proclamations of the governor.

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People v. Burbank, 12 Cal. 378, affirmed in *People v. Templeton*, 12 Cal. 402, relative to the election of judges in the State and the terms thereof.

People v. Campbell, 2 Cal. 135, affirmed in *People v. Murray*, 15 Cal. 223, relative to the time when an officer may be elected.

People v. Clark, 1 Cal. 406, affirmed in *Craig v. Godfroy*, 1 Cal. 415; and referred to in *Fowler v. Pierce*, 2 Cal. 170, as to the time when a statute goes into effect.

People v. Cohen, 8 Cal. 42, referred to in *People v. Winkler*, 9 Cal. 236; and in *People v. Peterson*, 9 Cal. 315, as to the necessary description of coin in an indictment for embezzlement; but restricted in *People v. Green*, 15 Cal. 513, that it must be limited by the facts to which they apply.

People v. Coleman, 4 Cal. 46, affirmed as "the revenue cases" in *Thompson v. Williams*, 6 Cal. 89; and in *People v. Rogers, admr.*, 13 Cal. 165, that the legislature has every power necessary for government not prohibited by the constitution.

People v. Cottle, 6 Cal. 227, affirmed in *People v. Gehr*, 8 Cal. 361, as to the incompetency of a juror who has expressed an opinion of the case.

People v. County Court of El Dorado County, 10 Cal. 19, affirmed in *Funkenstein v. Elgutter*, 11 Cal. 328, that no appeal lies from a judgment by default in a justice's court upon questions of fact.

People v. Craycroft, 2 Cal. 243, affirmed in *People v. Raynes*, 3 Cal. 367; in *Ward v. Severance*, 7 Cal. 129; and in *State v. Poulterer*, 16 Cal. 526, when a right exists at common law the remedy provided by statute is merely cumulative.

People v. Cuintano, 15 Cal. 327, affirmed in *People v. Moice*, 15 Cal. 331, relative to impanneling a jury for trial.

People v. Davidson, 5 Cal. 133, affirmed in *People v. Vanard*, 6 Cal. 563, relative to a verdict of assault under an indictment of assault with intent to commit murder.

People v. Demint, 8 Cal. 423, affirmed in *People v. Woppner*, 14 Cal. 438, that oral instructions are improper in criminal cases.

People v. Dolan, 9 Cal. 576, affirmed in *People v. Murray*, 10 Cal. 310, that an indictment for murder need not aver the

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killing to have been "willful, deliberate and premeditated."

People v. Edwards, 9 Cal. 286, affirmed in *Skillman v. Riley*, 10 Cal. 301, that amendments to statement on appeal must be embodied in one document; in *People v. Squires*, 14 Cal. 216, that the sheriff's bond covers his liabilities as tax collector.

People v. Fitch, 1 Cal. 535, affirmed in *Gorham v. Campbell*, 2 Cal. 137; in *People v. Olds*, 3 Cal. 177; in *People v. Scannell*, 7 Cal. 540; and in *People v. Mizner*, 7 Cal. 525, relative to appointment to office by the governor pending a vacancy.

People v. Freeland, 6 Cal. 96, affirmed in *People v. Roberts*, 6 Cal. 215, that a declaration of a juror that he is a naturalized citizen is prima facie evidence of that fact.

People v. Gherke, 6 Cal. 381, doubted in *Siemssen v. Bofer*, 6 Cal. 252, relative to inheritance by foreign heirs; and affirmed in *Forbes v. Scannell*, 13 Cal. 282, relative to foreign treaties.

People v. Gilmore, 4 Cal. 376, affirmed in *People v. Backus*, 5 Cal. 278, relative to the right to be tried for manslaughter only, when once found guilty in that degree on an indictment for murder.

People v. Gillespie, 1 Cal. 342, affirmed in *People v. King*, 1 Cal. 345; and in *Seale v. Mitchell*, 5 Cal. 402, as to the jurisdiction of the superior court.

People v. Hall, 4 Cal. 399, affirmed in *Speer v. See Yup Co.*, 13 Cal. 73; and in *People v. Elyea*, 14 Cal. 146, relative to Chinese as witnesses.

People v. Haskell, 5 Cal. 357, affirmed in *People v. Squires*, 14 Cal. 17, that the legislature can shorten the term of an office while filled.

People v. Hays, 4 Cal. 127, affirmed in *Seale v. Mitchell*, 5 Cal. 402; and in *Hart v. Burnett*, 15 Cal. 587, that the right of redemption is not retrospective; and in *Holland v. City of San Francisco*, 7 Cal. 735, relative to the corporate powers of the city of San Francisco.

People v. Hays, 5 Cal. 66, affirmed in *Williams v. Smith*, 6 Cal. 92; and in *Harvey v. Fisk*, 9 Cal. 94, that a sheriff may refuse to execute a certificate of sale of property sold and credit same on execution, when the lien is in dispute, unless the money is paid.

People v. Hester, 6 Cal. 679, affirmed in *Chard v. Harrison*, 7 Cal. 116; and

overruled in *People v. El Dorado County*, 8 Cal. 61; and in *People v. Board of Delegates of the Fire Department of San Francisco*, 14 Cal. 499, that a certiorari will lie to a board of supervisors.

People v. Houghtaling, 7 Cal. 348, affirmed in *Gunter v. Janes*, 9 Cal. 658, relative to property in the hands of an administrator de son tort.

People v. Hurley, 8 Cal. 390, affirmed in *People v. Ramirez*, 13 Cal. 173, that an instruction may be refused because it was once given.

People v. Kohle, 4 Cal. 198, affirmed in *People v. Rodriguez*, 10 Cal. 59, that a jury may be challenged peremptorily at any time before being sworn.

People v. Johnson, 6 Cal. 499, affirmed in *Nougues v. Douglass*, 7 Cal. 66, as to the unconstitutionality of the state debt.

People v. Lafarge, 3 Cal. 130, referred to in *Robb v. Robb*, 6 Cal. 22, as to the power of a district court to open a judgment after term.

People v. Langdon, 8 Cal. 1, affirmed in *People v. Whitman*, 10 Cal. 46, as to the power of the governor to fill a vacancy in an office.

People v. Lee, 5 Cal. 353, explained in *People v. Fisher*, 6 Cal. 155, as being erroneously decided on the civil instead of the criminal code of change of venue.

People v. Lloyd, 9 Cal. 54, affirmed in *People v. Cox*, 9 Cal. 33, without comment.

People v. March, 6 Cal. 543, explained in *People v. Stonecifer*, 6 Cal. 411, as being incorrect, in deciding that a prisoner may waive any incompetence of a juror to serve in the case.

People v. Martin, 6 Cal. 477, affirmed in *People v. Woppner*, 14 Cal. 437, relative to signing statements in criminal cases.

People v. Martin, 12 Cal. 409, affirmed in *People v. Rosborough*, 14 Cal. 178, relative to the election of judges and their terms.

People v. Milgate, 5 Cal. 127, affirmed in *People v. Roberts*, 6 Cal. 217; and in *People v. Stonecifer*, 6 Cal. 410, as to instructions upon character and malice.

People v. Mizner, 7 Cal. 519, affirmed in *People v. Langdon*, 8 Cal. 15, 17; in *People v. Addison*, 10 Cal. 7; and in *People v. Whitman*, 10 Cal. 46, as to power of the governor to appoint to a vacancy.

People v. Moore, 12 Cal. 56, referred

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to in *Hart v. Plum*, 14 Cal. 154, relative to taxation of mining claims.

People v. Mott, 3 Cal. 502, referred to in *People v. Fitch*, 1 Cal. 536; and in *People v. Mizner*, 7 Cal. 523, as to the appointment to office by the governor during a vacancy.

People v. Mullins, 10 Cal. 20, affirmed in *People v. Beatty*, 14 Cal. 572, relative to the consolidation of a city and county.

People v. McCauley, 1 Cal. 379, affirmed in *People v. Baker*, 1 Cal. 405, that a statement on appeal must show the erroneous evidence and instructions; and in *People v. Wells*, 2 Cal. 207, that the legislature can authorize a district judge to hold court in another district.

People v. McMakin, 8 Cal. 547, affirmed in *People v. Honshell*, 10 Cal. 87, as to assault with a drawn pistol.

People v. Naglee, 1 Cal. 232, referred to in *People v. Coleman*, 4 Cal. 52, as to the construction of the revenue laws.

People v. Town of Nevada, 6 Cal. 143, affirmed in *Colton v. Rossi*, 9 Cal. 599, that county courts cannot incorporate towns.

People v. Nugent, 4 Cal. 341, affirmed in *People v. Vanard*, 6 Cal. 562, as to requisites of an indictment for an assault with a deadly weapon.

People v. Olds, 3 Cal. 167, affirmed in *Merced Mining Co. v. Fremont*, 7 Cal. 133, that a mandamus can only order a court to exercise its discretion.

People v. Parsons, 6 Cal. 487, commented on in *People v. Olivera*, 7 Cal. 404; in *People v. Winkler*, 9 Cal. 236; and in *People v. Dolan*, 9 Cal. 584, that an indictment is sufficient which sets forth the words of a statute.

People v. Payne, 8 Cal. 341, affirmed in *People v. Honshell*, 10 Cal. 87, relative to force used in preventing a trespass; and in *People v. Acosta*, 10 Cal. 196, that a verdict given under great excitement will be set aside; and affirmed in *People v. Woppner*, 14 Cal. 438, that oral instructions are improper in criminal cases.

People v. Phoenix, 6 Cal. 92, affirmed in *People v. Wells*, 11 Cal. 339, that a special statute controls a general one.

People v. Porter, 6 Cal. 26, affirmed in *People v. Weller*, 11 Cal. 63; in *People v. Martin*, 12 Cal. 410; and in *People v. Rosborough*, 14 Cal. 147, relative to the election of judges of the courts.

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People v. Reid, 6 Cal. 288, referred to in *People v. Mizner*, 7 Cal. 523; and in *People v. Langdon*, 8 Cal. 11, as to the appointment by a governor to a vacancy.

People v. Roberts, 6 Cal. 214, affirmed in *People v. March*, 6 Cal. 547, as to effect of an erroneous instruction; and in *People v. Butler*, 8 Cal. 439, as to the number of grand jurors requisite to find an indictment.

People v. Roderiguez, 10 Cal. 50, affirmed in *People v. Cuintano*, 15 Cal. 329, relative to impanneling a jury for trial.

People v. Scannell, 7 Cal. 432, referred to in *Doane v. Scannell*, 7 Cal. 394, relative to the office of sheriff of San Francisco county.

People v. Squires, 14 Cal. 12, referred to in *People v. Supervisors Santa Barbara County*, 14 Cal. 103, relative to county officers.

People v. Steventon, 9 Cal. 273, affirmed in *People v. Choiser*, 10 Cal. 311; and in *People v. Judd*, 10 Cal. 314, as to the requisites of an indictment for murder.

People v. Stewart, 7 Cal. 140, affirmed in *People v. Gehr*, 8 Cal. 361, relative to jurors who form or express an opinion.

People v. Stillman, 7 Cal. 17, referred to in *Gilman v. Contra Costa County*, 8 Cal. 57, relative to appeals from an order refusing to change the venue.

People v. Stonecifer, 6 Cal. 405, affirmed in *People v. Honshell*, 10 Cal. 86, that affidavits in support of a motion must be in the statement to have the motion reviewed.

People v. Supervisors of El Dorado County, 8 Cal. 58, affirmed in *People v. Supervisors of Marin County*, 10 Cal. 345, and in *Robinson v. Supervisors of Sacramento County*, 16 Cal. 210, that a certiorari will lie to a board of supervisors.

People v. Templeton, 12 Cal. 394, affirmed in *People v. Rosborough*, 14 Cal. 187, relative to election of judges and their terms.

People v. Thompson, 4 Cal. 238, affirmed in *People v. Stuart*, 4 Cal. 226, that objections to the manner of transfer of an indictment must be made before appeal.

People v. Tillinghast, 10 Cal. 584, referred to in *Thornton v. Hooper*, 14 Cal. 11, relative to an act to fund the floating debt of San Francisco.

People v. Turner, 1 Cal. 143, referred

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to in *People v. Turner*, 1 Cal. 153; and *Ex parte Field*, 1 Cal. 187; and affirmed in *White v. Lighthall*, 1 Cal. 348, and in *Cowell v. Buckelew*, 14 Cal. 642, relative to writs of certiorari and mandamus.

People v. Vanard, 6 Cal. 562, affirmed in *People v. Wilson*, 9 Cal. 260, relative to a conviction of assault on an indictment for assault with intent to commit great bodily harm.

People v. Wallace, 9 Cal. 30, affirmed in *People v. Cox*, 9 Cal. 33; and in *People v. Coleman*, 10 Cal. 334, without comment.

People v. Weller, 11 Cal. 49, affirmed in *People v. Wells*, 11 Cal. 339; in *People v. Martin*, 12 Cal. 411, without comment; and in *People v. Rosborough*, 14 Cal. 147, relative to the election of judges and their terms.

People v. Weller, 11 Cal. 77, affirmed in *People v. Burbank*, 12 Cal. 392; and referred to in *Pattison v. Supervisors of Yuba County*, 13 Cal. 182, relative to the mode of constitutional construction as to election of district judges and their terms.

People v. Wells, 2 Cal. 198, referred to in *People v. Mizner*, 7 Cal. 523, relative to vacancy in an office.

People v. Whitman, 6 Cal. 659, explained and overruled in *Price v. Whitman*, 8 Cal. 415, as to the "Sundays" in the ten days in which the governor shall approve a legislative act; and referred to in *McCauley v. Brooks*, 16 Cal. 47, that a mandamus will issue to a controller.

People v. Whitman, 10 Cal. 38, affirmed in *Perkins v. Thornburgh*, 10 Cal. 191, that a statute is presumed to cover all the intentions of the law maker; and in *Saunders v. Haynes*, 13 Cal. 154, that votes given for an ineligible candidate are not to be counted; and questioned in *People v. Melony*, 15 Cal. 62, as being of doubtful authority.

People v. Woodlief, 2 Cal. 241, affirmed in *Porter v. Hermann*, 8 Cal. 625, that a radical defect in a summons will not support a judgment by default.

People v. Woods, 7 Cal. 579, affirmed in *People v. Bond*, 10 Cal. 570, relative to the commissioners of the funded debt of San Francisco.

People v. Woppner, 14 Cal. 437, referred to in *People v. Lee*, 14 Cal. 511, relative to statements on appeal in criminal cases.

Peters v. Jamestown Bridge Co., 5 Cal. 334, affirmed in *McMillan v. Richards*, 9 Cal. 410; and in *Nagle v. Macy*, 9 Cal. 429, relative to the assignment of a mortgage.

Phelan v. Olney, 6 Cal. 478, affirmed in *McMillan v. Richards*, 9 Cal. 410, that a mortgage is a mere incident of the indebtedness.

Phelan v. San Francisco County, 6 Cal. 531, affirmed in *Holland v. City of San Francisco*, 7 Cal. 380, and in *Argenti v. City of San Francisco*, 16 Cal. 272, relative to the powers of the corporation of San Francisco; and in *Phelan v. San Francisco County*, 9 Cal. 16, that remanding a case on appeal does not affect the rights of the parties.

Phelps v. Owens, 11 Cal. 22, affirmed in *Dorsey v. Manlove*, 13 Cal. 580, as being under the same rule of damages there laid down.

Pico v. Columbet, 12 Cal. 414, affirmed in *Goodenow v. Ewer*, 16 Cal. 471, relative to the rents collected by a tenant in common.

Pierce v. Kennedy, 5 Cal. 138, affirmed in *Geiger v. Clark*, 13 Cal. 580, as to the liability of a surety.

Pierce v. Minturn, 1 Cal. 470, affirmed in *Ellis v. Janes*, 7 Cal. 416; in *Walker v. Sedgwick*, 8 Cal. 402, that a tenant is estopped from denying the landlord's title; and in *Castro v. Armesti*, 14 Cal. 39, relative to statements on appeal.

Pierce v. Robinson, 13 Cal. 116, affirmed in *Pope v. Huth*, 14 Cal. 407, as to an equitable assignment of property; and in *Johnson v. Sherman*, 15 Cal. 291, relative to parol evidence to show the purpose of an instrument.

Piercy v. Sabin, 10 Cal. 22, affirmed in *Glazer v. Clift*, 10 Cal. 304; and in *Hawkins v. Borland*, 14 Cal. 415, that new matter must be specially pleaded.

Pixley v. Huggins, 15 Cal. 127, affirmed in *Curtis v. Sutter*, 15 Cal. 264, relative to the evidence necessary in an action of ejectment.

Plume v. Seward, 4 Cal. 94, affirmed in *Castro v. Gill*, 5 Cal. 42, that a party's possession is not confined to his actual inclosure; and in *Gunn v. Bates*, 6 Cal. 272; in *Nagle v. Macy*, 9 Cal. 427, prior possession is sufficient to maintain ejectment; in *Murphy v. Wallingford*, 6 Cal. 649; and in *Bird v. Dennison*, 7 Cal. 302, 309,

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that a survey and marking boundary lines is no evidence of possession.

Poole v. Gerrard, 6 Cal. 71, affirmed in *Morse v. McCarty*, 7 Cal. 346; in *Revalk v. Kramer*, 8 Cal. 74, separate deeds of husband and wife to a homestead are void; and overruled in *Gee v. Moore*, 14 Cal. 477, relative to the right of survivorship; and referred to in *Guiod v. Guiod*, 14 Cal. 508, relative to abandonment, but abrogated by the statute of 1860, p. 311.

Posten v. Rasette, 5 Cal. 467, affirmed in *Letter v. Putney*, 7 Cal. 423, that exceptions to the admissibility of a deed should be taken at nisi prius; and in *Marziou v. Pioche*, 8 Cal. 536, as to the irrevocable character of a power of attorney; and in *Stanley v. Green*, 12 Cal. 166, as to requisites of a deed to pass title in the civil law.

Potter v. Seale, 5 Cal. 410, referred to in same case, 8 Cal. 220, as appearing with additional facts.

Preston v. Kehoe, 10 Cal. 445, referred to in same case, 15 Cal. 318, relative to the actual possession necessary in an action of forcible entry.

Price v. Dunlap, 5 Cal. 483, affirmed in *Castro v. Wetmore*, 16 Cal. 380, relative to indemnity on a lost note.

Price v. Sacramento County, 6 Cal. 254, affirmed in *Placer County v. Austin*, 8 Cal. 305, as to the power of a county to sue and be sued.

Priest v. Union Canal Co., 6 Cal. 170, referred to in *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 153, as to appropriation of water for mining purposes.

Rabé v. Hamilton, 15 Cal. 31, referred to in *Shaw v. Randall*, 15 Cal. 380, relative to undertakings on appeal.

Rabé v. Wells, 3 Cal. 148, affirmed in *Morgan v. Hugg*, 5 Cal. 410, that errors relied on must be shown on appeal.

Ramirez v. Kent, 2 Cal. 558, affirmed in *People v. Folsom*, 5 Cal. 378, that an alien may hold real estate until office found.

Raun v. Reynolds, 11 Cal. 14, referred to in *Reynolds v. Harris*, 14 Cal. 679, as conclusive of the law in the case.

Ray v. Armstrong, 4 Cal. 208, affirmed in *Garbrell v. Fitch*, 6 Cal. 189, relative to time requisite to give notice of unlawful holding over.

Reed v. McCormick, 4 Cal. 342, referred to in *Parsons v. Tuolumne County*

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Water Co., 5 Cal. 43; in *Keller v. Franklin*, 5 Cal. 434; and in *People v. Fowler*, 9 Cal. 86, as to the jurisdiction of the county courts.

Reina v. Cross, 6 Cal. 29, affirmed in *Lawson v. Worms*, 6 Cal. 370, that freight paid in advance may be recovered back.

Revalk v. Kramer, 8 Cal. 66, affirmed in *Kramer v. Revalk*, 8 Cal. 75; in *Van Reynegom v. Revalk*, 8 Cal. 76; in *Cook v. Klink*, 8 Cal. 353; in *Buchanan's Estate*, 8 Cal. 509; and in *Marks v. Marsh*, 9 Cal. 97, in proceedings against the wife for the homestead property; and overruled in *Gee v. Moore*, 14 Cal. 477, relative to the right of survivorship; and referred to in *Pixley v. Huggins*, 15 Cal. 134, relative to injunctions against sales of property on execution; the questions of homestead are abrogated by the statute of 1860, p. 311.

Reyes v. Sandford, 5 Cal. 117, affirmed in *Pearks v. Freer*, 9 Cal. 643, that an objection to the venue must be made before answer.

Reynolds v. Harris, 14 Cal. 679, referred to in *Raun v. Reynolds*, 15 Cal. 467, relative to the opinion in that case.

Reynolds v. Jourdan, 6 Cal. 108, affirmed in *Adams v. Pugh*, 7 Cal. 151, that assumpsit will lie for the part performance of a contract which has been interrupted.

Reynolds v. Lathrop, 7 Cal. 43, affirmed in *McDevitt v. Sullivan*, 8 Cal. 597, that a purchaser can collect rents until time of redemption expires.

Reynolds v. West, 1 Cal. 322, affirmed in *Brown v. O'Connor*, 1 Cal. 420; and overruled in *Cohas v. Raisin*, 3 Cal. 451; in *Hart v. Burnett*, 15 Cal. 588, 598; and in *Payne v. Treadwell*, 16 Cal. 227, as to Mexican grants in California.

Rich v. Davis, 4 Cal. 22, affirmed in same case, 6 Cal. 142, without comment.

Richards v. McMillan, 6 Cal. 410, affirmed in *Cordier v. Schloss*, 12 Cal. 146, as to the statement on a confession of judgment.

Richards v. Schroeder, 10 Cal. 434, referred to in *Chaffin v. Doub*, 14 Cal. 386, relative to change of possession of personal property under the statute of frauds.

Rickett v. Johnson, 8 Cal. 34, affirmed in *Revalk v. Kramer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; in *Phelan v. Smith*, 8 Cal. 521; in *Gorham v. Toomy*, 9 Cal. 77; and in *Uhlfelder v. Levy*, 9 Cal. 614,

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that a court of coördinate jurisdiction cannot enjoin the proceedings of another; and referred to in *Pixley v. Huggins*, 15 Cal. 134, as not applicable to the latter case.

Riddell v. Blake, 4 Cal. 264, affirmed in *Walker v. Sedgwick*, 8 Cal. 403, a party cannot retain possession of land under contract of purchase and deny title also.

Riddell v. Shirley, 5 Cal. 488, explained in *Randall v. Buffington*, 10 Cal. 494, that a sale of property may be made to prefer creditors without fraud.

Riddle v. Baker, 13 Cal. 302, affirmed in *Pico v. Webster*, 14 Cal. 204, relative to a judgment against sureties on a bond.

Riggs v. Waldo, 2 Cal. 485, affirmed in *Lightstone v. Laurencel*, 4 Cal. 277; referred to in *Pierce v. Kennedy*, 5 Cal. 139, and stated to be incorrectly reported; referred to in *Bryan v. Berry*, 6 Cal. 396; in *Kritzer v. Mills*, 9 Cal. 23; in *Brady v. Reynolds*, 13 Cal. 32; and in *Geiger v. Clark*, 13 Cal. 580, as to the liability of a surety.

Ringgold v. Haven, 1 Cal. 108, affirmed in *Dalrymple v. Hanson*, 1 Cal. 127; in *Hart v. Spaulding*, 1 Cal. 214; in *Mateer v. Brown*, 1 Cal. 221; and in *Smith v. Compton*, 6 Cal. 26, that a motion for a nonsuit is waived, if defendant then supply the evidence.

Ritter v. Patch, 12 Cal. 298, affirmed in *Berri v. Patch*, 12 Cal. 300, without comment.

Ritter v. Stevenson, 7 Cal. 388, affirmed in same case, 11 Cal. 27, without comment.

Ritter v. Stock, 12 Cal. 402, affirmed in *Duff v. Fisher*, 15 Cal. 382, relative to interference with the finding of the court on appeal.

Rix v. McHenry, 7 Cal. 89, affirmed in *Isaac v. Swift*, 10 Cal. 83, relative to judicial sale pending in proceedings in insolvency.

Robb v. Robb, 6 Cal. 21, affirmed in *Shaw v. McGregor*, 8 Cal. 521, that after the term, a judgment cannot be disturbed.

Robinson v. Gaar, 6 Cal. 275, explained in *Palmer v. Boling*, 8 Cal. 388; and in *Hardenburgh v. Kidd*, 10 Cal. 403, that by the statute of 1857, p. 334, making deeds prima facie evidence of title, an injunction will lie to restrain an illegal sale for taxes.

Robinson v. Magee, 9 Cal. 81, referred to in *McCauley v. Brooks*, 16 Cal. 32,

relative to payment of the State indebtedness by warrants.

Robinson v. Smith, 14 Cal. 94, affirmed in *Naglee v. Lyman*, 14 Cal. 454, relative to the transfer of negotiable paper before maturity.

Rollins v. Forbes, 10 Cal. 299, affirmed in *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; in *Rowland v. Leiby*, 14 Cal. 157; in *De Leon v. Higuera*, 15 Cal. 495; and in *Chapin v. Broder*, 16 Cal. 422, as to a decree for a debt and foreclosure of the property of only one of the defendants.

Rose v. Munie, 4 Cal. 173, affirmed in *Pixley v. Huggins*, 15 Cal. 132, as to the effect of the registry act.

Rowe v. Chandler, 1 Cal. 167, affirmed in *Stearns v. Aguirre*, 6 Cal. 183, relating to misjoinder and nonjoinder of parties.

Rowe v. Kohle, 4 Cal. 285, affirmed in *Luning v. Brady*, 10 Cal. 267, that the joint and several note of husband and wife is obligatory on the husband.

Rowe v. Table Mountain Water Co., 10 Cal. 441, referred to in *Wilson v. Spring Hill Quartz M. Co.*, 10 Cal. 445, without comment.

Rowland v. Leiby, 14 Cal. 156, affirmed in *Chapin v. Broder*, 16 Cal. 422, as to a personal decree in foreclosure.

Ruiz v. Norton, 4 Cal. 355, affirmed in *Flint v. Lyon*, 4 Cal. 20; and in *Moore v. McKinlay*, 5 Cal. 474, as to implied warranty of sale by sample; and in *Crosby v. Watkins*, 12 Cal. 88, as to the right of agent to sue in his own name.

Russell v. Amador, 3 Cal. 400, affirmed in *Jamson v. Quivey*, 5 Cal. 491, that the court must give or refuse instructions.

Russell v. Armador, 2 Cal. 305, affirmed in *Semple v. Burkey*, 2 Cal. 321; in *Bowers v. Johns*, 2 Cal. 419; in *Hoagland v. Clary*, 2 Cal. 475; in *Brown v. Brown*, 3 Cal. 111; referred to in *People v. Lafarge*, 3 Cal. 135; and explained in *Vermule v. Shaw*, 4 Cal. 216, that the court must find the facts and law of a case separately.

Russell v. Elliott, 2 Cal. 245, referred to in *Benham v. Rowe*, 2 Cal. 261; and affirmed in *Merced Mining Co. v. Fremont*, 7 Cal. 133, that a mandamus can only direct the court to use its discretion; and affirmed in *Nickerson v. Chatterton*, 7 Cal. 570, relating to the condition precedent of a statutory undertaking.

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Ryan v. Daly, 6 Cal. 238, affirmed in *Gladwin v. Gladwin*, 14 Cal. 334, as to a confession of judgment.

Salmon v. Hoffman, 2 Cal. 138, affirmed in *Cahoon v. Robinson*, 6 Cal. 226; and in *Walker v. Sedgwick*, 8 Cal. 403, that a vendor has an equitable lien for land sold.

San Francisco Gas Co. v. City of San Francisco, 9 Cal. 453, affirmed in *Hunt v. City of San Francisco*, 11 Cal. 258; in *Ord v. Steamer Uncle Sam*, 13 Cal. 372, relative to verification by a corporation; and affirmed in *Argenti v. City of San Francisco*, 16 Cal. 267, relative to the contract of a municipal corporation.

Sanford v. Head, 5 Cal. 297, affirmed in *Deck v. Gerke*, 12 Cal. 436, relative to the jurisdiction of probate court.

Sargent v. Wilson, 5 Cal. 504, affirmed in *Dorsey v. McFarland*, 7 Cal. 346; in *Kraemer v. Revalk*, 8 Cal. 74; in *Moses v. Warner*, 10 Cal. 297, that the sale of the homestead is void as to \$5,000, except as the statute provides; and in *Horn v. Volcano Water Co.*, 13 Cal. 70, relative to intervention of third parties.

Saunders v. Haynes, 13 Cal. 148, affirmed in *Jacks v. Day*, 15 Cal. 92, as to the jurisdiction of the county court.

Sayre v. Nichols, 5 Cal. 487, overruled in same case, 7 Cal. 538; and the latter case affirmed in *Davidson v. Dallas*, 8 Cal. 247, relative to the liability of an agent who signs for his principal.

Seale v. Mitchell, 5 Cal. 401, referred to in *Hart v. Burnett*, 15 Cal. 587, as being badly reported; and commented on in *Argenti v. City of San Francisco*, 15 Cal. 272, as to the contracts of a municipal corporation.

Selkirk v. Supervisors of Sacramento County, 3 Cal. 323, affirmed in *Tuolumne Water Co. v. Chapman*, 8 Cal. 397, that a demurrer admits the facts alleged in the complaint.

Selover v. American Russian Commercial Co., 7 Cal. 266, affirmed in *Revalk v. Kraemer*, 8 Cal. 72, as to separate property of the wife; and in *Kendall v. Miller*, 9 Cal. 592, as to the acknowledgment of a married woman.

Scott v. Ward, 13 Cal. 458, affirmed in *Noe v. Card*, 15 Cal. 596, 610, as to acquisition of common property under the Mexican law.

Shattuck v. Carson, 2 Cal. 588, affirmed in *Guy v. Hermance*, 5 Cal. 75; in *Alver-*

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son v. Jones, 10 Cal. 11; and in *Pixley v. Huggins*, 15 Cal. 133, that a party may protect his property from sale which would create a cloud on the title.

Shaw v. Davis, 5 Cal. 466, referred to in *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42, as to the interest of a witness in the result of a suit.

Sherwood v. Dunbar, 6 Cal. 53, affirmed in *Shaver v. Bear River and Auburn W. and M. Co.*, 10 Cal. 402, though a mortgage be void, yet the debt will stand good.

Siemssen v. Bofer, 6 Cal. 259, referred to in *Forbes v. Scannell*, 13 Cal. 283, relative to foreign treaties.

Simpers v. Sloan, 5 Cal. 457, affirmed in *Poole v. Gerrard*, 6 Cal. 72, that a femme covert cannot make a contract.

Sinclair v. Wood, 3 Cal. 98, affirmed in *Hudson v. Simon*, 6 Cal. 455, that a partnership cannot be proven by implication.

Sloan v. Smith, 3 Cal. 406, affirmed in *Peabody v. Phelps*, 9 Cal. 225, that a referee need not be sworn.

Smith v. Brannan, 13 Cal. 107, affirmed in *Baker v. Joseph*, 16 Cal. 177, that an objection to the form of a complaint must first be made in the court below.

Smith v. Brown, 5 Cal. 18, affirmed in *Brummagim v. Boucher*, 6 Cal. 17, that the court must order judgment against a garnishee, and not direct the money to be paid into court.

Smith v. Doe, 15 Cal. 100, affirmed in *Gillan v. Hutchinson*, 16 Cal. 155, relative to the rights of miners on public lands.

Smith v. Chichester, 1 Cal. 409, affirmed in *Coffinberry v. Horrill*, 5 Cal. 493; in *Peabody v. Phelps*, 7 Cal. 53; and in *Wicks v. Ludwig*, 9 Cal. 175, that a judgment entered in vacation is void.

Smith v. Compton, 6 Cal. 24, affirmed in *Winans v. Hardenburg*, 8 Cal. 293; and in *Perkins v. Thornburg*, 10 Cal. 191, that a motion for a nonsuit is waived by the defense supplying the evidence.

Smith v. Fowler, 2 Cal. 568, affirmed in *Macoleta v. Packard*, 14 Cal. 179, relative to interest under the Mexican law.

Smith v. Morse, 2 Cal. 524, affirmed in *Guy v. Hermance*, 5 Cal. 75, that a party can enjoin a sale of his property when it will cloud his title; and in *Welch v. Sullivan*, 8 Cal. 186, that the irregularity of a sale of property by an officer will not defeat the title; in *Heydenfeldt v. Hitchcock*, 15 Cal. 514, relative to the illegality

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of the ordinance passed, and referred to in *Hart v. Burnett*, 15 Cal. 586, relative to the title of San Francisco in the pueblo lands; in *Holladay v. Frisbie*, 15 Cal. 637; and in *Wheeler v. Miller*, 16 Cal. 125, as to sale of water lots on execution against the city.

Smith v. Ogg Shaw, 16 Cal. 88, affirmed in the same case, 16 Cal. 92, relative to an unlawful holding over.

Smith v. Pollock, 2 Cal. 92, affirmed in *Benham v. Rowe*, 2 Cal. 261, that parties must consent to a reference; and explained in *Smith v. Rowe*, 4 Cal. 7, that it applies to law and not to equity cases.

Smith v. Randall, 6 Cal. 47, affirmed in *Welch v. Sullivan*, 8 Cal. 186; in *Harvey v. Fisk*, 9 Cal. 94, that the irregularity of a sale by an officer will not defeat the sale; and in *Cloud v. El Dorado County*, 12 Cal. 133, that a judgment cannot be attacked collaterally by a stranger for irregularity.

Smith v. Rowe, 4 Cal. 6, affirmed in *Still v. Saunders*, 8 Cal. 286, that in chancery cases a party may frame special issues for a jury.

Smith v. Smith, 12 Cal. 216, affirmed in *Scott v. Ward*, 13 Cal. 470; and in *Pixley v. Huggins*, 15 Cal. 131, as to the separate property of husband and wife.

Soule v. Dawes, 7 Cal. 575, affirmed in *Crowell v. Gilmore*, 13 Cal. 56; and in *Soule v. Dawes*, 14 Cal. 249, as to the mechanic's lien.

Souter v. Ship Sea Witch, 1 Cal. 162, affirmed in *McQueen v. Ship Russell*, 1 Cal. 166; in *Tucker v. Bark Sacramento*, 1 Cal. 403; and in *Ray v. Bark Henry Harbeck*, 1 Cal. 451, relative to admiralty jurisdiction over vessels, and overruled by the code of April 29th, 1851, chapter 6, title 8.

Spect v. Hoyt, 3 Cal. 413, affirmed in *Hastings v. Steamer Uncle Sam*, 10 Cal. 341, the granting or refusing a new trial will not be disturbed, except in the abuse of discretion.

Stanley v. Green, 12 Cal. 148, referred to in *De Leon v. Higuera*, 15 Cal. 496, relative to the sufficiency of a description of land in a deed.

Stafford v. Lick, 7 Cal. 479, affirmed in *Robinson v. Magee*, 9 Cal. 85, that the obligation of a contract must depend upon the law at the time the contract was made.

Stark v. Barnes, 4 Cal. 412, affirmed in

Kelly v. Natoma Water Co., 6 Cal. 108, as to the appropriation of water for mining purposes.

State v. McCauley, 15 Cal. 429, affirmed in *McCauley v. Brooks*, 16 Cal. 25, relative to the validity of the State prison contract; and in *Koppikus v. State Capitol Commissioners*, 16 Cal. 253, relative to the State debt.

Stearns v. Aguirre, 7 Cal. 443, affirmed in *Bryan v. Berry*, 8 Cal. 135, that an appeal may be taken from an order changing a judgment; in *Phelan v. Supervisors of San Francisco County*, 9 Cal. 16; in *Chipman v. Bowman*, 14 Cal. 158; and in *Davidson v. Dallas*, 15 Cal. 84, after a judgment is remanded on appeal, parties have their original rights, with a regard to the opinion of the appellate court.

Stewart v. Scannell, 8 Cal. 80, affirmed in *Vance v. Boynton*, 8 Cal. 56; in *Bacon v. Scannell*, 9 Cal. 273; and in *Stanford v. Scannell*, 10 Cal. 9, as to a delivery under the statute of frauds.

Still v. Saunders, 8 Cal. 281, affirmed in *Duff v. Fisher*, 15 Cal. 381, relative to jury trials.

Stoakes v. Barrett, 5 Cal. 36, affirmed in *Burdge v. Underwood*, 6 Cal. 46; in *Merced Mining Co. v. Fremont*, 7 Cal. 324; in *Martin v. Browner*, 11 Cal. 14; and in *Boggs v. Merced Mining Co.*, 14 Cal. 376, as to the appropriation of public lands for mining purposes.

Sullivan v. Davis, 4 Cal. 292, affirmed in *De Rutte v. Muldrow*, 16 Cal. 512, relative to the acts of an agent under a power of attorney.

Summers v. Dickenson, 9 Cal. 554, affirmed in *Owens v. Jackson*, 9 Cal. 324, that a patent is prima facie evidence of title to swamp lands in this State; and explained and qualified in *Doll v. Meader*, 16 Cal. 330, upon the same point.

Summers v. Farish, 10 Cal. 347, affirmed in *Heyman v. Landers*, 12 Cal. 111, that counsel fees may be allowed on a bond for an injunction; in *Prader v. Purkett*, 13 Cal. 591; and in *Browner v. Davis*, 15 Cal. 11, that an action on a bond may be brought in the name of the party beneficially entitled to the fruits thereof.

Suñol v. Hepburn, 1 Cal. 255, affirmed in *Brown v. O'Connor*, 1 Cal. 421; referred to in *Gunn v. Bates*, 6 Cal. 272, as to recovery in ejectment by joint tenants,

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or tenants in common, and abrogated by statute of 1857, p. 62.	<i>v. Pinney</i> , 6 Cal. 235; in <i>Dorsey v. McFarland</i> , 7 Cal. 846; in <i>Revalk v. Kraemer</i> , 8 Cal. 71; in <i>Buchanan's Estate</i> , 8 Cal. 509; in <i>Moss v. Warner</i> , 10 Cal. 297; and in <i>Estate of Tompkins</i> , 12 Cal. 125, as to the law of homestead, but overruled in <i>Gee v. Moore</i> , 14 Cal. 477, and abrogated by the statute of 1860, p. 311.
<i>Suydam v. Pitcher</i> , 4 Cal. 280, affirmed in <i>Carpentier v. Hart</i> , 5 Cal. 407; and in <i>Shaw v. McGregor</i> , 8 Cal. 521, that a judgment cannot be disturbed after the term; and in <i>Holmes v. Rogers</i> , 13 Cal. 201, that an appearance of an attorney will bind the parties.	<i>Thayer v. White</i> , 3 Cal. 228, affirmed in <i>Riddle v. Blake</i> , 4 Cal. 267, as to rescinding a contract for the sale of land; and in <i>Arguello v. Edinger</i> , 10 Cal. 160, relative to proceedings in court to rescind the contract.
<i>Swain v. Graves</i> , 8 Cal. 549, affirmed in <i>Dore v. Covey</i> , 13 Cal. 509, relative to appeal bonds.	<i>Thompson v. Manrow</i> , 1 Cal. 428, affirmed in <i>Parke v. Williams</i> , 7 Cal. 249, as to the exemplification of a foreign judgment.
<i>Sweetland v. Froe</i> , 6 Cal. 144, affirmed in <i>Murphy v. Wallingford</i> , 6 Cal. 649; and in <i>Wright v. Whitesides</i> , 15 Cal. 48, that a recovery of land by ejectment may be had to the limits of the survey.	<i>Thompson v. Monrow</i> , 2 Cal. 99, affirmed in <i>Cavender v. Guild</i> , 4 Cal. 253, as to the exemplification of a foreign judgment.
<i>Taaffe v. Josephson</i> , 7 Cal. 353, affirmed in <i>Swartz v. Hazlitt</i> , 8 Cal. 128, that fraud may arise from an ignorance of the law; in <i>Seligman v. Kalkman</i> , 8 Cal. 215, fraud may arise from an ignorance of solvency; and in <i>McKenty v. Gladwin</i> , 10 Cal. 228, and in <i>Gladwin v. Gladwin</i> , 13 Cal. 334, that if the consideration of a note is in part fraudulent, the whole is fraudulent; but overruled in <i>Patrick v. Montader</i> , 13 Cal. 442, that it is fraud to sue on a note not yet due; and further overruled in <i>Gamble v. Voll</i> , 15 Cal. 510, that it is not conclusive evidence of fraud that a judgment is entered for too much.	<i>Thompson v. Rowe</i> , 2 Cal. 68, affirmed in <i>Laforge v. Magee</i> , 6 Cal. 285, as to the power of the legislature to direct the payment of revenue of a county.
<i>Tartar v. Hall</i> , 3 Cal. 262, affirmed in <i>Redman v. Bellamy</i> , 4 Cal. 250; and in <i>Burdge v. Underwood</i> , 6 Cal. 46, that a party is estopped from denying title under which he enters.	<i>Thornburgh v. Hand</i> , 7 Cal. 554, affirmed in <i>Glazer v. Clift</i> , 10 Cal. 304, that an officer must plead justification in replevin.
<i>Tartar v. Spring Creek W. and M. Co.</i> , 5 Cal. 395, affirmed in <i>Merced Mining Co. v. Fremont</i> , 7 Cal. 325; in <i>State v. Moore</i> , 12 Cal. 70; and in <i>Boggs v. Merced Mining Co.</i> , 14 Cal. 376, as to the appropriation of land for mining purposes.	<i>Thornton v. Borland</i> , 12 Cal. 440, affirmed in <i>Smith v. Yreka Water Co.</i> , 14 Cal. 202, as to the opinion in <i>Gallagher v. Delaney</i> , 10 Cal. 400.
<i>Taylor, Estate of</i> , 10 Cal. 482, affirmed in the same case, 16 Cal. 434, relative to the presentation of a claim of an administrator against an estate.	<i>Throckmorton v. Burr</i> , 5 Cal. 400, affirmed in <i>Covillaud v. Tanner</i> , 7 Cal. 40; and in <i>Parke v. Kilham</i> , 8 Cal. 79, that tenants in common cannot join in ejectment, but must sue separately.
<i>Taylor v. Brooks</i> , 5 Cal. 332, affirmed in <i>McCall v. Harris</i> , 6 Cal. 283, that a statute must be construed in favor of a bona fide creditor.	<i>Tissot v. Throckmorton</i> , 6 Cal. 471, referred to in <i>Tissot v. Darling</i> , 9 Cal. 285, without comment.
<i>Taylor v. Steamer Columbia</i> , 5 Cal. 268, affirmed in <i>Warner v. Steamer Uncle Sam</i> , 9 Cal. 710, as to the admiralty jurisdiction of the State courts.	<i>Tohler v. Folsom</i> , 1 Cal. 208, referred to in <i>Abell v. Calderwood</i> , 4 Cal. 93; and in <i>Stafford v. Lick</i> , 7 Cal. 490, as to specific performance for sale of land under the civil law.
<i>Taylor v. Hargous</i> , 4 Cal. 268, affirmed in <i>Poole v. Gerrard</i> , 6 Cal. 72; in <i>Holden</i>	<i>Tooms v. Randall</i> , 3 Cal. 438, affirmed in <i>Greenfield v. Steamer Gunnell</i> , 6 Cal. 68, that want of verification is cured by the answer; and in <i>Pearkes v. Freer</i> , 9 Cal. 643, that the objection to the venue comes too late after answer.
	<i>Toothaker v. Cornwall</i> , 4 Cal. 28, overruled in <i>McFarland v. Pico</i> , 8 Cal. 630, relative to presentment and notice of demand of promissory note.

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Touchard v. Touchard, 5 Cal. 306, affirmed in *Holliday v. West*, 6 Cal. 625, relative to the condition subsequent of a Mexican grant; and referred to as overruled in *Hart v. Burnett*, 15 Cal. 599; and referred to in *Argenti v. City of San Francisco*, 16 Cal. 270, relative to the contract of a municipal corporation.

Treat v. McCall, 10 Cal. 511, referred to in *Schloas v. White*, 16 Cal. 68, relative to defendants not personally served with process.

Truebody v. Jacobson, 2 Cal. 269, affirmed in *Cahoon v. Robinson*, 6 Cal. 226; and in *Walker v. Sedgwick*, 8 Cal. 403, that a vendor has an equitable lien on land sold.

Tryon v. Sutton, 13 Cal. 490, affirmed in *Gregory v. Ford*, 14 Cal. 143, that complainant's equity must be shown by the bill, or he is entitled to no relief.

Turner v. McIlhaney, 8 Cal. 575, affirmed in *Marziou v. Pioche*, 8 Cal. 534, as to acts of agent binding on principal.

Tyson v. Wells, 2 Cal. 122, affirmed in *Headley v. Reed*, 2 Cal. 325; in *Grayson v. Guild*, 4 Cal. 125; and in *Phelps v. Peabody*, 7 Cal. 53, as to manner of ordering a reference and the report thereon.

Uhlfelder v. Levy, 9 Cal. 607, affirmed in *Hockstacker v. Levy*, 11 Cal. 76, without comment; and referred to in *Pixley v. Huggins*, 15 Cal. 134, as not applicable relative to injunction of executions.

Vallejo v. Randall, 5 Cal. 461, overruled in *Watts v. White*, 13 Cal. 324, as to the venue of action for real property.

Vanderslice v. Hanks, 3 Cal. 27, affirmed in *Touchard v. Touchard*, 5 Cal. 307; and overruled in *Gunn v. Bates*, 6 Cal. 269; in *Welch v. Sullivan*, 8 Cal. 198; in *Ferris v. Coover*, 10 Cal. 616; and *Hart v. Burnett*, 15 Cal. 598, relative to Mexican grants in California.

Vance v. Boynton, 8 Cal. 554, affirmed in *Whitney v. Stark*, 8 Cal. 517; and in *Bacon v. Scannell*, 9 Cal. 273, as to the change of possession of personal property under the statute of frauds.

Vandyke v. Herman, 3 Cal. 295, referred to in *Knight v. Fair*, 9 Cal. 118; and in *McMillan v. Richards*, 9 Cal. 413, as to the form of redemption under the statute.

Van Etten v. Jilson, 6 Cal. 19, affirmed in *Grass Valley Mining Co. v. Stackhouse*, 6 Cal. 414; in *Small v. Gwinn*, 6 Cal.

449; in *Freeman v. Powers*, 7 Cal. 105; and in *Swain v. Chase*, 12 Cal. 286, as to the jurisdiction of justices' courts in mining claims.

Visher v. Webster, 8 Cal. 109, referred to in *Cohn v. Mulford*, 15 Cal. 52, that only the admissions of the vendor made before the sale completed, are admissible to show his own fraud.

Von Schmidt v. Huntington, 1 Cal. 56, affirmed in *Belt v. Davis*, 1 Cal. 142, as to the answer in equity cases being taken as true; in *Castro v. Gill*, 6 Cal. 160; and *Tevis v. Pitcher*, 10 Cal. 477, that Mexican customs in California may be given in evidence.

Walker v. Sedgwick, 5 Cal. 192, affirmed in *Still v. Saunders*, 8 Cal. 286; and in *Duff v. Fisher*, 13 Cal. 380, that chancery cases are not entitled to a jury trial.

Waltham v. Carson, 10 Cal. 180, affirmed in *Doll v. Feller*, 16 Cal. 433, that a failure to appear at a trial in ejectment is a waiver of a jury.

Walton v. Minturn, 1 Cal. 362, referred to in *Piercy v. Sabin*, 10 Cal. 30, that new matter must be set up in the answer.

Warner v. Hall, 1 Cal. 90, affirmed in *Warner v. Kelly*, 1 Cal. 91, that the legislature has not provided for appeals from the county to the supreme court; and overruled by amendment of May 15th, 1854, to the code of practice.

Warner v. Steamer Uncle Sam, 9 Cal. 697, affirmed in *Ord v. Steamer Uncle Sam*, 13 Cal. 372, as to the admiralty jurisdiction of the State courts.

Warner v. Wilson, 4 Cal. 310, qualified in *Smith v. Andrews*, 6 Cal. 654, that the opinion, as related to the introduction of the record of the probate court as evidence, was obiter and incorrect; and in *Dunn v. Tozer*, 10 Cal. 170, that the defect of parties must be taken advantage of by demurrer.

Washington v. Page, 4 Cal. 388, referred to in *People v. Johnson*, 6 Cal. 504; as being too broad on the point that constitutional provisions are merely directory; and in *Pierpont v. Crouch*, 10 Cal. 316, relative to the passage of a law embracing more than one object.

Waterman v. Smith, 13 Cal. 373, affirmed in *Moore v. Wilkinson*, 13 Cal. 486; in *Boggs v. Merced Mining Co.*, 14 Cal. 362; and in *Waterman v. Samuels*, 16 Cal. 124, relative to survey of public lands; and in

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Stark v. Barrett, 15 Cal. 366, relative to the claim for mesne profits.

Weaver v. Conger, 6 Cal. 548, affirmed in the same case, 10 Cal. 238, relative to the priority of possession of public lands.

Weaver v. Conger, 10 Cal. 233, affirmed in *Primm v. Gray*, 10 Cal. 523, as to plea of abatement for the pendency of prior action.

Welch v. Sullivan, 8 Cal. 165, affirmed in *Henderson v. Grewell*, 8 Cal. 584; and in *Piercy v. Sabin*, 10 Cal. 30, that defendant cannot, in ejectment, defend on an older possession in a third party; and referred to in *Hart v. Burnett*, 15 Cal. 588, relative to real estate in San Francisco.

Wells v. Robinson, 13 Cal. 133, affirmed in *George v. Ransom*, 14 Cal. 660, relative to the principle of trust funds.

Welton v. Adams, 4 Cal. 37, affirmed in *Price v. Dunlap*, 5 Cal. 484, that plaintiff must indemnify in an action on a lost instrument; and in *McMillan v. Richards*, 9 Cal. 418, that certificates of deposit are negotiable instruments.

Weston v. Bear River and Auburn W. and M. Co., 5 Cal. 186, referred to in same case, 6 Cal. 429; and in *Strout v. Natoma W. and M. Co.*, 9 Cal. 79, that no transfer of corporation stock is good against third parties, unless made on the books of the corporation.

Wheatley v. Strobe, 12 Cal. 92, affirmed in *Pope v. Huth*, 14 Cal. 408, as to the equitable assignment of funds by an order drawn.

Whipley v. McKune, 12 Cal. 352, referred to in *Saunders v. Haynes*, 13 Cal. 150, as not questioning the jurisdiction of the county judge to try the contest of a district judgeship.

Whipley v. Mills, 9 Cal. 641, affirmed in *Hastings v. Halleck*, 10 Cal. 31, that to perfect an appeal, the statute must be complied with strictly.

White v. Todd's Valley Water Co., 8 Cal. 443, referred to in *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 153, as to the appropriation of water for mining purposes.

White v. Wentworth, 3 Cal. 246, affirmed in *Nelson v. Lemmon*, 10 Cal. 50; and in *Nelson v. Mitchell*, 10 Cal. 93, that error must be shown affirmatively to disturb a judgment.

WIN.

Whitwell v. Barbier, 7 Cal. 54, affirmed in *Deidesheimer v. Brown*, 8 Cal. 340, that the appearance of a party to object to the jurisdiction does not waive his rights; in *Gray v. Hawes*, 8 Cal. 568, that there must be jurisdiction to have a personal judgment; in *Alderson v. Bell*, 9 Cal. 321; in *Gregory v. Ford*, 14 Cal. 143, and in *Schloss v. White*, 16 Cal. 68, that a judgment cannot be impeached collaterally for want of service; and in *Swain v. Chase*, 12 Cal. 286, that a judgment of a justice's court must show facts to give jurisdiction affirmatively.

Whitney v. Higgins, 10 Cal. 547, affirmed in *Montgomery v. Tutt*, 11 Cal. 314; in *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 526, in *Gamble v. Voll*, 15 Cal. 510, and in *Goodenow v. Ewer*, 16 Cal. 468, that parties not in court are unaffected by a decree in foreclosure.

Wilcombe v. Dodge, 3 Cal. 260, referred to in *McFarland v. Pico*, 8 Cal. 634, a party has all of the last day on which to pay a promissory note.

Wild v. Van Valkenburgh, 7 Cal. 166, overruled in *Montgomery v. Tutt*, 11 Cal. 326, as to demand of payment of a bill at a place where made payable.

Williams v. Gregory, 9 Cal. 76, affirmed in *Dickinson v. Van Horn*, 9 Cal. 210, as to the sufficiency of a statement on motion for a new trial.

Williams v. Smith, 6 Cal. 91, affirmed in *Harvey v. Fisk*, 9 Cal. 94, that a sheriff may refuse to give a certificate of sale where the money is not paid and the lien is in dispute.

Wilson v. Roach, 4 Cal. 362, affirmed in *People v. Boring*, 8 Cal. 411, as to the power of the court to appoint its officers; and in *Belloc v. Rogers*, 9 Cal. 129, that the district courts have jurisdiction of probate matters.

Winans v. Christy, 4 Cal. 70, affirmed in *Ritchie v. Dorland*, 6 Cal. 40, that plaintiff may join any number of parties in an ejectment suit; in *Anderson v. Parker*, 6 Cal. 200; in *Ellis v. Jeans*, 7 Cal. 417; and in *Curtis v. Sutter*, 15 Cal. 264, that a joint verdict may be rendered against defendants in an ejectment suit; in *Merced Mining Co. v. Fremont*, 7 Cal. 319; and in *Nagle v. Macy*, 9 Cal. 427, that prior possession is sufficient to maintain ejectment.

WOL.

ZAN.

Wolf v. Fleischacker, 5 Cal. 244, affirmed in *Reynolds v. Graham*, 6 Cal. 167; in *Giblin v. Jordan*, 6 Cal. 417; and in *Kellersberger v. Kopp*, 6 Cal. 565, as to joint tenancy in a homestead.

Wolf v. Fogarty, 6 Cal. 224, affirmed in *Kelsey v. Dunlap*, 7 Cal. 162; and in *Fogarty v. Finlay*, 10 Cal. 244, as to the defective acknowledgment of an instrument, but abrogated by the statutes of 1860, pp. 179, 357.

Woods v. City of San Francisco, 4 Cal. 190, affirmed in *Minor v. City of San Francisco*, 9 Cal. 45, without comment, and referred to in *Hart v. Burnett*, 15 Cal. 587.

Woodworth v. Fulton, 1 Cal. 295, affirmed in *Reynolds v. West*, 1 Cal. 325; in *Folsom v. Root*, 1 Cal. 376; in *City of San Francisco v. Clark*, 1 Cal. 386; in *Fisher v. Salmon*, 1 Cal. 414; in *Brown v. O'Connor*, 1 Cal. 421; and overruled in *Cohas v. Raisin*, 3 Cal. 451; in *Welch*

v. Sullivan, 8 Cal. 200, and in *Hart v. Burnett*, 15 Cal. 558, relative to grants of land in San Francisco; and referred to in *Treadwell v. Payne*, 15 Cal. 498.

Wright v. Whitesides, 15 Cal. 46, affirmed in *Coryell v. Cain*, 16 Cal. 573, relative to possessory claims under the statute.

Younge v. Pacific Mail S. S. Co., 1 Cal. 353, affirmed in *Muldrow v. Norris*, 2 Cal. 78, as to remote damages.

Yount v. Howell, 15 Cal. 465, affirmed in *Clarke v. Boyreau*, 14 Cal. 637; and in *Boles v. Cohen*, 15 Cal. 151, relative to the necessary allegations in ejectment; and in *Stark v. Barrett*, 15 Cal. 366, relative to the claim for mesne profits.

Zander v. Coe, 5 Cal. 230, affirmed in *Ford v. Smith*, 5 Cal. 331; in *Hart v. Moon*, 6 Cal. 162; in *Small v. Gwinn*, 6 Cal. 449; in *Freeman v. Powers*, 7 Cal. 105; and in *People v. Fowler*, 9 Cal. 86, as to the jurisdiction of justices' and other courts in this State.

DIGEST.

ABANDONMENT.

I. What Act constitutes an Abandonment.

II. The Effect of an Abandonment.

1. Upon the Person Abandoning.

2. Upon the Rights of the Wife in a Homestead.

I. WHAT ACT CONSTITUTES AN ABANDONMENT.

1. Laying off the premises into town lots, selling the same, and exercising other acts of ownership over them, does not operate as an abandonment, but taken in connection with previous acts of ownership, would rather seem to strengthen the plaintiff's possession. *Plume v. Seward*, 4 Cal. 97.

2. The inference of abandonment may arise from a single act as well as from a series of acts continued through a long space of time. It is a fact to be determined from the particular circumstances of the case. *Davis v. Butler*, 6 Cal. 511.

3. In an action to enforce a specific performance of a contract for the sale of lands, we think, after a lapse of four years from the maturity of the note given in payment of the purchase, the action is barred by limitation, and shows an abandonment of the purchase by plaintiff. *Brown v. Covillaud*, 6 Cal. 572; *Pearis v. Covillaud*, 6 Cal. 621; *Green v. Covillaud*, 10 Cal. 322; *Farley v. Vaughn*, 11 Cal. 237.

4. Where water from an artificial ditch is turned into a natural water-course, and mingled with natural waters of that stream to conduct it to another point to be used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural stream, to the injury of rights previously acquired therein. *Hoffman v. Stone*, 7 Cal. 49; *Merced Mining Co. v. Fremont*, 7 Cal. 325; *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 151.

5. The law will not presume an abandonment of an interest in property in dispute from the lapse of time, unless the statute of limitation has run against it. *Crandall v. Woods*, 8 Cal. 144; *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323; *Bird v. Lisbros*, 9 Cal. 5; *Partridge v. McKinney*, 10 Cal. 183.

6. The fact that a first mortgage was canceled of record is no evidence of any intention to abandon the lien when a new note and mortgage to plaintiff, executed the same day, constituted a part of the same transaction, and must be taken and construed together with the acknowledgment of satisfaction of record. *Birrell v. Schie*, 9 Cal. 107; *Swift v. Kraemer*, 13 Cal. 530.

7. To suffer the tailings of a mining claim to flow where they list, without obstructions to confine them within the proper limits, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an ex-

What Act constitutes an Abandonment.

ception to the rule. *Jones v. Jackson*, 9 Cal. 244.

8. The removal of an enclosure of land for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill*, 9 Cal. 557.

9. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: held, that the efforts of the owners of a claim to procure machinery for working the claim are, by fair intendment, to be considered as work done on the claim, and there is no abandonment. *Packer v. Heaton*, 9 Cal. 570.

10. The doctrine of abandonment of real estate only applies where there has been a mere naked possession without title. The right of the occupant originating in mere possession, may, as a matter of course, be lost by abandonment. *Ferris v. Coover*, 10 Cal. 631.

11. The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, nor does his refusal to pay, or his delay in paying the expenses of the business, or the assessments, create of itself a forfeiture; there must be clear or unequivocal proof of abandonment. *Waring v. Crow*, 11 Cal. 371.

12. The question of abandonment of a mining claim should be left to the jury upon the facts adduced in evidence. *Ib.*

13. The prosecution of the purpose to appropriate water for mining uses is a necessary element of title; and the negation of this, the abandonment of the purpose, is not so much matter of avoidance in title as it is matter showing that no title was ever obtained. *Kimball v. Gearhart*, 12 Cal. 50; *Mc Garrity v. Byington*, 12 Cal. 431.

14. The mere fact that a party chose to apply water which he had a right to use in mining, in whole or in part, if he so chose, in sawing timber and grinding wheat, is no abandonment of his title to it. *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 237.

15. The lapse of reasonable time without availing themselves of the privilege

of condemnation of land, is an abandonment of all claim to it. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 317.

16. Where claimants had, prior to the issuance of a patent, published a notice that they had become owners of the grant, specifying its boundaries, and warning off trespassers, it is not reasonable to suppose that they intended to abandon all rights to any other land, provided the official survey did not conform to the boundaries they indicated. *Moore v. Wilkinson*, 13 Cal. 489; *Moore v. Roff*, 13 Cal. 489.

17. Claiming or taking one title is no abandonment of the other, and the possession, if not referred to the good title, would not be referred exclusively to the bad. *Morrison v. Wilson*, 13 Cal. 499.

18. Action against the sheriff for seizing plaintiff's wheat as the property of A. The wheat was grown on plaintiff's land, and in his possession; that A was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that plaintiff was entitled to one-third by the contract between him and A, and A sold to plaintiff and delivered possession and then abandoned the premises, plaintiff residing thereon. A took no further control of the premises or crops, and plaintiff assumed entire dominion over both: held, that plaintiff was not bound to abandon his premises or carry the grain beyond them to protect his title against creditors of A. *Pacheco v. Hunsacker*, 14 Cal. 124; *Chaffin v. Doub*, 14 Cal. 386.

19. The failure to prosecute a motion for a new trial, is an abandonment of the motion. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Cal. 303; *Greene v. Doane*, 15 Cal. 304.

20. Parol evidence is admissible to establish a new and distinct agreement, upon a new consideration, which is to be a substitute for the old written agreement; but it must appear that the old agreement is abandoned, and is not competent to show, by parol, the incorporation of new terms and conditions, and the new agreement must be valid in itself, and such as may be the basis of an action. *Adler v. Friedman*, 16 Cal. 140.

The Effect of an Abandonment.

II. THE EFFECT OF AN ABANDONMENT.

1. Upon the Person Abandoning.

21. When the contract was entire and the covenants dependent, and the plaintiff had declared his inability to keep it, and afterwards actually abandoned it: held, that these facts constituted a defense to his claim under the contract. *Green v. Wells*, 2 Cal. 585.

22. Where there is no abandonment or dedication of the land, the use for a limited time by the public cannot fairly raise the presumption of a dedication. *City of San Francisco v. Scott*, 4 Cal. 116.

23. Where a party can show nothing but a prior possession, that reliance may fail, if it be proven that he voluntarily abandoned his possession without the purpose of returning. *Bequette v. Caulfield*, 4 Cal. 279; *Bird v. Lisbros*, 9 Cal. 5.

24. Land in California must either belong to the United States or to claimants under a grant, the question as to the rights of the State not being raised; and where the highest federal tribunal having full authority to decide the matter voluntarily abandoned the claim of title of the government, the courts of this State should not question it. *Gunn v. Bates*, 6 Cal. 271.

25. Where insurance is effected for only a part of the value of the article insured, the abandonment of the article cannot transfer the interest of the assured any further than that interest is covered by the policy. *White v. Mary Ann*, 6 Cal. 471.

26. The abandonment determines the right of the party from the day of the act, and the property is to him as though he had never owned or occupied it. *Davis v. Butler*, 6 Cal. 512.

27. A party having abandoned his mining claim, will not be permitted to come in within the time allowed by the statute for commencing civil actions, and reassert or resume his former interest to the prejudice of those who may afterwards appropriate it. *Ib.*

28. Partners not contributing anything as partners, or claiming to be such, and apparently both by words and acts abandoning the concern and all participation therein, cannot claim to be partners in the profits of an adventure when they could not

have been held responsible to defendants for losses. *Cayton v. Walker*, 10 Cal. 456.

29. There can be no such thing as abandonment in favor of a particular individual or for a consideration; such an act would be a gift or sale. An abandonment is the relinquishment of a right, the giving up of something to which we are entitled. *Stephens v. Mansfield*, 11 Cal. 365.

30. The silent lien of a vendor is extinguished whenever he manifests an intention to abandon or not to look to it, and this intention is manifested by taking other and independent security upon the same land, or a portion of it, or on other land. *Hunt v. Waterman*, 12 Cal. 305.

31. A right coming entirely from possession may be lost by an abandonment of that possession, and the law determines what shall be or prove an abandonment. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 535.

32. The lease was terminated long before the removal of the fixtures, and after an abandonment of the premises subsequent to an entry and a right of entry by the landlord who held the legal title, the right to remove was gone, and the title from these latter facts alone vested in the owner of the estate. *Merritt v. Judd*, 14 Cal. 73.

33. The fact that the husband abandons his wife, or suffers her to act as a femme sole, and take care of herself, does not give her a right to mortgage either his or her separate property—whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. *Harrison v. Brown*, 16 Cal. 291.

2. Upon the Rights of the Wife in a Homestead.*

34. *It is the duty of the wife to live with the husband, and her removal with him from the homestead is no abandonment, as*

* The Homestead Act was passed in 1851, statutes, p. 296. In 1854, the opinion in *Taylor v. Hargous*, 4 Cal. 273, held that there could be no abandonment of the homestead except by the joint act of husband and wife. This decision was repeatedly affirmed until 1859, when the court, in *Ge v. Moore*, 14 Cal. 478, reversed all previous cases, and held that there could be an abandonment without the concurrence of the wife, which latter decision has been adhered to in several later cases. In 1860, statutes, p. 311, the act has been amended so as to require a registry of the homestead, and an abandonment must be by deed acknowledged and recorded after execution by husband and wife.

Abatement of Nuisances.—Of Pleas in Abatement.

will prevent a recovery thereof. *Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Cal. 71; *Holden v. Pinney*, 6 Cal. 236; *Dunn v. Tozer*, 10 Cal. 171; *Moss v. Warner* 10 Cal. 297; overruled in *Gee v. Moore*, 14 Cal. 478; *Guiod v. Guiod*, 14 Cal. 507; *Harper v. Forbes*, 15 Cal. 204.

35. The fact that both husband and wife were anxious and willing to sell the homestead for the reasons stated, and repeated efforts were made by the husband to accomplish this purpose, does not show an intention to abandon, but to sell their homestead. *Dunn v. Tozer*, 10 Cal. 171.

36. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. DeDiablar*, 12 Cal. 330.

37. The appropriation of premises as a homestead gives the wife a right to insist that their character as a homestead shall continue until she consents to their alienation, or another homestead is provided, or they are otherwise abandoned. *Gee v. Moore*, 14 Cal. 478.

38. If the premises in controversy were in fact abandoned, with no intention on the part of the head of the family to reoccupy them as a homestead at the date of the conveyance, the entire estate passed to the grantee absolutely; but if not thus abandoned—if the removal were temporary in its nature, made for a specific purpose, for the repair or reconstruction of the building, which had fallen—the premises remained subject to his right to claim their enjoyment, and use as such homestead. *Guiod v. Guiod*, 14 Cal. 507; *Bowman v. Norton*, 16 Cal. 218.

39. As by the husband's act the premises were originally impressed with the character of a homestead, so by his act they may be abandoned as such. The wife, from the nature of her dependent relation to her husband—a relation not only essential to the peace and happiness of the family itself but to the well being of society—must abide the consequences of such abandonment. *Guiod v. Guiod*, 14 Cal. 507; *Harper v. Forbes*, 15 Cal. 204. *Broadus v. Nelson*, 16 Cal. 81.

40. A complaint by husband and wife to recover the homestead conveyed away by deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the convey-

ance, or that they had not been abandoned previously. *Harper v. Forbes*, 15 Cal. 203.

41. To rebut the presumption of abandonment in such case, it must be shown that the removal was temporary, made for the specific purpose, with the intention of reoccupying the premises. *Ib.* 204.

See HOMESTEAD.

ABATEMENT.

I. Abatement of Nuisances.

II. Of Pleas in Abatement.

1. Other Proceedings pending for the same Cause.
2. Misjoinder or Nonjoinder.
3. Error in Venue.
4. Want of Capacity to Sue.

III. Of the Pleadings.

I. ABATEMENT OF NUISANCES.

1. Every person in the community in which a common nuisance works an injury is supposed to be aggrieved by it, and has a right to abate it, without regard to the question whether it is an immediate obstruction or injury to him. *Gunter v. Geary*, 1 Cal. 466.

2. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it. *Ib.*

3. The statute of this State defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances which the statute does not embrace. *Stiles v. Laird*, 5 Cal. 122.

4. Actions for the diversion of the waters of a ditch are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Killam*, 8 Cal. 79.

See NUISANCE.

II. OF PLEAS IN ABATEMENT.

1. Other Proceedings pending for the same Cause.

5. Where the owner of a vessel lost by

Of the Pleadings.

neglect of the steam tug, and partially insured, sued for damages, and an objection was raised that the action was not brought in the name of the real party in interest: held, that it was properly brought in his name, and a recovery by the owner in such an action would abate another action for the same cause against defendant by the insurance company. *White v. Mary Ann*, 6 Cal. 471.

6. A defendant must not be harassed with several suits for the same matter at the same time; in such a case the pendency of one suit may be plead in abatement of the other. *Seligman v. Kalkman*, 8 Cal. 216.

7. A plea in abatement of a former suit pending is no bar to an action where the complaint in that case is so defective that a judgment rendered thereon would be a nullity. *Reynolds v. Harris*, 9 Cal. 341.

8. If it does not appear that any summons had ever issued upon the complaint, or that there had ever been any voluntary appearance on the part of the defendants in the first action, there was then no suit pending upon which defendants could in a second action plead abatement that another action was pending between the same parties for the same cause of action. *Weaver v. Conger*, 10 Cal. 238; *Primm v. Gray*, 10 Cal. 522.

9. Where on plea of abatement to the entire action, that another suit for the same cause of action was pending at the time of suit brought, the proof shows that the first suit is only for part of the same matter sued for in the second suit, the plea fails. *Thompson v. Lyon*, 14 Cal. 42.

See ACTIONS, BAR, PLEA IN.

2. Misjoinder and Nonjoinder.

10. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313; *Dunn v. Tozer*, 10 Cal. 170.

11. Where a part owner brings an action in form ex delicto, and the objection is not made by plea in abatement, the other part owner may afterwards sue alone. *Whitney v. Stark*, 8 Cal. 516.

See JOINDER, MISJOINDER, NONJOINDER, PARTIES.

3. Error in Venue.

12. The right to try particular cases in particular counties is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue, at the proper time and place. *Watts v. White*, 13 Cal. 324.

See VENUE.

4. Want of Capacity to Sue.

13. The want of capacity in the plaintiff to sue should have been specially set up in the answer. The general issue is not sufficient. *California Steam Nav. Co. v. Wright*, 8 Cal. 590; *White v. Moses*, 11 Cal. 70.

III. OF THE PLEADINGS.

14. Matter of abatement, or which was such at common law, must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. *Tooms v. Randall*, 3 Cal. 440; *Pearkes v. Freer*, 9 Cal. 643.

15. As to what shall constitute matter of abatement, or the form and precise words of the legislature, the legislature are wisely left to determine. *People v. Kelly*, 6 Cal. 214.

16. The nonpresentation of a claim to an administrator for his allowance is a matter of avoidance in an action on the claim, only to be taken advantage of by plea, and it is still in its nature and effect nothing more than a matter of abatement. *Ellissen v. Halleck*, 6 Cal. 363; *Falkner v. Folsom's Ex'rs*, 6 Cal. 412; *McCann v. Sierra County*, 7 Cal. 124; *Hentsch v. Porter*, 10 Cal. 560.

17. A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus where it appears that the suit has abated, there being no longer parties or subject matter before the court; there is no longer a case in which the question can be asked. *Ex parte Rowe*, 7 Cal. 176.

Remedy against Absent Debtors.—Presumption of Death.—Effect of Judgment.

18. Where the matter in abatement, if true, would only defeat the present right to recover, the defendant, though not compelled to demur or answer, should be obliged to make the objection by motion or otherwise before the court of original jurisdiction during the term at which the judgment was obtained. *Hentsch v. Porter*, 10 Cal. 561.

19. Pleas in abatement are not favored, and the party pleading must prove his plea as put. *Thompson v. Lyon*, 14 Cal. 42.

ABSENT AND ABSCONDING DEBTORS.

- I. Remedy against Absent Debtors.
- II. Presumption of Death of Absent Debtor.
- III. Effect of a Judgment against an Absent Debtor.
 - 1. By Publication.
 - 2. By Appointment of an Attorney.

I. REMEDY AGAINST ABSENT DEBTORS.

1. To entitle the plaintiff to subject the assets of an absent debtor to the payment of his claim in equity, he must show that he is without a remedy at law. *Lupton v. Lupton*, 3 Cal. 121.

2. If a plaintiff is about to leave the State, the defendant has his remedy for a cross demand by writ of arrest, and cannot require plaintiff to give security to answer a contingent liability, unless he proffer to secure the plaintiff likewise in an action for contribution. *Bell v. Walsh*, 7 Cal. 87.

II. PRESUMPTION OF DEATH OF ABSENT DEBTOR.

3. In case of absence of a person from whom no tidings are received, the presumption of life ceases at the end of seven years, and to shorten this time there must be evidence of some specific peril to the life of the individual. *Ashbury v. Sanders*, 8 Cal. 64. See DEATH.

III. EFFECT OF A JUDGMENT AGAINST AN ABSENT DEBTOR.

1. By Publication.

4. A judgment obtained by publication of summons against a defendant out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

5. Under the code, after the expiration of six months, if the absent defendant fails to deny the allegations of the complaint he is held to admit them as true, and cannot afterwards show their falsity. *Ware v. Robinson*, 9 Cal. 111.

6. An affidavit which avers a cause of action against the defendant; that defendant cannot after due diligence be found in the State; that he was beyond the limits of the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons was issued, and that defendant still has a family residing in said county; is insufficient to authorize the publication of the summons for only thirty days; it must be for three months. *Jordan v. Giblin*, 12 Cal. 102.

7. An affidavit for an order of publication of the summons upon the ground of the absence of the defendant from the State is insufficient, if it does not show that the defendant had left the State, or that any diligence had been used to ascertain his whereabouts beyond inquiring of a single individual; where there is no pretense that he concealed himself to avoid service. *Swain v. Chase*, 12 Cal. 285.

See PUBLICATION, SUMMONS.

2. By Appointment of an Attorney.

8. The provision of the code authorizing a judgment personal and final against an absent defendant for whom the court has appointed an attorney with privilege to the defendant to come in and deny in six months is not in violation of the Constitution of the United States. *Ware v. Robinson*, 9 Cal. 111.

Effect of an Acceptance.—Acceptance of a Bill of Exchange.

9. The affidavit to authorize the appointment of an attorney for an absent or absconding debtor must show that summons had been issued and placed in the hands of the proper officer, and an effort had been made to serve the defendant personally. *Jordan v. Giblin*, 12 Cal. 102.

See ATTORNEY, SUMMONS.

ACCEPTANCE.

I. Effect of an Acceptance.

II. Acceptance of a Bill of Exchange.

1. What constitutes an Acceptance.
2. A Verbal Acceptance is insufficient.
3. An Endorser may be a Witness against an Acceptor.

I. EFFECT OF AN ACCEPTANCE.

1. An acceptance of goods bearing a name different from the one used in the sale note, by a sub-vendee of part of goods sold, does not conclude the vendee as to the whole contract. *Flint v. Lyon*, 4 Cal. 21; *Moore v. McKinlay*, 5 Cal. 474.

2. A tenant in common of land is not bound by the acts of a cotenant in accepting a balance of the purchase money and promising a deed, after the right thereto had become forfeited. *Pearis v. Covillaud*, 6 Cal. 621.

3. The acceptance by a collector of taxes of a warrant is not a liquidation of the debt, but the receipt of it by the State treasurer from the collector would be a liquidation for which the treasurer is responsible. *Scofield v. White*, 7 Cal. 401.

4. The acceptance of a note of a third party by the creditor is considered as accompanied with the condition that the note shall be paid at maturity. *Griffith v. Grogan*, 12 Cal. 322.

5. We are not aware of any rule requiring a delivery, as of formal deeds, necessary in an assignment. The making of the trust and its acceptance are sufficient, especially if accompanied or followed by the possession of the party. *Forbes v. Scannell*, 13 Cal. 287.

6. The acceptance of a deed does not, in favor of a stranger—that is, one neither

party nor privy to the deed—estop the grantee in fee from showing that the grantor had no title at the date of the deed. *Schuhman v. Garratt*, 16 Cal. 102.

7. In case of services rendered a municipal corporation, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay for them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Argenti v. City of San Francisco*, 16 Cal. 283.

II. ACCEPTANCE OF A BILL OF EXCHANGE.

1. What constitutes an Acceptance.

8. Where an order is drawn on a firm for an unspecified sum which is not negotiable, and an endorsement of the exact sum due is made by one of the firm, thus rendering it negotiable, it operates as a release to the firm, and as an individual acceptance by the partner endorsing. *Garwood v. Simpson*, 8 Cal. 106.

9. Where a draft is accepted conditionally, to be paid upon the happening of a contingency; whether the contingency has happened, is a question for the jury. *Nagle v. Homer*, 8 Cal. 358.

10. A draft payable in terms out of an appropriation for public work done for the acceptor becomes due on the payment for the work by the government. *Ib.*

11. A drew an order on B in favor of C for a sum of money, part of which was paid, and the amount was receipted on the back of the order in the hand-writing of B, and signed by C: held, not to be an acceptance of the order for the whole amount, but only for the amount paid. *Bassett v. Haines*, 9 Cal. 261.

12. A letter of credit, promising unconditionally to accept bills drawn upon its faith, is deemed under our statute an actual acceptance in favor of a person who, upon its faith, receives a bill so drawn, for a valuable consideration. *Naglee v. Lyman*, 14 Cal. 454.

An Accessory may be charged with the Principal in the same Indictment.

2. *A Verbal Acceptance is insufficient.*

13. The written acceptance of the drawee is necessary to charge him as acceptor under the statute; a verbal acceptance is insufficient, but the want of acceptance will not prevent the equitable assignment of the bill to hold the fund against which it is drawn. *Wheatley v. Strobe*, 12 Cal. 97; *Pope v. Huth*, 14 Cal. 408.

3. *An Endorser may be a Witness against an Acceptor.*

14. In an action against the maker of a note, or the acceptor of a bill, the endorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 86.

See **BILLS OF EXCHANGE**.

ACCESSORY.

- I. An Accessory may be charged with the Principal in the same Indictment.
 II. The Record of the Conviction of the Principal is not Evidence against an Accessory.

I. AN ACCESSORY MAY BE CHARGED WITH THE PRINCIPAL IN THE SAME INDICTMENT.

1. An indictment in charging D. and K. with an assault with intent to commit murder, and afterwards charges K. with being an accessory, charges but one offense. The criminal code treats an accessory as a principal, and it is not error to charge the accessory and principal in the same indictment. *People v. Davidson*, 5 Cal. 134.

2. An indictment charging a felony and setting forth that the defendant was an accessory before the fact, is good under our statute, by which no distinction exists between a principal and an accessory before the fact. *People v. Cryder*, 6 Cal. 23; *People v. Bearss*, 10 Cal. 69.

See **INDICTMENT**.

II. THE RECORD OF THE CONVICTION OF THE PRINCIPAL IS NOT EVIDENCE AGAINST AN ACCESSORY.

3. At common law, an accessory before the fact could not be tried or convicted without the previous trial and conviction of the principal. The acquittal of the principal discharged the accessory, and he could not be afterwards tried, no matter how conclusive the subsequently discovered proof might be of the principal's guilt, and the record of conviction of the principal was necessary; but our statute has altered this and the record is not necessary but improper evidence at the trial of an accessory. *People v. Bearss*, 10 Cal. 70.

See **CRIMINAL LAW**.

ACCOMPLICE.

1. An accomplice or codefendant in a criminal action under our code who elects to be tried separately is a competent witness for the other defendants charged with the same offense, the credibility of his testimony being left to the jury. *People v. Labra*, 5 Cal. 185.

2. To convict the defendant of larceny upon the testimony of an accomplice together with corroborating evidence, the corroborating evidence must connect the defendant with the offense charged. It is not sufficient that it corroborate the accomplice as to the fact that a larceny was committed. *People v. Eckert*, 16 Cal. 112.

3. McB., the accomplice, swore to the larceny by defendant. The court instructed the jury "that though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony;" held, that this instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *Ib.*

See **CRIMINAL LAW**.

ACCORD AND SATISFACTION.

1. A general denial has the same influence as the general issue at common law, and under that accord and satisfaction may well be shown. *Gavin v. Annan*, 2 Cal. 497; *Piercy v. Sabin*, 10 Cal. 30.

2. The principle that a liability cannot be discharged by a less sum than the amount due applies to payments of money, and has never been extended to a case where merchandise or property in goods was accepted. *Gavin v. Annan*, 2 Cal. 497.

3. A sued B and C for forcible entry and detainer and obtained judgment against them with damages, and afterwards took a deed from B for the premises and procured D to indemnify B against the judgment, and verbally promised not to prosecute B on the judgment: held, the facts show accord and satisfaction of the judgment. *Ransom v. Farish*, 4 Cal. 387.



ACCOUNT.

I. Action on Account.

1. Of the Pleadings.
2. Of the Evidence.
3. Assignment of an Account.

II. Bill for an Account.

1. Of the Pleadings.
2. Reference.

III. Account Stated.

I. ACTION ON ACCOUNT.

1. Of the Pleadings.

1. A complaint is insufficient which alleges indebtedness and sets forth an account but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness has accrued. *Mershon v. Randall*, 4 Cal. 326.

2. An action of assumpsit is the proper remedy on an account against a county, which has been rejected by the supervisors. *Price v. Sacramento County*, 6 Cal. 256.

2. Of the Evidence.

3. Under the mechanics, lien act it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars v. McKay*, 14 Cal. 128.

4. In a suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm, by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. *Landis v. Turner*, 14 Cal. 575.

5. In suit on an account against B. & S. as a firm, a receipt to B. alone, signed by plaintiffs "in full for accounts and demands due us to date," was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on: held, that the parol proof was admissible; that the term "all accounts" may be shown to cover firm as well as personal indebtedness. *Hawley v. Bader*, 15 Cal. 46.



3. Assignment of an Account.

6. Where an account is verbally assigned to a creditor as a security to pay a debt from the proceeds and return the surplus, the assignment is void and the assignee cannot sue thereupon in his own name. *Ritter v. Stevenson*, 7 Cal. 389; 11 Cal. 27.

7. The mere signing an assignment of an account, without delivery, is insufficient to pass a title. *Ib.*

See ASSIGNMENT.



II. BILL FOR AN ACCOUNT.

1. Of the Pleadings.

8. One copartner cannot sue another, unless by bill for a dissolution and praying for an account. *Russell v. Ford*, 2 Cal. 87; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 3 Cal. 292; *Nugent v.*

Bill for an Account.

Locke, 4 Cal. 320; *Barnstead v. Empire Mining Co.* 5 Cal. 299.

9. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculations of every kind, for a certain period of time, although the parties may not have been technically partners. *Garr v. Redman*, 5 Cal. 576.

10. Nor is it misjoinder of causes of action to demand, in the same action, that defendants account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Ib.*

11. In an action against an agent for not accounting, a request to account and pay over must be alleged in the complaint and proven at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

12. Unless an account is asked for in a bill in equity, there is no error in refusing to order it; and if the prayer is for an account, the evidence must then warrant it. *Dominguez v. Dominguez*, 7 Cal. 427.

13. Where two shareholders in a joint stock company sold to the company goods to a large amount and afterwards, during the existence of the company, sold their stock to A, and assigned their account for such goods to B, who sued such company on said account by attachment: held, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. *Bullard v. Kinney*, 10 Cal. 63.

14. M. & B., the plaintiffs, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back; B. agreeing to pay certain firm debts. The sale and agreement were afterward canceled, and B. sold M. one-half of the ranch. Defendant, Myers, agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase, O. and M. knew of B.'s title; held, that a bill in equity by B. against M., O. and Myers, for an account of the partnership

between M. & B., and for a decree establishing plaintiff's right to the half of the ranch, does not lie; that his remedy at law for his half of the ranch, against M. or any one claiming under him with notice of his title, is clear, and that M. would be estopped from disputing the title, and as M. makes no defense to the bill, it is good against him, for an account. *Brush v. Maydwell*, 4 Cal. 209.

15. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Collins v. Butler*, 14 Cal. 230.

16. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation until the further order of the court; collect money due or to become due on it; sell certain stock and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 148.

17. In a suit by a stockholder in a private corporation against the corporation and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business of the corporation: held, that this was error; that, although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet, as no fraud was shown, and as the superintendent had faithfully performed his duties as such, he was entitled to his salary. *Ib.* 149.

18. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the busi-

Accounts Stated.

ness in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all of the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. *Ib.* 151.

2. Reference.

19. An order setting aside the report of the referee appointed to take an account is merely interlocutory and not appealable before final judgment. *Johnston v. Dopkins*, 6 Cal. 84; *Baker v. Baker*, 10 Cal. 528.

20. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marziou v. Pioche*, 10 Cal. 546.

21. Where a party gets into possession of property, as a water-ditch, under a sheriff's suit on foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. It would be impracticable for a jury to settle the account, at least, without great delay and embarrassment. *Rawn v. Reynolds*, 15 Cal. 470.

III. ACCOUNTS STATED.

22. Where accounts bear upon their face the words "audited and approved" and "certified to be correct:" held, that this is sufficient language to create them instruments in writing within the meaning of the statute, and not accounts. *Sannickson v. Brown*, 5 Cal. 57.

23. An account audited against the city

of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. *Knox v. Woods*, 8 Cal. 546.

24. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted. *Branger v. Chevalier*, 9 Cal. 360.

25. Accounts stated may be opened and the whole account taken de novo for gross mistake in some cases, but this can only be done when the gross error affects all the items of the transaction. When the clear mistake affects only a portion of the items of the stated account it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. *Ib.* 361.

26. Where D. had a running account with L. from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857, and D., within one year after the granting of letters of administration, commenced his suit on said account against the estate: held, that the suit was commenced in time. *Danglada v. De la Guerra*, 10 Cal. 386.

27. The notice of mechanics' lien, filed in the recorder's office, need not set out the items of the account; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient. *Heston v. Martin*, 11 Cal. 42; *Brennan v. Swazey*, 16 Cal. 142.

28. A complaint stating that defendant was justly indebted to plaintiff in several sums, found to be due from the defendant to the plaintiff on an account then stated between them, which defendant then promised to pay, and the sum is due and unpaid, sufficiently states a cause of action. *Dewitt v. Porter*, 13 Cal. 172.

29. Where, in suit on an account stated, the only evidence was that of a witness who said defendant, on presentation of the account, admitted it to be correct and promised to pay it, and the court charged the jury that, if they believed the testimony of the witness, they must find for plaintiff the amount claimed; and they so found: held, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry v. Sickles*, 13 Cal. 429.

What is a sufficient Acknowledgment.

30. To sustain an action on an account stated, it must be shown there was a demand in favor of plaintiff acceded to by defendant. And if defendant does not object to the accounts as presented within a reasonable time, his silence will be an admission of its correctness. *Ib.*

31. Evidence that the items of the account are overcharged is not admissible, the complaint being verified and the answer not averring fraud or mistake in the accounting. *Ib.* 430.

ACCOUNT BOOKS.

1. A private account book of the plaintiff, kept by himself and containing only an account of money paid, is not evidence to charge the defendant. *Collin v. Card*, 2 Cal. 422.

2. Where the plaintiff to a set-off of defendant, involved the question whether or not profits had been made by plaintiff's steamboat such account book is not evidence to sustain plaintiff's hypothesis. *Ib.*

3. Our statute authorizes the court to make an order directing a party to produce books and papers in court. *Barnstead v. Empire Mining Co.*, 5 Cal. 300.

4. The books of account kept in the office of an alcalde are admissible in evidence as a register of the acts of that officer belonging to the office, kept by his directions and handed over by each alcalde to his successor. *Kyburg v. Perkins*, 6 Cal. 675.

5. To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept. *Ib.* 676.

6. The account book of a tradesman is not admissible to establish a charge for money loaned, but it may be to show that articles were procured for the defendant, which plaintiff paid for and charged as so much money loaned. *Le Franc v. Hewitt*, 7 Cal. 186.

7. An account book is not admissible to prove a single item only, yet where the evidence shows that defendant bought goods at various times, for which only one charge was entered after the order

was filled, it seems that the account book is admissible. *Ib.*

8. In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books; and had no clerk—the book was sufficiently proved to be admitted in evidence. *Landis v. Turner*, 14 Cal. 574.

9. And being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and of their value, and of the specific materials furnished and their price; it not appearing that any higher evidence was attainable. *Ib.* 575.

10. The fact that the charges are first made on a slate and then transferred to the book does not affect the character of the book as one of original entries—the charges on the slate being mere memoranda, not intended to be permanent. *Ib.*

11. But the transfer must not be long delayed, otherwise the book will be rejected, unless the delay be satisfactorily explained. A delay of three days is not unreasonable. *Ib.* 576.

ACKNOWLEDGMENT.*

I. What is sufficient.

1. The purpose of an Acknowledgment.
2. Who may take an Acknowledgment.

II. Defective Acknowledgments.

1. Seal.
2. Damages.
3. Amendment.

III. Acknowledgment of a Married Woman.

* The statute of 1860, p. 179, authorizes a defective acknowledgment to be corrected by proceedings before the county judge; and the statute of 1860, p. 357, makes defective acknowledgments notice hereafter, the same as if the defect did not exist, so far as not to impair the obligations of contracts.

What is a sufficient Acknowledgment.—Who may take an Acknowledgment.

I. WHAT IS SUFFICIENT.

1. Where the officer certifies that the parties "were known" to him, the word "personally" is not necessary. *Hopkins v. Delaney*, 8 Cal. 87; *Welch v. Sullivan*, 8 Cal. 187, 512; *Henderson v. Grewell*, 8 Cal. 584.

2. The officer must state in his certificate the fact of acknowledgment. Although a man may not execute the instrument freely, in point of fact, yet if he make the acknowledgment properly he is afterwards estopped to deny it, as against subsequent innocent parties.—*Bryan v. Ramires*, 8 Cal. 466; *Henderson v. Grewell*, 8 Cal. 584.

3. An acknowledgment that a party executed the instrument "freely and voluntarily" is not essential, but the voluntary execution of the instrument must be presumed from the fact that he acknowledged that he "executed the same." *Henderson v. Grewell*, 8 Cal. 584.

4. The words "described in and who executed," are not essential in the acknowledgment. *Ib.*

5. Where to a certificate of proof by a subscribing witness, acknowledging the execution of an instrument, the witness adds his signature, and the officer adds the usual jurat to the affidavit, such additions do not vitiate the certificate if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage. *Whitney v. Arnold*, 10 Cal. 533.

6. A certificate of acknowledgment by a subscribing witness which shows the identity of the witness produced with the person whose name is subscribed as a witness to the conveyance, such identity resting in the personal knowledge of the officer, and sets forth the proof of the execution, and "that the witness, whose name is subscribed to such conveyance as a party thereto," executed the same—which is equivalent to the words, "is the person who executed the same"—in the presence of the witness, who thereupon became a subscribing witness, is amply sufficient. *Ib.*

7. In acknowledgments to deeds, substantial conformity with the statute is sufficient. *Goode v. Smith*, 13 Cal. 83.

8. Where a deed has attached to it

certificates of acknowledgment made at the Hawaiian Islands, the one by a person who describes himself, in the body of the certificate, as "the principal notary public" of the Islands, and affixes to his signature a similar designation of his official character, with his notarial seal; and the other by a person who describes himself, in the body of his certificate, as "the vice consul of the United States of America, at Honolulu, Hawaiian Islands," and affixes to his signature the designation of his official character as "U. S. Vice Consul," and the consular seal: held, that the execution of the deed was prima facie sufficiently proved to be admitted in evidence; that the persons before whom the acknowledgments purported to have been made were shown to be the officers they represent themselves to be, and were authorized to take the acknowledgments. *Mott v. Smith*, 16 Cal. 552.

9. The general designation in the fourth section of the Act of April 16th, 1850, as to conveyances of any notary public or any consul of the United States, embraces notaries and consuls of every grade—whether principal or inferior notary, or consul general or vice consul. *Ib.*

10. The certificates of a notary public or United States consul, of acknowledgment of a deed, are prima facie evidence of the official character of the person by whom they are given. *Ib.*

11. In the United States, certificates of the proof and acknowledgment of deeds, executed in foreign jurisdiction, are generally received as prima facie evidence of both the character of the officers and the genuineness of their signatures. *Ib.*

1. The purpose of an Acknowledgment.

12. The purpose of a certificate of acknowledgment is to entitle the instrument to be recorded and to be admitted in evidence without further proof. *Fogarty v. Finlay*, 10 Cal. 245.

2. Who may take an Acknowledgment.

13. The city recorder of San Francisco was authorized by law to take an acknowl-

Defective Acknowledgments. — Seal. — Damages.

edgment of a conveyance by express authority of the statute. *Hopkins v. Delaney*, 8 Cal. 87.

14. The certificate of acknowledgment of a notary public to a deed is not an act in pais, which he may exercise by virtue of his office at any time while in office. *Bours v. Zachariah*, 11 Cal. 292.

II. DEFECTIVE ACKNOWLEDGMENTS.

15. A power of attorney acknowledged before a notary public in New York city, who is not authorized by our statute to take such acknowledgments is insufficient. *Lord v. Sherman*, 2 Cal. 501.

16. The supreme court of the United States has decided that there was no constitutional prohibition upon States passing laws confirming all defective acknowledgments of conveyances, unless they impaired the obligation of the contracts. *Smith v. Morse*, 2 Cal. 545.

17. A certificate of acknowledgment of a deed, in the words "Before me personally appeared A B, to be the individual, &c." is bad, and the record of the conveyance on such a certificate imparts no notice to third parties. The omission might as well be supplied by the words "claiming" or "representing," as by "known" or "proved." There is no averment that the party making the acknowledgment is the person who executed it upon the personal knowledge of the officer. *Wolf v. Fogarty*, 6 Cal. 225; *Kelsey v. Dunlap*, 7 Cal. 162; *Henderson v. Grewell*, 8 Cal. 584; *Fogarty v. Finlay*, 10 Cal. 244.

18. Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the same was known to him, or was identified by the testimony of a witness examined by him for that purpose: held, that such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damages resulting from such negligence. *Fogarty v. Finlay*, 10 Cal. 246.

1. Seal.

19. Although an acknowledgment may

be defective in not having the seal of the officer taking it, so as to deprive it of registration, yet this does not make the deed void; it merely affects its notice to third parties. *Hastings v. Vaughn*, 5 Cal. 319.

20. An objection that a county clerk has no power to make an acknowledgment because he has no seal of office, is too narrow a construction of the statute. The court of which he is clerk is entitled to a seal, and that is sufficient. His power does not depend upon the fact of his having procured a seal, or the care with which he preserved it. *Ingoldsby v. Juan*, 12 Cal. 580.

21. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 23d, 1852, is good under the statute then in force. *Stark v. Barrett*, 15 Cal. 372.

22. A certified copy of a deed from the county recorder's office, contained in the margin of the *acknowledgment* taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No Seal]—the conclusion of the acknowledgment being "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

23. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

2. Damages.

24. If a notary does not faithfully perform his duty, but is guilty of gross and culpable negligence, in taking an acknowledgment, he is responsible to the party injured for the damages resulting from his negligence. *Fogarty v. Finlay*, 10 Cal. 245.

Amendment.—Acknowledgment of a Married Woman.

25. A neglect to complete the certificate of acknowledgment is not excused by the fact that the certificate had been partially filled by the attorney for the grantee. The certificate upon its face is unfinished; the date and the name of the grantor had been inserted, leaving it for the notary to insert his knowledge or the evidence received of the identity of the party making the acknowledgment. *Ib.*

26. If the notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence, for an officer who affixes his official signature and seal to a document, thereby giving to it the character of evidence, without examining it to find whether the facts certified are true, can scarcely be said faithfully to perform his duty according to law. *Ib.*

3. Amendment.

27. A notary derives his power from the statute. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is to take an acknowledgment, and certify it, as parts of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. He has no power to amend his return afterwards. *Bours v. Zachariah*, 11 Cal. 292.

III. ACKNOWLEDGMENT OF A MARRIED WOMAN.

28. The acknowledgment is a necessary part of a conveyance of real estate by a married woman; up to the last moment she may retract the execution of the deed. *Selover v. American Russian Comm. Co.*, 7 Cal. 275.

29. It is not in the power of a court of equity to compel a married woman to correct an insufficient acknowledgment. *Barrett v. Tewksbury*, 9 Cal. 15.

30. In the acknowledgment of a married woman to a deed, there must be a

privy examination. *Kendall v. Miller*, 9 Cal. 592.

31. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a justice of the supreme court, judge of a district court, county judge, or notary public. *Kendall v. Miller*, 9 Cal. 592; see *Goode v. Smith*, 13 Cal. 84, post.

32. The certificate of an acknowledgment of a married woman to a deed must state that the contents of the deed were explained to her; otherwise it is defective, and will not pass her interest in the estate. *Pease v. Barbiers*, 10 Cal. 440.

33. Under our law, no presumption of knowledge of the contents of an instrument, on the part of a married woman, arises from the fact of executing and acknowledging it; the contents must be made known to her. *Ib.*

34. The words "undue influence" being omitted in the acknowledgment of a wife does not render it invalid. *Goode v. Smith*, 13 Cal. 84.

35. A justice of the peace can take the acknowledgment of a wife to a deed as well as a notary, and there is no good reason why he should not. *Ib.*

36. When an acknowledgment is defective in any substantial particular, the femme's title did not pass. *Morrison v. Wilson*, 13 Cal. 498.

37. Where the jury and court are satisfied that the wife understood English, at the time of executing and acknowledging a note and mortgage upon the homestead, there was no necessity for an interpreter to explain the contents of the mortgage. *Pfeiffer v. Riehn*, 13 Cal. 647.

38. To the efficacy of a conveyance of her real estate by a married woman, it is essential that she should join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him, or compulsion, or undue influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another. *Mott v. Smith*, 16 Cal. 556.

See ADMISSION, CONVEYANCE, DEED, MORTGAGE, NOTARY.

Acquittal.—When an Action will Lie.

ACQUITTAL.

1. The defendant was convicted of manslaughter upon an indictment charging murder, which verdict was set aside: held, that on a second trial the defendant can plead the former conviction of manslaughter as an acquittal of the crime of murder, and can only be retried for manslaughter. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

2. Accessories may, by the act of this State, be indicted and tried with the principal, or separately, and either may be convicted or acquitted without reference to the previous conviction or acquittal of the other. *People v. Bearss*, 10 Cal. 69.

See CRIMINAL LAW.

ACTIONS.

I. When an Action will Lie.

II. Form of Actions.

1. Under the Code.
2. A Party is bound by his Action.
3. Consolidation of Actions.
4. By or against whom Actions will Lie.
 - (a.) By whom.
 - (b.) Against whom.
5. When Assignable.
6. Process.

I. WHEN AN ACTION WILL LIE.

1. An action cannot be maintained against A to recover damages for a trespass to real estate committed by B. *Lick v. Stevenson*, 1 Cal. 129.

2. Where a contract is made to convey land by a quit claim deed at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

3. An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, cannot be sustained.

Board of Health v. Pacific Mail S. S. Co., 1 Cal. 198.

4. A possessory action cannot be maintained under Mexican law by a person who has acquired his titles subsequent to the intrusion complained of. *Sunol v. Hepburn*, 1 Cal. 259.

5. The statute authorizing the granting of a license to keep a gambling house could not be construed as conferring a right of action to sue for a gaming debt, but protection solely against a criminal prosecution. *Bryant v. Mead*, 1 Cal. 444.

6. An action for debt will not lie against a keeper of a gaming table without license, to recover the amount of license; the only redress is by indictment. *People v. Craycroft*, 2 Cal. 244.

7. When new parties in interest are known to the plaintiff, it adds strength to his right of a new action after judgment had. *Truebody v. Jacobson*, 2 Cal. 283.

8. After the purchase of property by plaintiff at sheriff's sale, he has a right to sue for possession. And the discovery of a fraud after suit brought, would entitle him so to shape his action as to include it, for the consideration of the court. *Ib.* 284.

9. The district attorney may at any time after the adjournment of the term of the court maintain an action on a recognizance declared forfeited, and proceed against the bail. *People v. Carpenter*, 7 Cal. 403.

10. A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

11. There is nothing in our statute which divests the right to maintain an action on a judgment at law. *Ames v. Hoy*, 12 Cal. 19; *Stuart v. Lander*, 16 Cal. 375.

12. An action can be maintained at law upon a decree in equity for a specific sum of money, whenever a sum liquidated and made definite by contract or judgment is recoverable. *Ames v. Hoy*, 12 Cal. 20.

13. Where the owner of a lot neglects for three days after notice from the superintendent of public streets of said city to repair the street in front of his lot, as re-

Form of Actions. — A Party is bound by his Action. — Consolidation of Actions.

quired by statute, the superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount. *Hart v. Gavin*, 12 Cal. 478.

14. Relief from a judgment against an insolvent may be by motion to discharge it, unless there be suspicion of fraud in the release of the insolvent. No formal action is necessary. *Inlay v. Carpentier*, 13 Cal. 177.

II. FORM OF ACTIONS.

1. Under the Code.

15. The code provides that there shall be but one form of civil action, but it does not intend to abolish all distinctions between law and equity as to actions. The innovation extends only to the form of action and the pleadings, while the technicalities of pleading have been dispensed with. *Dewitt v. Hays*, 2 Cal. 468; *Payne v. Treadwell*, 16 Cal. 243.

16. The distinction in the form of actions ex delicto and ex contractu was abolished by statute, but the general principles which govern such actions are retained. *Lubert v. Chauviteau*, 3 Cal. 463.

17. When personal property is tortuously taken, the party aggrieved may waive the action in tort, and sue in assumpsit for the value of the property. *Fratt v. Clark*, 12 Cal. 90.

18. An action to recover a judgment against an administrator, for money embezzled by his intestate, pending which a bill in equity was filed to recover the property bought with the money, and prosecuted to a decree after judgment was taken at law for the amount, evidences no such distinct and deliberate choice to take the general claim on the estate for money, in lieu of the claim on this property, as to bar plaintiff from prosecuting his equitable claim. *Wells v. Robinson*, 12 Cal. 142.

19. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs, and expenses to be shared pro rata, and afterwards prosecuted both claims to judgment in his own name, and in his own

name bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable for money had and received, or in indebitatus assumpsit. *Herrick v. Hodges*, 13 Cal. 433.

20. A suit to enforce a particular lien, under the act, is a proceeding to enforce all the liens against the property. And an intervention in a suit already pending, if filed within six months, is as much a compliance with the act as an original suit. *Mars v. McKay*, 14 Cal. 129.

21. Proceedings for the settlement of an estate and matters connected therewith are not civil actions within the meaning of sections 18 to 20 of the civil code. *Estate of Scott*, 15 Cal. 221.

See COMPLAINT, PLEADINGS.

2. A Party is bound by his Action.

22. If an action be improperly commenced, the party bringing it having obtained the benefit, cannot avoid the responsibility he may have thus incurred by pleading his own misfeasance. *Turner v. Billagram*, 2 Cal. 522.

3. Consolidation of Actions.

23. The law will not tolerate a division of a joint right of action into several actions. *Nightingale v. Scannell*, 6 Cal. 509.

24. A defendant shall not be harassed with several suits for the same matter at the same time; the pendency of one suit may be pleaded in abatement of the other. *Seligman v. Kalkman*, 8 Cal. 216.

25. It often happens that a party has his election to pursue one of two or more remedies, but he should not pursue several at one and the same time. *Ib.* 217.

26. A creditor has not the right to assign a debt in parcels, and thus by splitting up the cause of action, subject the debtor to the costs and expenses of more suits than the parties originally contemplated. *Marziou v. Pioche*, 8 Cal. 536.

By whom.—Against whom.—When Assignable.—Process.

4. *By or against whom Actions will lie.*

(a.) *By whom.*

27. One copartner cannot sue another unless by bill for a dissolution, praying for an account. *Russell v. Ford*, 2 Cal. 87; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 3 Cal. 292; *Nugent v. Locke*, 4 Cal. 320; *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

28. An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property, upon an alleged obligation; but the defendant has his rights to any provisional remedy in law. *King v. Hall*, 5 Cal. 84.

29. The right of a member of an incorporated company to sue a corporation is undoubted. *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

30. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Park v. Killam*, 8 Cal. 79.

31. Where two persons are employed by the claimants of a tract of land under Mexican title, as agents to procure the confirmation of the grant, and services are rendered and expenses incurred by the agents: held, that such services and expenses are individual in their character and not joint, and that separate actions may be maintained by such agents for their expenses thus incurred. *Conner v. Hutchinson*, 12 Cal. 127.

32. An action brought by an agent in his own name for a trespass in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

33. An alien friend may sue an American in the consular courts of China, established there under the treaty of 1844. *Forbes v. Scannell*, 13 Cal. 283.

34. An action upon a duty due by an auctioneer to the State, under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of

the State. *State v. Poulterer*, 16 Cal. 532.

35. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the probate court is necessary in such cases. *Hallock v. Mixer*, 16 Cal. 579.

(b.) *Against whom.*

36. A county government* is a portion of the State government, and as there is no remedy against the State, there can be none against the county. *Hunsacker v. Borden*, 5 Cal. 290.

37. A party cannot be imprisoned under a judgment in a civil action for assault and battery. *Ex parte Prader*, 6 Cal. 240.

38. Counties are quasi corporations, *and can sue and be sued, according to the act of May 11th, 1854. *Price v. Sacramento County*, 6 Cal. 255; *Tuolumne County v. Stanislaus County*, 6 Cal. 442; *Gilman v. Contra Costa County*, 6 Cal. 677; 8 Cal. 57; *Placer County v. Astin*, 8 Cal. 305.

39. In the absence of any statute to that effect, the State cannot be sued, and the judgment against her is erroneous. *People v. Talmage*, 6 Cal. 258.

See DEFENDANT, PARTIES, PLAINTIFF.

5. *When Assignable.*

40. A cause of action arising out of a tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456.

6. *Process.*

41. Mere cognizance of the existence of an action is not notice in a legal sense. The notice must apprise the party whose rights are to be affected of what is required of him, and the consequences

* The opinion in *Hunsacker v. Borden*, 5 Cal. 290, has become abrogated by the act of May 11th, 1854, Statutes, p. 194, enabling a county to sue or be sued, which act has received judicial construction in *Price v. Sacramento County*, 6 Cal. 255, and other cases.

which may follow if he neglect to defend the action. *Peabody v. Phelps*, 9 Cal. 226.

42. To support a plea in abatement founded on the pendency of a prior action, it is necessary that process issue in such former action, or that there be an appearance such as would waive the issuance of process. *Conger v. Weaver*, 10 Cal. 238; *Primm v. Gray*, 10 Cal. 522.

43. Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the twenty-sixth of January, 1857, and summons issued thereon: held, that the action was not commenced until the issuing of the summons. *Green v. Jackson W. Co.*, 10 Cal. 375.

See SUMMONS.

ACTIONS, JOINDER OF.

1. If several causes of action are improperly united in the same action, the objection must be taken by demurrer or it will be deemed to be waived, and the action will be sustained. *Macondray v. Simmons*, 1 Cal. 395; *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Clark v. Boyreau*, 14 Cal. 638.

2. A contract contained a covenant for stipulated damages, and by the same contract the parties were constituted partners: it was held, that in an action on said contract the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

3. In a complaint for trespass, the plaintiff in one count claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages: it was held, that these causes of action were properly joined. *Tendesen v. Marshall*, 3 Cal. 440.

4. A claim for damages for a personal tort cannot properly be united in an action with a demand cognizable in equity. *Mayo v. Madden*, 4 Cal. 28.*

5. A claim for possession of real property, with damages for its detention, can-

not be joined with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. *Idaho v. Sacramento Turnpike Co.*, 5 Cal. 225.

6. It is not misjoinder of causes of action to demand in the same action that defendant account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Garr v. Redman*, 6 Cal. 576.

7. A party may declare in tort, under our pleadings, and at the same time ask for the equitable interposition of the court to protect the subject matter in litigation until the cause is heard. *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237.

8. A complaint which joins an action of "trespass quare clausum fregit," ejectment, and prayer for relief in chancery will be held bad on demurrer. To sustain such complaint would be subversive of all the rules of pleading. *Bigelow v. Gove*, 7 Cal. 135.

9. It is not necessary, in an action against a sheriff to recover damages (in addition to the \$200 imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 1 Cal. 642.

10. An action at law which prays judgment against the party who gave the note sued upon may be joined with an equitable demand to foreclose a mortgage given by that party and his wife to secure the payment of the note. *Forbes*, 10 Cal. 300; *Rowe v. Tain Water Co.*, 10 Cal. 444; *Lieby*, 14 Cal. 157.

11. In an action for injury to property, a claim for damages may be joined with a claim for the defendant's dam, and the continuing injury may properly be joined with a claim for damages in the prevention of the defendant from working his claim. *Forbes v. Tain Water Co.*, 12 Cal. 557.

12. The union in one complaint, of an allegation that the defendant have wrongfully built a dam across Mormon Creek, and that the water of said creek be "dammed up," etc., and that

* In the opinion of *Gates v. Kieff*, 7 Cal. 125, the court stated that the case of *Mayo v. Madden*, 4 Cal. 28, was not analogous.

Adjournment.

with an allegation that "defendants have constructed gates, etc., in their said dams and flumes, which they hoist for the purpose of cleaning out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 27.

13. Common counts cannot all be united in one count, as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 147.

14. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 548.

15. Though the prayer, or one of the prayers, may indicate a distinct cause of action against one defendant, yet it is immaterial if the allegations of the complaint, taking them all together, make no homogeneous case as against all the defendants. *De Leon v. Higuera*, 15 Cal. 495.

16. Complaint avers in substance that defendant made his note, etc., setting out a copy; that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc. * * * defendant, by virtue of * * * proceedings in insolvency, etc. * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc.: held, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 502.

17. An objection that one of two counts

in a complaint is an equitable cause of action, and should not be tried by jury, must be taken at the time, and cannot be urged on appeal if not so taken. *Baker v. Joseph*, 16 Cal. 177.

ADJOURNMENT.

1. A judgment rendered by a district court after the time appointed for the adjournment of the term is invalid, and will be set aside as void. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

2. After the adjournment of the term no power remains in the court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kramer*, 2 Cal. 583; *Morrison v. Dapman*, 4 Cal. 257; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

3. The fact that the court was adjourned, though not for the term, at the time set for the hearing of objections of creditors to an insolvent's discharge, and that the hearing took place before the judge at chambers, is no valid objection to the discharge. *Clarke v. Ray*, 6 Cal. 604.

4. A judgment rendered by a district court after the time appointed for the adjournment of the term may be set aside, if there has been no service of summons upon the defendants. *Carpentier v. Hart*, 5 Cal. 407; *Pico v. Carillo*, 7 Cal. 32; *Shaw v. McGregor*, 8 Cal. 521.

5. A district attorney may at any time after the adjournment of the term of the court at which the recognizance is declared forfeited, proceed against the bail. *People v. Carpenter*, 7 Cal. 403.

6. While the term lasts, the court has power to amend the record. After the term had passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 173.

See CONTINUANCE.

ADMINISTRATORS AND EXECUTORS.

I. Jurisdiction of an Administrator.

1. Resignation or Removal of an Administrator.

2. Who may Administer.

II. Fees of an Administrator.

III. Actions by or against Administrators.

1. By an Administrator.

2. When the Administrator is a necessary Party Plaintiff.

3. Against an Administrator.

4. When an Administrator is a Necessary Party Defendant.

5. Of the Pleadings.

6. Of the Costs against an Administrator.

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IV. An Executor may be a Witness to the Execution of a Will.

V. Powers of an Administrator.

1. May Assign a Judgment.

2. Liabilities of an Administrator.

VI. Inventory of an Estate.

VII. Claims against an Estate.

VIII. Liens against Property in the hands of an Administrator.

IX. Property in the hands of an Administrator.

X. Sales by an Administrator.

XI. Final Account of an Administrator.

I. JURISDICTION OF ADMINISTRATION.

1. Two jurisdictional facts must exist to support administration in every case; first, the death of the party; second, his residence within the county at the time of his death. They must be alleged in the petition and be true in point of fact. *Beckett v. Selover*, 7 Cal. 233; *Haynes v. Weeks*, 10 Cal. 118.

2. To vest the incoming administrator with title to an estate, there must be a grant of letters of administration to him; the mere handing over of the papers by the old administrator to the new is insufficient. *Rogers v. Hoberlein*, 11 Cal. 129.

1. Resignation or Removal of an Administrator.

3. Where the administrator resigns, leaving the administration incomplete, there is no final rule of compensation. The probate court should apportion it in

reference to the compensation fixed by law for the whole, according to sound discretion. *Ord v. Little*, 3 Cal. 389.

4. The compensation allowed by law to executors upon the whole value of the estate, both real and personal, only applies when the administration is complete and the estate is finally settled. *Ib.*

5. An administrator resigned and appeared in court to have a final settlement of his accounts. The judge found him indebted to the estate in a large sum, and ordered him to pay it into court. Upon his refusal, he was prosecuted on his bond: held, the action does not lie, as the order was illegal, and he was not bound to pay the money into court. *Wilson v. Hernandez*, 5 Cal. 443.

6. The probate judge, as the general supervisor and guardian of the estates of deceased persons, has power by law to suspend or remove an administrator whenever he has reason to believe, either from his own knowledge or from credible information, that such administrator has fraudulently wasted or mismanaged the estate, or is about to do so, or has become incompetent to manage it. An appellate court should not interfere with the order, except in case of gross abuse of discretion. *Deck's Estate v. Gherke*, 6 Cal. 669.

7. The fair inference to be drawn from the act regulating estates of deceased persons is, that the permission given an executor or administrator to resign in the one case specified is a negative of such right in all others. *Haynes v. Meeks*, 10 Cal. 116.

8. Where an administrator filed in the probate court his resignation, and on the same day the court made an order reciting that the administrator had filed his resignation and required him to turn over the effects of the estate to and settle with the public administrator, and when such settlement should be fully made the administrator and his sureties be released, and where no final settlement was made: held, that such act was an acceptance, on the part of the court, of such resignation. *Ib.* 118.

2. Who may Administer.

9. The statute provides that any other of the next of kin who would be entitled

Fees of an Administrator.—Actions by or against Administrators.

to share in the distribution of the estate shall be entitled to administer, it must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there be no nearer kindred. *Anderson v. Potter*, 5 Cal. 64.

10. The brother of deceased being entitled to letters of administration on the estate, gave D., a stranger, a writing, requesting the court to appoint him administrator. D. applied for letters, annexing to his petition said writing. At the hearing, the brother asked leave to withdraw the writing, opposed the appointment of D., and prayed letters to himself: held, that the brother waived his right, and that, having encouraged D. to go to the expense and trouble of applying for letters of administration, he is estopped from withdrawing his assent and waiver, or renunciation. *Estate of Kirtlan*, 16 Cal. 165.

11. The mere fact that one is not of kin to the deceased does not incapacitate him to hold the office of administrator. A stranger is legally competent, though the other parties named in the fifty-second section of the act concerning the estates of deceased persons are entitled to priority. *Ib.*

12. The sixty-sixth section of that act does not restrict the power of appointment given in the fifty-second section. The object of this section—the sixty-sixth—authorizing the appointment of some competent person at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of others more competent. *Ib.*

13. The proviso in the fifty-second section of the act to regulate the settlement of the estates of deceased persons, as amended by the act of April 23d, 1855, extends to all the classes of persons designated in the section, and is not limited to persons embraced within the tenth class; and a surviving partner, though a brother, where the partnership existed at the time of the death of the intestate, cannot be administrator. *Cornell v. Gallaher*, 16 Cal. 367.

II. FEES OF AN ADMINISTRATOR.

14. Where the administrator resigns, leaving the administration incomplete, there is no fixed value of compensation. The probate court should apportion it in reference to the compensation fixed by

law for the whole, according to sound discretion. *Ord v. Little*, 3 Cal. 389.

15. The compensation allowed by law to executors upon the whole value of the estate, both real and personal, only applies when the administration is complete, and the estate is finally settled. *Ib.*

16. An administrator being compelled by law to hold, protect and guard funds coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his commissions thereon. *Wells v. Robinson*, 13 Cal. 143.

III. ACTIONS BY OR AGAINST ADMINISTRATORS.

1. By an Administrator.

17. The common council of Sacramento by resolution made an appropriation to the mayor of the city of \$10,000, reciting meritorious services (but such as were within his official duty) as the consideration, which was exclusive of his salary, which was regularly paid. The mayor died the day the appropriation was passed, and did not accept it formally: held, that the appropriation could not be recovered in action at law by the administrator.—*Heslep v. City of Sacramento*, 2 Cal. 581.

18. There is no authority for prosecuting the cause in the name of a deceased person; all proceedings ought to be stayed until, by suggestion, his executor or administrator was made a party. *Sanchez v. Roach*, 5 Cal. 248.

19. An administrator, by our statute, being entitled to possession of the real estate of the deceased, may maintain ejectment; and where the complaint avers title in the administrator, a default admits it. *Curtis v. Herrick*, 14 Cal. 119.

20. In suit by an administrator against defendant, for conversion of the property of the estate under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof as to the right title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Beckman v. Geddes*, 14 Cal. 252.

When the Administrator is a Necessary Party.

2. When the Administrator is a necessary Party Plaintiff.

21. In this State all property of the deceased, real and personal, remains in the possession of the administrator until administration of the estate is had, or a decree of distribution is made by the probate court. The administrator until then is the proper party plaintiff in a suit to quiet title to the estate. *Curtis v. Sutter*, 15 Cal. 264.

3. Against an Administrator.

22. The general right to sue an administrator was taken away by the statute, except in case of presentation and rejection of the account, and the declaration should have set out the exception. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 558.

23. Executors who have entered into and possessed a leasehold estate, of which their testator was assignee, are liable for the rents accruing during the possession, as assignees de bonis propriis. (Obiter.) *Smiley v. Van Winkle*, 6 Cal. 606.

24. Where an administrator is sued in equity by the people, to compel him to pay over to the county treasurer money collected by the intestate as tax collector: held, that he occupied the position of one who takes possession, without authority, of property belonging to another, and that he may be treated as a trustee de son tort. *People v. Houghtaling*, 7 Cal. 352; *Gunter v. Janes*, 9 Cal. 658.

25. Where the adverse possession of the defendant was wrongful in the beginning, its character is not changed by the act of plaintiff, consenting to the appointment of defendant as administrator of the estate upon which he is trespassing. *Taylor v. Woodward*, 10 Cal. 92.

26. M., a married woman, had a sum of money left her by bequest during coverture; she and her husband joined in a power of attorney to O., authorizing him to demand and receipt for the money, which he did, and the husband then died. M. brought suit for the money: held, that it was the separate property of M., and

when O. received it, he did so as trustee of M., and it could not be charged with money advanced to the husband, and a settlement thereof with the administrator of her husband could not have any effect on M.'s rights, although these defenses were set up. *Dickinson v. Owen*, 11 Cal. 75.

27. A was indebted upon a note and mortgage to B in the sum of \$40,000. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterwards A mortgaged to C, together with other property, the property previously mortgaged to B, subject to the first mortgage, for which C was to advance to A, from time to time, sums of money not to exceed \$12,000, to enable A to pay his debts. By this mortgage C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the \$12,000 and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and out of the proceeds pay the amount and interest so advanced. C at various times advanced to A nearly \$12,000, and collected rents to the amount of \$28,000. Subsequently C died, and his executor collected the rents: held, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B, as an agent of A, and that A was entitled to the trust fund. *Gunter v. Janes*, 9 Cal. 658.

4. When an Administrator is a necessary Party Defendant.

28. In cases of joint and several contracts, an administrator cannot be joined with the survivor; for one is charged de bonis testatoris and the other de bonis propriis. *Humphreys v. Crane*, 5 Cal. 176; *May v. Hanson*, 6 Cal. 643.

29. Where the plaintiff, in an action to foreclose a mortgage against a party who has died since the service of the summons and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the action. *Belloc v. Rogers*, 9 Cal.

Of the Pleadings.

125; *Hentsch v. Porter*, 10 Cal. 559; (limited in *Cowell v. Buckelew*, 14 Cal. 642).

30. All the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it. *Beckett v. Selover*, 7 Cal. 215; *Harwood v. Marye*, 8 Cal. 580; *Haynes v. Meeks*, 10 Cal. 120.

31. A demand that a mortgagee be subrogated to rights under a prior mortgage, for the satisfaction of which a part of his mortgage was taken, is not a claim in the sense of the statute against the estate of the deceased person. The administrator is a proper party for the purpose of liquidating the amount of the indebtedness. *Carr v. Caldwell*, 10 Cal. 385.

5. Of the Pleadings.

32. Where, in an action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary under the statute that the administrator should deny the signature of the intestate on oath. It must be proven. *Heath v. Lent*, 1 Cal. 411.

33. In an action against an administrator the court should, if asked, charge the jury as to the statute time within which the action could be brought, when the claim is rejected. *Benedict v. Hoggin*, 2 Cal. 386.

34. A person who was not a party to a settlement by an administrator in the probate court, may disregard the settlement, and file his bill in chancery to compel him to account. *Clarke v. Perry*, 5 Cal. 60; *Belloc v. Rogers*, 9 Cal. 129; *Deck's Estate v. Gherke*, 12 Cal. 438.

35. The failure of a party to aver in his complaint that he has presented his claim for allowance to the administrator, is a matter of avoidance in an action on the claim, only to be taken advantage of by plea, and it is still in its nature and effect nothing more than a matter of abatement. *Ellissen v. Halleck*, 6 Cal. 363; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 560.

36. Though the defendant is described in the caption of the complaint as admin-

istrator, but the facts stated in the body of the complaint show that he is not sought to be charged as administrator: held, that it is not an action against him in his representative capacity. *People v. Houghtaling*, 7 Cal. 350.

37. Where plaintiff in a justice's suit avers he is the administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 599.

38. Bill filed by a judgment creditor of J., upon order of court permitting it, against defendants as executors. Bill avers that the will of deceased "directed by written or oral instructions" the executors to sell certain cattle and retain the proceeds for the use and benefit of J., after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions, when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: held, that a demurrer was properly sustained; that a pleading must be taken most strongly against a pleader, and that there is no law giving effect to an oral instruction of a testator as a will, or a part of a will, and that the creditor of J. can have no more rights than J. himself. *Sparks v. De La Guerra*, 14 Cal. 111.

39. At most, J. is only a legatee, and the executors of the trustees of the legacy. And the bill, not stating that the estate is settled, nor that the property or the money is not necessary to pay off debts or expenses of administration, nor that J. would be entitled before final settlement to his legacy without tendering a refunding bond, cannot be maintained. *Sparks v. De La Guerra*, 14 Cal. 112.

40. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon to the amount of about three hundred cords; that the defendant afterwards

An Executor may be a Witness to the Execution of a Will.

also entered upon the premises, without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refused to deliver it to them, to their damage of \$1,100—the alleged value of the wood—sufficiently shows plaintiff's ownership of the wood. *Halleck v. Mixer*, 16 Cal. 577.

41. The complaint here, averring that the plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action—though it is subject to other objections. The complaint should state the death of F.; his leaving a last will and testament; the appointment therein of the plaintiffs as executors; the probate of the will; the issuance of letters testamentary thereon to the plaintiffs; and their qualification and entry upon the discharge of their duties as executors. *Ib.* 579.

42. The executors had the right to institute the action under the general authority conferred upon them by the statute. No special authorization from the probate court is requisite in such cases. *Ib.* 580.

6. *Costs against an Administrator.*

43. Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been prosecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. 169.

7. *Of the Judgment against an Administrator.*

44. The only effect of a judgment against an administrator, upon any claim for money, shall be to establish the claim in the same manner as if it had been al-

lowed by the administrator and the probate court. *Belloc v. Rogers*, 9 Cal. 127.

45. A judgment by default may be taken against an administrator as well as any other party. *Chase v. Swain*, 9 Cal. 137; *Hentsch v. Porter*, 10 Cal. 562.

46. Under our system, a judgment against an administrator is little—if any—better than an allowance by him, and approval by the probate judge. *Wells v. Robinson*, 13 Cal. 143.

47. A decree of the probate court, ordering a claim to be paid, rendered on petition of the administrator, and without objection to him, is final and conclusive; and cannot be assailed collaterally nor directly on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

IV. AN EXECUTOR MAY BE A WITNESS TO THE EXECUTION OF A WILL.

48. An executor named in a will may be a witness to the execution of the will, when he is neither heir nor legatee. *Panaud v. Jones*, 1 Cal. 505.

V. POWERS OF AN ADMINISTRATOR.

49. When two executors are named in a will, both must ordinarily join in the execution of the powers conferred therein, but the testator may confer upon each of his executors all the power necessary, and he who first enters upon the administration shall proceed to its conclusion. *Panaud v. Jones*, 1 Cal. 511.

1. *May Assign a Judgment.*

50. An administrator of an estate in New York has the right to assign, for a valuable consideration, a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this State. *Low v. Burrows*, 12 Cal. 188.

Bill for an Account.

Locke, 4 Cal. 320; *Barnstead v. Empire Mining Co.* 5 Cal. 299.

9. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure, where, in consideration of outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor and speculations of every kind, for a certain period of time, although the parties may not have been technically partners. *Garr v. Redman*, 5 Cal. 576.

10. Nor is it misjoinder of causes of action to demand, in the same action, that defendants account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Ib.*

11. In an action against an agent for not accounting, a request to account and pay over must be alleged in the complaint and proven at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

12. Unless an account is asked for in a bill in equity, there is no error in refusing to order it; and if the prayer is for an account, the evidence must then warrant it. *Dominguez v. Dominguez*, 7 Cal. 427.

13. Where two shareholders in a joint stock company sold to the company goods to a large amount and afterwards, during the existence of the company, sold their stock to A, and assigned their account for such goods to B, who sued such company on said account by attachment: held, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained portion. *Bullard v. Kinney*, 10 Cal. 63.

14. M. & B., the plaintiffs, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back; B. agreeing to pay certain firm debts. The sale and agreement were afterward canceled, and B. sold M. one-half of the ranch. Defendant, Myers, agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase, O. and M. knew of B.'s title; held, that a bill in equity by B. against M., O. and Myers, for an account of the partnership

between M. & B., and for a decree establishing plaintiff's right to the half of the ranch, does not lie; that his remedy at law for his half of the ranch, against M. or any one claiming under him with notice of his title, is clear, and that M. would be estopped from disputing the title, and as M. makes no defense to the bill, it is good against him, for an account. *Brush v. Maydwell*, 4 Cal. 209.

15. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Collins v. Butler*, 14 Cal. 230.

16. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation until the further order of the court; collect money due or to become due on it; sell certain stock and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 148.

17. In a suit by a stockholder in a private corporation against the corporation and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business of the corporation: held, that this was error; that, although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet, as no fraud was shown, and as the superintendent had faithfully performed his duties as such, he was entitled to his salary. *Ib.* 149.

18. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the busi-

Accounts Stated.

ness in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all of the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. *Ib.* 151.

2. Reference.

19. An order setting aside the report of the referee appointed to take an account is merely interlocutory and not appealable before final judgment. *Johnston v. Dopkins*, 6 Cal. 84; *Baker v. Baker*, 10 Cal. 528.

20. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marziou v. Pioche*, 10 Cal. 546.

21. Where a party gets into possession of property, as a water-ditch, under a sheriff's suit on foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. It would be impracticable for a jury to settle the account, at least, without great delay and embarrassment. *Raun v. Reynolds*, 15 Cal. 470.

III. ACCOUNTS STATED.

22. Where accounts bear upon their face the words "audited and approved" and "certified to be correct:" held, that this is sufficient language to create them instruments in writing within the meaning of the statute, and not accounts. *Sannickson v. Brown*, 5 Cal. 57.

23. An account audited against the city

of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. *Knox v. Woods*, 8 Cal. 546.

24. An account in writing, examined and signed by the parties, will be deemed a stated account, notwithstanding it contains the ordinary preliminary clause that errors are excepted. *Branger v. Chevalier*, 9 Cal. 360.

25. Accounts stated may be opened and the whole account taken de novo for gross mistake in some cases, but this can only be done when the gross error affects all the items of the transaction. When the clear mistake affects only a portion of the items of the stated account it will be permitted to stand, except in so far as it can be impugned by the party alleging the error. *Ib.* 361.

26. Where D. had a running account with L. from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857, and D., within one year after the granting of letters of administration, commenced his suit on said account against the estate: held, that the suit was commenced in time. *Danglada v. De la Guerra*, 10 Cal. 386.

27. The notice of mechanics' lien, filed in the recorder's office, need not set out the items of the account; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient. *Heston v. Martin*, 11 Cal. 42; *Brennan v. Swazey*, 16 Cal. 142.

28. A complaint stating that defendant was justly indebted to plaintiff in several sums, found to be due from the defendant to the plaintiff on an account then stated between them, which defendant then promised to pay, and the sum is due and unpaid, sufficiently states a cause of action. *Dewitt v. Porter*, 13 Cal. 172.

29. Where, in suit on an account stated, the only evidence was that of a witness who said defendant, on presentation of the account, admitted it to be correct and promised to pay it, and the court charged the jury that, if they believed the testimony of the witness, they must find for plaintiff the amount claimed; and they so found: held, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry v. Sickles*, 13 Cal. 429.

What is a sufficient Acknowledgment.

30. To sustain an action on an account stated, it must be shown there was a demand in favor of plaintiff acceded to by defendant. And if defendant does not object to the accounts as presented within a reasonable time, his silence will be an admission of its correctness. *Ib.*

31. Evidence that the items of the account are overcharged is not admissible, the complaint being verified and the answer not averring fraud or mistake in the accounting. *Ib.* 430.

ACCOUNT BOOKS.

1. A private account book of the plaintiff, kept by himself and containing only an account of money paid, is not evidence to charge the defendant. *Collin v. Card*, 2 Cal. 422.

2. Where the plaintiff to a set-off of defendant, involved the question whether or not profits had been made by plaintiff's steamboat such account book is not evidence to sustain plaintiff's hypothesis. *Ib.*

3. Our statute authorizes the court to make an order directing a party to produce books and papers in court. *Barnstead v. Empire Mining Co.*, 5 Cal. 300.

4. The books of account kept in the office of an alcalde are admissible^e in evidence as a register of the acts of that officer belonging to the office, kept by his directions and handed over by each alcalde to his successor. *Kyburg v. Perkins*, 6 Cal. 675.

5. To entitle a book to the character of an official register it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper authority to be kept. *Ib.* 676.

6. The account book of a tradesman is not admissible to establish a charge for money loaned, but it may be to show that articles were procured for the defendant, which plaintiff paid for and charged as so much money loaned. *Le Franc v. Hewitt*, 7 Cal. 186.

7. An account book is not admissible to prove a single item only, yet where the evidence shows that defendant bought goods at various times, for which only one charge was entered after the order

was filled, it seems that the account book is admissible. *Ib.*

8. In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books; and had no clerk—the book was sufficiently proved to be admitted in evidence. *Landis v. Turner*, 14 Cal. 574.

9. And being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and of their value, and of the specific materials furnished and their price; it not appearing that any higher evidence was attainable. *Ib.* 575.

10. The fact that the charges are first made on a slate and then transferred to the book does not affect the character of the book as one of original entries—the charges on the slate being mere memoranda, not intended to be permanent. *Ib.*

11. But the transfer must not be long delayed, otherwise the book will be rejected, unless the delay be satisfactorily explained. A delay of three days is not unreasonable. *Ib.* 576.

ACKNOWLEDGMENT.*

I. What is sufficient.

1. The purpose of an Acknowledgment.
2. Who may take an Acknowledgment.

II. Defective Acknowledgments.

1. Seal.
2. Damages.
3. Amendment.

III. Acknowledgment of a Married Woman.

* The statute of 1860, p. 179, authorizes a defective acknowledgment to be corrected by proceedings before the county judge; and the statute of 1860, p. 357, makes defective acknowledgments notice hereafter, the same as if the defect did not exist, so far as not to impair the obligations of contracts.

What is a sufficient Acknowledgment.—Who may take an Acknowledgment.

I. WHAT IS SUFFICIENT.

1. Where the officer certifies that the parties "were known" to him, the word "personally" is not necessary. *Hopkins v. Delaney*, 8 Cal. 87; *Welch v. Sullivan*, 8 Cal. 187, 512; *Henderson v. Grewell*, 8 Cal. 584.

2. The officer must state in his certificate the fact of acknowledgment. Although a man may not execute the instrument freely, in point of fact, yet if he make the acknowledgment properly he is afterwards estopped to deny it, as against subsequent innocent parties.—*Bryan v. Ramires*, 8 Cal. 466; *Henderson v. Grewell*, 8 Cal. 584.

3. An acknowledgment that a party executed the instrument "freely and voluntarily" is not essential, but the voluntary execution of the instrument must be presumed from the fact that he acknowledged that he "executed the same." *Henderson v. Grewell*, 8 Cal. 584.

4. The words "described in and who executed," are not essential in the acknowledgment. *Ib.*

5. Where to a certificate of proof by a subscribing witness, acknowledging the execution of an instrument, the witness adds his signature, and the officer adds the usual jurat to the affidavit, such additions do not vitiate the certificate if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage. *Whitney v. Arnold*, 10 Cal. 533.

6. A certificate of acknowledgment by a subscribing witness which shows the identity of the witness produced with the person whose name is subscribed as a witness to the conveyance, such identity resting in the personal knowledge of the officer, and sets forth the proof of the execution, and "that the witness, whose name is subscribed to such conveyance as a party thereto," executed the same—which is equivalent to the words, "is the person who executed the same"—in the presence of the witness, who thereupon became a subscribing witness, is amply sufficient. *Ib.*

7. In acknowledgments to deeds, substantial conformity with the statute is sufficient. *Goode v. Smith*, 13 Cal. 83.

8. Where a deed has attached to it

certificates of acknowledgment made at the Hawaiian Islands, the one by a person who describes himself, in the body of the certificate, as "the principal notary public" of the Islands, and affixes to his signature a similar designation of his official character, with his notarial seal; and the other by a person who describes himself, in the body of his certificate, as "the vice consul of the United States of America, at Honolulu, Hawaiian Islands," and affixes to his signature the designation of his official character as "U. S. Vice Consul," and the consular seal: held, that the execution of the deed was prima facie sufficiently proved to be admitted in evidence; that the persons before whom the acknowledgments purported to have been made were shown to be the officers they represent themselves to be, and were authorized to take the acknowledgments. *Mott v. Smith*, 16 Cal. 552.

9. The general designation in the fourth section of the Act of April 16th, 1850, as to conveyances of any notary public or any consul of the United States, embraces notaries and consuls of every grade—whether principal or inferior notary, or consul general or vice consul. *Ib.*

10. The certificates of a notary public or United States consul, of acknowledgment of a deed, are prima facie evidence of the official character of the person by whom they are given. *Ib.*

11. In the United States, certificates of the proof and acknowledgment of deeds, executed in foreign jurisdiction, are generally received as prima facie evidence of both the character of the officers and the genuineness of their signatures. *Ib.*

1. The purpose of an Acknowledgment.

12. The purpose of a certificate of acknowledgment is to entitle the instrument to be recorded and to be admitted in evidence without further proof. *Fogarty v. Finlay*, 10 Cal. 245.

2. Who may take an Acknowledgment.

13. The city recorder of San Francisco was authorized by law to take an acknowl-

Defective Acknowledgments. — Seal. — Damages.

edgment of a conveyance by express authority of the statute. *Hopkins v. Delaney*, 8 Cal. 87.

14. The certificate of acknowledgment of a notary public to a deed is not an act in pais, which he may exercise by virtue of his office at any time while in office. *Bours v. Zachariah*, 11 Cal. 292.

II. DEFECTIVE ACKNOWLEDGMENTS.

15. A power of attorney acknowledged before a notary public in New York city, who is not authorized by our statute to take such acknowledgments is insufficient. *Lord v. Sherman*, 2 Cal. 501.

16. The supreme court of the United States has decided that there was no constitutional prohibition upon States passing laws confirming all defective acknowledgments of conveyances, unless they impaired the obligation of the contracts. *Smith v. Morse*, 2 Cal. 545.

17. A certificate of acknowledgment of a deed, in the words "Before me personally appeared A B, to be the individual, &c." is bad, and the record of the conveyance on such a certificate imparts no notice to third parties. The omission might as well be supplied by the words "claiming" or "representing," as by "known" or "proved." There is no averment that the party making the acknowledgment is the person who executed it upon the personal knowledge of the officer. *Wolf v. Fogarty*, 6 Cal. 225; *Kelsey v. Dunlap*, 7 Cal. 162; *Henderson v. Grewell*, 8 Cal. 584; *Fogarty v. Finlay*, 10 Cal. 244.

18. Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to state in his certificate that the party acknowledging the same was known to him, or was identified by the testimony of a witness examined by him for that purpose: held, that such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damages resulting from such negligence. *Fogarty v. Finlay*, 10 Cal. 246.

1. Seal.

19. Although an acknowledgment may

be defective in not having the seal of the officer taking it, so as to deprive it of registration, yet this does not make the deed void; it merely affects its notice to third parties. *Hastings v. Vaughn*, 5 Cal. 319.

20. An objection that a county clerk has no power to make an acknowledgment because he has no seal of office, is too narrow a construction of the statute. The court of which he is clerk is entitled to a seal, and that is sufficient. His power does not depend upon the fact of his having procured a seal, or the care with which he preserved it. *Ingoldsby v. Juan*, 12 Cal. 580.

21. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 23d, 1852, is good under the statute then in force. *Stark v. Barrett*, 15 Cal. 372.

22. A certified copy of a deed from the county recorder's office, contained in the margin of the *acknowledgment* taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No Seal]—the conclusion of the acknowledgment being "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

23. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

2. Damages.

24. If a notary does not faithfully perform his duty, but is guilty of gross and culpable negligence, in taking an acknowledgment, he is responsible to the party injured for the damages resulting from his negligence. *Fogarty v. Finlay*, 10 Cal. 245.

Amendment.—Acknowledgment of a Married Woman.

25. A neglect to complete the certificate of acknowledgment is not excused by the fact that the certificate had been partially filled by the attorney for the grantee. The certificate upon its face is unfinished; the date and the name of the grantor had been inserted, leaving it for the notary to insert his knowledge or the evidence received of the identity of the party making the acknowledgment. *Ib.*

26. If the notary read the certificate before signing it, this omission must have been known to him; if he did not, he is equally guilty of negligence, for an officer who affixes his official signature and seal to a document, thereby giving to it the character of evidence, without examining it to find whether the facts certified are true, can scarcely be said faithfully to perform his duty according to law. *Ib.*

3. Amendment.

27. A notary derives his power from the statute. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is to take an acknowledgment, and certify it, as parts of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. He has no power to amend his return afterwards. *Bours v. Zachariah*, 11 Cal. 292.

III. ACKNOWLEDGMENT OF A MARRIED WOMAN.

28. The acknowledgment is a necessary part of a conveyance of real estate by a married woman; up to the last moment she may retract the execution of the deed. *Selover v. American Russian Comm. Co.*, 7 Cal. 275.

29. It is not in the power of a court of equity to compel a married woman to correct an insufficient acknowledgment. *Barrett v. Tewksbury*, 9 Cal. 15.

30. In the acknowledgment of a married woman to a deed, there must be a

privy examination. *Kendall v. Miller*, 9 Cal. 592.

31. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a justice of the supreme court, judge of a district court, county judge, or notary public. *Kendall v. Miller*, 9 Cal. 592; see *Goode v. Smith*, 13 Cal. 84, post.

32. The certificate of an acknowledgment of a married woman to a deed must state that the contents of the deed were explained to her; otherwise it is defective, and will not pass her interest in the estate. *Pease v. Barbiers*, 10 Cal. 440.

33. Under our law, no presumption of knowledge of the contents of an instrument, on the part of a married woman, arises from the fact of executing and acknowledging it; the contents must be made known to her. *Ib.*

34. The words "undue influence" being omitted in the acknowledgment of a wife does not render it invalid. *Goode v. Smith*, 13 Cal. 84.

35. A justice of the peace can take the acknowledgment of a wife to a deed as well as a notary, and there is no good reason why he should not. *Ib.*

36. When an acknowledgment is defective in any substantial particular, the femme's title did not pass. *Morrison v. Wilson*, 13 Cal. 498.

37. Where the jury and court are satisfied that the wife understood English, at the time of executing and acknowledging a note and mortgage upon the homestead, there was no necessity for an interpreter to explain the contents of the mortgage. *Pfeiffer v. Riehn*, 13 Cal. 647.

38. To the efficacy of a conveyance of her real estate by a married woman, it is essential that she should join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him, or compulsion, or undue influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another. *Mott v. Smith*, 16 Cal. 556.

See ADMISSION, CONVEYANCE, DEED, MORTGAGE, NOTARY.

Acquittal.—When an Action will Lie.

ACQUITTAL.

1. The defendant was convicted of manslaughter upon an indictment charging murder, which verdict was set aside: held, that on a second trial the defendant can plead the former conviction of manslaughter as an acquittal of the crime of murder, and can only be retried for manslaughter. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

2. Accessories may, by the act of this State, be indicted and tried with the principal, or separately, and either may be convicted or acquitted without reference to the previous conviction or acquittal of the other. *People v. Bearss*, 10 Cal. 69.

See CRIMINAL LAW.

ACTIONS.

I. When an Action will Lie.

II. Form of Actions.

1. Under the Code.
2. A Party is bound by his Action.
3. Consolidation of Actions.
4. By or against whom Actions will Lie.
 - (a.) By whom.
 - (b.) Against whom.
5. When Assignable.
6. Process.

I. WHEN AN ACTION WILL LIE.

1. An action cannot be maintained against A to recover damages for a trespass to real estate committed by B. *Lick v. Stevenson*, 1 Cal. 129.

2. Where a contract is made to convey land by a quit claim deed at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

3. An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, cannot be sustained.

Board of Health v. Pacific Mail S. S. Co., 1 Cal. 198.

4. A possessory action cannot be maintained under Mexican law by a person who has acquired his titles subsequent to the intrusion complained of. *Sunol v. Hepburn*, 1 Cal. 259.

5. The statute authorizing the granting of a license to keep a gambling house could not be construed as conferring a right of action to sue for a gaming debt, but protection solely against a criminal prosecution. *Bryant v. Mead*, 1 Cal. 444.

6. An action for debt will not lie against a keeper of a gaming table without license, to recover the amount of license; the only redress is by indictment. *People v. Craycroft*, 2 Cal. 244.

7. When new parties in interest are known to the plaintiff, it adds strength to his right of a new action after judgment had. *Truebody v. Jacobson*, 2 Cal. 283.

8. After the purchase of property by plaintiff at sheriff's sale, he has a right to sue for possession. And the discovery of a fraud after suit brought, would entitle him so to shape his action as to include it, for the consideration of the court. *Ib.* 284.

9. The district attorney may at any time after the adjournment of the term of the court maintain an action on a recognizance declared forfeited, and proceed against the bail. *People v. Carpenter*, 7 Cal. 403.

10. A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

11. There is nothing in our statute which divests the right to maintain an action on a judgment at law. *Ames v. Hoy*, 12 Cal. 19; *Stuart v. Lander*, 16 Cal. 375.

12. An action can be maintained at law upon a decree in equity for a specific sum of money, whenever a sum liquidated and made definite by contract or judgment is recoverable. *Ames v. Hoy*, 12 Cal. 20.

13. Where the owner of a lot neglects for three days after notice from the superintendent of public streets of said city to repair the street in front of his lot, as re-

Form of Actions.—A Party is bound by his Action.—Consolidation of Actions.

quired by statute, the superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount. *Hart v. Gavin*, 12 Cal. 478.

14. Relief from a judgment against an insolvent may be by motion to discharge it, unless there be suspicion of fraud in the release of the insolvent. No formal action is necessary. *Imlay v. Carpentier*, 13 Cal. 177.

II. FORM OF ACTIONS.

1. Under the Code.

15. The code provides that there shall be but one form of civil action, but it does not intend to abolish all distinctions between law and equity as to actions. The innovation extends only to the form of action and the pleadings, while the technicalities of pleading have been dispensed with. *Dewitt v. Hays*, 2 Cal. 468; *Payne v. Treadwell*, 16 Cal. 243.

16. The distinction in the form of actions *ex delicto* and *ex contractu* was abolished by statute, but the general principles which govern such actions are retained. *Lubert v. Chauviteau*, 3 Cal. 463.

17. When personal property is tortuously taken, the party aggrieved may waive the action in tort, and sue in *assumpsit* for the value of the property. *Fratt v. Clark*, 12 Cal. 90.

18. An action to recover a judgment against an administrator, for money embezzled by his intestate, pending which a bill in equity was filed to recover the property bought with the money, and prosecuted to a decree after judgment was taken at law for the amount, evidences no such distinct and deliberate choice to take the general claim on the estate for money, in lieu of the claim on this property, as to bar plaintiff from prosecuting his equitable claim. *Wells v. Robinson*, 12 Cal. 142.

19. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs, and expenses to be shared *pro rata*, and afterwards prosecuted both claims to judgment in his own name, and in his own

name bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable for money had and received, or in *indebitatus assumpsit*. *Herrick v. Hodges*, 13 Cal. 433.

20. A suit to enforce a particular lien, under the act, is a proceeding to enforce all the liens against the property. And an intervention in a suit already pending, if filed within six months, is as much a compliance with the act as an original suit. *Mars v. McKay*, 14 Cal. 129.

21. Proceedings for the settlement of an estate and matters connected therewith are not civil actions within the meaning of sections 18 to 20 of the civil code. *Estate of Scott*, 15 Cal. 221.

See COMPLAINT, PLEADINGS.

2. A Party is bound by his Action.

22. If an action be improperly commenced, the party bringing it having obtained the benefit, cannot avoid the responsibility he may have thus incurred by pleading his own misfeasance. *Turner v. Billagram*, 2 Cal. 522.

3. Consolidation of Actions.

23. The law will not tolerate a division of a joint right of action into several actions. *Nightingale v. Scannell*, 6 Cal. 509.

24. A defendant shall not be harassed with several suits for the same matter at the same time; the pendency of one suit may be pleaded in abatement of the other. *Seligman v. Kalkman*, 8 Cal. 216.

25. It often happens that a party has his election to pursue one of two or more remedies, but he should not pursue several at one and the same time. *Ib.* 217.

26. A creditor has not the right to assign a debt in parcels, and thus by splitting up the cause of action, subject the debtor to the costs and expenses of more suits than the parties originally contemplated. *Marziou v. Pioche*, 8 Cal. 536.

By whom.—Against whom.—When Assignable.—Process.

4. *By or against whom Actions will lie.*

(a.) *By whom.*

27. One copartner cannot sue another unless by bill for a dissolution, praying for an account. *Russell v. Ford*, 2 Cal. 87; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 3 Cal. 292; *Nugent v. Locke*, 4 Cal. 320; *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

28. An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former for money or property, upon an alleged obligation; but the defendant has his rights to any provisional remedy in law. *King v. Hall*, 5 Cal. 84.

29. The right of a member of an incorporated company to sue a corporation is undoubted. *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

30. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Park v. Killam*, 8 Cal. 79.

31. Where two persons are employed by the claimants of a tract of land under Mexican title, as agents to procure the confirmation of the grant, and services are rendered and expenses incurred by the agents: held, that such services and expenses are individual in their character and not joint, and that separate actions may be maintained by such agents for their expenses thus incurred. *Conner v. Hutchinson*, 12 Cal. 127.

32. An action brought by an agent in his own name for a trespass in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

33. An alien friend may sue an American in the consular courts of China, established there under the treaty of 1844. *Forbes v. Scannell*, 13 Cal. 283.

34. An action upon a duty due by an auctioneer to the State, under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of

the State. *State v. Poulterer*, 16 Cal. 532.

35. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the probate court is necessary in such cases. *Hallock v. Mixer*, 16 Cal. 579.

(b.) *Against whom.*

36. A county government* is a portion of the State government, and as there is no remedy against the State, there can be none against the county. *Hunsacker v. Borden*, 5 Cal. 290.

37. A party cannot be imprisoned under a judgment in a civil action for assault and battery. *Ex parte Prader*, 6 Cal. 240.

38. Counties are quasi corporations, *and can sue and be sued, according to the act of May 11th, 1854. *Price v. Sacramento County*, 6 Cal. 255; *Tuolumne County v. Stanislaus County*, 6 Cal. 442; *Gilman v. Contra Costa County*, 6 Cal. 677; 8 Cal. 57; *Placer County v. Astin*, 8 Cal. 305.

39. In the absence of any statute to that effect, the State cannot be sued, and the judgment against her is erroneous. *People v. Talmage*, 6 Cal. 258.

See DEFENDANT, PARTIES, PLAINTIFF.

5. *When Assignable.*

40. A cause of action arising out of a tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456.

6. *Process.*

41. Mere cognizance of the existence of an action is not notice in a legal sense. The notice must apprise the party whose rights are to be affected of what is required of him, and the consequences

* The opinion in *Hunsacker v. Borden*, 5 Cal. 290, has become abrogated by the act of May 11th, 1854, Statutes, p. 194, enabling a county to sue or be sued, which act has received judicial construction in *Price v. Sacramento County*, 6 Cal. 255, and other cases.

Actions, Joinder of.

which may follow if he neglect to defend the action. *Peabody v. Phelps*, 9 Cal. 226.

42. To support a plea in abatement founded on the pendency of a prior action, it is necessary that process issue in such former action, or that there be an appearance such as would waive the issuance of process. *Conger v. Weaver*, 10 Cal. 238; *Primm v. Gray*, 10 Cal. 522.

43. Where a complaint was filed on the thirtieth day of October, 1856, and no summons was issued thereon, and an amended complaint was filed on the twenty-sixth of January, 1857, and summons issued thereon: held, that the action was not commenced until the issuing of the summons. *Green v. Jackson W. Co.*, 10 Cal. 375.

See SUMMONS.

ACTIONS, JOINDER OF.

1. If several causes of action are improperly united in the same action, the objection must be taken by demurrer or it will be deemed to be waived, and the action will be sustained. *Macondray v. Simmons*, 1 Cal. 395; *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Clark v. Boyreau*, 14 Cal. 638.

2. A contract contained a covenant for stipulated damages, and by the same contract the parties were constituted partners: it was held, that in an action on said contract the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

3. In a complaint for trespass, the plaintiff in one count claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages: it was held, that these causes of action were properly joined. *Tendesen v. Marshall*, 3 Cal. 440.

4. A claim for damages for a personal tort cannot properly be united in an action with a demand cognizable in equity. *Mayo v. Madden*, 4 Cal. 28.*

5. A claim for possession of real property, with damages for its detention, can-

not be joined with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike Co.*, 5 Cal. 225.

6. It is not misjoinder of causes of action to demand in the same action that defendant account for and refund a proportion of the outfit and advances made by plaintiff, as agreed in the same contract. *Garr v. Redman*, 6 Cal. 576.

7. A party may declare in tort, under our pleadings, and at the same time ask for the equitable interposition of the court to protect the subject matter in litigation until the cause is heard. *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237.

8. A complaint which joins an action of "trespass quare clausum fregit," ejectment and prayer for relief in chancery will be held bad on demurrer. To sustain such complaint would be subversive of all the rules of pleading. *Bigelow v. Gove*, 7 Cal. 135.

9. It is not necessary, in an action against a sheriff to recover damages (in addition to the \$200 imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 9 Cal. 642.

10. An action at law which prays for a judgment against the party who executed the note sued upon may be joined with an equitable demand to foreclose a mortgage given by that party and his wife to secure the payment of the note. *Rollins v. Forbes*, 10 Cal. 300; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Rowland v. Lieby*, 14 Cal. 157.

11. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears Union Water Co.*, 12 Cal. 557.

12. The union in one count of a complaint, of an allegation that defendants have wrongfully built dams and flumes across Mormon Creek, so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff,

* In the opinion of *Gates v. Kieff*, 7 Cal. 126, the court stated that the case of *Mayo v. Madden*, 4 Cal. 28, was not analogous.

Adjournment.

with an allegation that "defendants have constructed gates, etc., in their said dams and flumes, which they hoist for the purpose of cleaning out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 27.

13. Common counts cannot all be united in one count, as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 147.

14. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 548.

15. Though the prayer, or one of the prayers, may indicate a distinct cause of action against one defendant, yet it is immaterial if the allegations of the complaint, taking them all together, make no homogeneous case as against all the defendants. *De Leon v. Higuera*, 15 Cal. 495.

16. Complaint avers in substance that defendant made his note, etc., setting out a copy; that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc. * * * defendant, by virtue of * * * proceedings in insolvency, etc. * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc.: held, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 502.

17. An objection that one of two counts

in a complaint is an equitable cause of action, and should not be tried by jury, must be taken at the time, and cannot be urged on appeal if not so taken. *Baker v. Joseph*, 16 Cal. 177.

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ADJOURNMENT.

1. A judgment rendered by a district court after the time appointed for the adjournment of the term is invalid, and will be set aside as void. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

2. After the adjournment of the term no power remains in the court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kramer*, 2 Cal. 583; *Morrison v. Dapman*, 4 Cal. 257; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

3. The fact that the court was adjourned, though not for the term, at the time set for the hearing of objections of creditors to an insolvent's discharge, and that the hearing took place before the judge at chambers, is no valid objection to the discharge. *Clarke v. Ray*, 6 Cal. 604.

4. A judgment rendered by a district court after the time appointed for the adjournment of the term may be set aside, if there has been no service of summons upon the defendants. *Carpentier v. Hart*, 5 Cal. 407; *Pico v. Carillo*, 7 Cal. 32; *Shaw v. McGregor*, 8 Cal. 521.

5. A district attorney may at any time after the adjournment of the term of the court at which the recognizance is declared forfeited, proceed against the bail. *People v. Carpenter*, 7 Cal. 403.

6. While the term lasts, the court has power to amend the record. After the term had passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 173.

See CONTINUANCE.

## ADMINISTRATORS AND EXECUTORS.

- I. Jurisdiction of an Administrator.
  1. Resignation or Removal of an Administrator.
  2. Who may Administer.
- II. Fees of an Administrator.
- III. Actions by or against Administrators.
  1. By an Administrator.
  2. When the Administrator is a necessary Party Plaintiff.
  3. Against an Administrator.
  4. When an Administrator is a Necessary Party Defendant.
  5. Of the Pleadings.
  6. Of the Costs against an Administrator.
  7. Of the Judgment against an Administrator.
- IV. An Executor may be a Witness to the Execution of a Will.
- V. Powers of an Administrator.
  1. May Assign a Judgment.
  2. Liabilities of an Administrator.
- VI. Inventory of an Estate.
- VII. Claims against an Estate.
- VIII. Liens against Property in the hands of an Administrator.
- IX. Property in the hands of an Administrator.
- X. Sales by an Administrator.
- XI. Final Account of an Administrator.

## I. JURISDICTION OF ADMINISTRATION.

1. Two jurisdictional facts must exist to support administration in every case; first, the death of the party; second, his residence within the county at the time of his death. They must be alleged in the petition and be true in point of fact. *Beckett v. Selover*, 7 Cal. 233; *Haynes v. Weeks*, 10 Cal. 118.

2. To vest the incoming administrator with title to an estate, there must be a grant of letters of administration to him; the mere handing over of the papers by the old administrator to the new is insufficient. *Rogers v. Hoberlein*, 11 Cal. 129.

## 1. Resignation or Removal of an Administrator.

3. Where the administrator resigns, leaving the administration incomplete, there is no final rule of compensation. The probate court should apportion it in

reference to the compensation fixed by law for the whole, according to sound discretion. *Ord v. Little*, 3 Cal. 389.

4. The compensation allowed by law to executors upon the whole value of the estate, both real and personal, only applies when the administration is complete and the estate is finally settled. *Ib.*

5. An administrator resigned and appeared in court to have a final settlement of his accounts. The judge found him indebted to the estate in a large sum, and ordered him to pay it into court. Upon his refusal, he was prosecuted on his bond: held, the action does not lie, as the order was illegal, and he was not bound to pay the money into court. *Wilson v. Hernandez*, 5 Cal. 443.

6. The probate judge, as the general supervisor and guardian of the estates of deceased persons, has power by law to suspend or remove an administrator whenever he has reason to believe, either from his own knowledge or from credible information, that such administrator has fraudulently wasted or mismanaged the estate, or is about to do so, or has become incompetent to manage it. An appellate court should not interfere with the order, except in case of gross abuse of discretion. *Deck's Estate v. Gherke*, 6 Cal. 669.

7. The fair inference to be drawn from the act regulating estates of deceased persons is, that the permission given an executor or administrator to resign in the one case specified is a negative of such right in all others. *Haynes v. Weeks*, 10 Cal. 116.

8. Where an administrator filed in the probate court his resignation, and on the same day the court made an order reciting that the administrator had filed his resignation and required him to turn over the effects of the estate to and settle with the public administrator, and when such settlement should be fully made the administrator and his sureties be released, and where no final settlement was made: held, that such act was an acceptance, on the part of the court, of such resignation. *Ib.* 118.

## 2. Who may Administer.

9. The statute provides that any other of the next of kin who would be entitled

## Fees of an Administrator.—Actions by or against Administrators.

to share in the distribution of the estate shall be entitled to administer, it must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there be no nearer kindred. *Anderson v. Potter*, 5 Cal. 64.

10. The brother of deceased being entitled to letters of administration on the estate, gave D., a stranger, a writing, requesting the court to appoint him administrator. D. applied for letters, annexing to his petition said writing. At the hearing, the brother asked leave to withdraw the writing, opposed the appointment of D., and prayed letters to himself: held, that the brother waived his right, and that, having encouraged D. to go to the expense and trouble of applying for letters of administration, he is estopped from withdrawing his assent and waiver, or renunciation. *Estate of Kirtlan*, 16 Cal. 165.

11. The mere fact that one is not of kin to the deceased does not incapacitate him to hold the office of administrator. A stranger is legally competent, though the other parties named in the fifty-second section of the act concerning the estates of deceased persons are entitled to priority. *Ib.*

12. The sixty-sixth section of that act does not restrict the power of appointment given in the fifty-second section. The object of this section—the sixty-sixth—authorizing the appointment of some competent person at the request of the person entitled, to be joined with such person, was to allow those entitled to letters the aid of others more competent. *Ib.*

13. The proviso in the fifty-second section of the act to regulate the settlement of the estates of deceased persons, as amended by the act of April 23d, 1855, extends to all the classes of persons designated in the section, and is not limited to persons embraced within the tenth class; and a surviving partner, though a brother, where the partnership existed at the time of the death of the intestate, cannot be administrator. *Cornell v. Gallaher*, 16 Cal. 367.

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## II. FEES OF AN ADMINISTRATOR.

14. Where the administrator resigns, leaving the administration incomplete, there is no fixed value of compensation. The probate court should apportion it in reference to the compensation fixed by

law for the whole, according to sound discretion. *Ord v. Little*, 3 Cal. 389.

15. The compensation allowed by law to executors upon the whole value of the estate, both real and personal, only applies when the administration is complete, and the estate is finally settled. *Ib.*

16. An administrator being compelled by law to hold, protect and guard funds coming into his hands, which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his commissions thereon. *Wells v. Robinson*, 13 Cal. 143.

## III. ACTIONS BY OR AGAINST ADMINISTRATORS.

1. *By an Administrator.*

17. The common council of Sacramento by resolution made an appropriation to the mayor of the city of \$10,000, reciting meritorious services (but such as were within his official duty) as the consideration, which was exclusive of his salary, which was regularly paid. The mayor died the day the appropriation was passed, and did not accept it formally: held, that the appropriation could not be recovered in action at law by the administrator.—*Heslep v. City of Sacramento*, 2 Cal. 581.

18. There is no authority for prosecuting the cause in the name of a deceased person; all proceedings ought to be stayed until, by suggestion, his executor or administrator was made a party. *Sanchez v. Roach*, 5 Cal. 248.

19. An administrator, by our statute, being entitled to possession of the real estate of the deceased, may maintain ejectment; and where the complaint avers title in the administrator, a default admits it. *Curtis v. Herrick*, 14 Cal. 119.

20. In suit by an administrator against defendant, for conversion of the property of the estate under the one hundred and sixteenth section of the statute to regulate the settlement of estates, the proof as to the right title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Beckman v. Geddes*, 14 Cal. 252.



## When the Administrator is a Necessary Party.

## 2. When the Administrator is a necessary Party Plaintiff.

21. In this State all property of the deceased, real and personal, remains in the possession of the administrator until administration of the estate is had, or a decree of distribution is made by the probate court. The administrator until then is the proper party plaintiff in a suit to quiet title to the estate. *Curtis v. Sutter*, 15 Cal. 264.

## 3. Against an Administrator.

22. The general right to sue an administrator was taken away by the statute, except in case of presentation and rejection of the account, and the declaration should have set out the exception. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 558.

23. Executors who have entered into and possessed a leasehold estate, of which their testator was assignee, are liable for the rents accruing during the possession, as assignees de bonis propriis. (Obiter.) *Smiley v. Van Winkle*, 6 Cal. 606.

24. Where an administrator is sued in equity by the people, to compel him to pay over to the county treasurer money collected by the intestate as tax collector: held, that he occupied the position of one who takes possession, without authority, of property belonging to another, and that he may be treated as a trustee de son tort. *People v. Houghtaling*, 7 Cal. 352; *Gunter v. Janes*, 9 Cal. 658.

25. Where the adverse possession of the defendant was wrongful in the beginning, its character is not changed by the act of plaintiff, consenting to the appointment of defendant as administrator of the estate upon which he is trespassing. *Taylor v. Woodward*, 10 Cal. 92.

26. M., a married woman, had a sum of money left her by bequest during coverture; she and her husband joined in a power of attorney to O., authorizing him to demand and receipt for the money, which he did, and the husband then died. M. brought suit for the money: held, that it was the separate property of M., and

when O. received it, he did so as trustee of M., and it could not be charged with money advanced to the husband, and a settlement thereof with the administrator of her husband could not have any effect on M.'s rights, although these defenses were set up. *Dickinson v. Owen*, 11 Cal. 75.

27. A was indebted upon a note and mortgage to B in the sum of \$40,000. B assigned the note and mortgage to C, and received from him his notes in lieu thereof. Afterwards A mortgaged to C, together with other property, the property previously mortgaged to B, subject to the first mortgage, for which C was to advance to A, from time to time, sums of money not to exceed \$12,000, to enable A to pay his debts. By this mortgage C was authorized to receive the rents of the mortgaged premises, and apply them to the payment of the \$12,000 and interest, and in case the rents should not be sufficient for that purpose, and A should not pay within two months after request, then C was to sell, and out of the proceeds pay the amount and interest so advanced. C at various times advanced to A nearly \$12,000, and collected rents to the amount of \$28,000. Subsequently C died, and his executor collected the rents: held, in an action by A against C's administrator, that C acted in the purchase of the note and mortgage of B, as an agent of A, and that A was entitled to the trust fund. *Gunter v. Janes*, 9 Cal. 658.

## 4. When an Administrator is a necessary Party Defendant.

28. In cases of joint and several contracts, an administrator cannot be joined with the survivor; for one is charged de bonis testatoris and the other de bonis propriis. *Humphreys v. Crane*, 5 Cal. 176; *May v. Hanson*, 6 Cal. 643.

29. Where the plaintiff, in an action to foreclose a mortgage against a party who has died since the service of the summons and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the action. *Belloc v. Rogers*, 9 Cal.

## Of the Pleadings.

125; *Hentsch v. Porter*, 10 Cal. 559; (limited in *Cowell v. Buckelew*, 14 Cal. 642).

30. All the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of the administrator, who is therefore a necessary party to all suits affecting it. *Beckett v. Selover*, 7 Cal. 215; *Harwood v. Marye*, 8 Cal. 580; *Haynes v. Meeks*, 10 Cal. 120.

31. A demand that a mortgagee be subrogated to rights under a prior mortgage, for the satisfaction of which a part of his mortgage was taken, is not a claim in the sense of the statute against the estate of the deceased person. The administrator is a proper party for the purpose of liquidating the amount of the indebtedness. *Carr v. Caldwell*, 10 Cal. 385.

## 5. Of the Pleadings.

32. Where, in an action against an administrator, the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary under the statute that the administrator should deny the signature of the intestate on oath. It must be proven. *Heath v. Lent*, 1 Cal. 411.

33. In an action against an administrator the court should, if asked, charge the jury as to the statute time within which the action could be brought, when the claim is rejected. *Benedict v. Hoggin*, 2 Cal. 386.

34. A person who was not a party to a settlement by an administrator in the probate court, may disregard the settlement, and file his bill in chancery to compel him to account. *Clarke v. Perry*, 5 Cal. 60; *Belloc v. Rogers*, 9 Cal. 129; *Deck's Estate v. Gherke*, 12 Cal. 438.

35. The failure of a party to aver in his complaint that he has presented his claim for allowance to the administrator, is a matter of avoidance in an action on the claim, only to be taken advantage of by plea, and it is still in its nature and effect nothing more than a matter of abatement. *Ellissen v. Halleck*, 6 Cal. 363; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 560.

36. Though the defendant is described in the caption of the complaint as admin-

istrator, but the facts stated in the body of the complaint show that he is not sought to be charged as administrator: held, that it is not an action against him in his representative capacity. *People v. Houghaling*, 7 Cal. 350.

37. Where plaintiff in a justice's suit avers he is the administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 599.

38. Bill filed by a judgment creditor of J., upon order of court permitting it, against defendants as executors. Bill avers that the will of deceased "directed by written or oral instructions" the executors to sell certain cattle and retain the proceeds for the use and benefit of J., after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions, when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: held, that a demurrer was properly sustained; that a pleading must be taken most strongly against a pleader, and that there is no law giving effect to an oral instruction of a testator as a will, or a part of a will, and that the creditor of J. can have no more rights than J. himself. *Sparks v. De La Guerra*, 14 Cal. 111.

39. At most, J. is only a legatee, and the executors of the trustees of the legacy. And the bill, not stating that the estate is settled, nor that the property or the money is not necessary to pay off debts or expenses of administration, nor that J. would be entitled before final settlement to his legacy without tendering a refunding bond, cannot be maintained. *Sparks v. De La Guerra*, 14 Cal. 112.

40. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon to the amount of about three hundred cords; that the defendant afterwards



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An Executor may be a Witness to the Execution of a Will.

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also entered upon the premises, without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refused to deliver it to them, to their damage of \$1,100—the alleged value of the wood—sufficiently shows plaintiff's ownership of the wood. *Halleck v. Mixer*, 16 Cal. 577.

41. The complaint here, averring that the plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have been ever since in the possession of the premises, is not demurrable on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action—though it is subject to other objections. The complaint should state the death of F.; his leaving a last will and testament; the appointment therein of the plaintiffs as executors; the probate of the will; the issuance of letters testamentary thereon to the plaintiffs; and their qualification and entry upon the discharge of their duties as executors. *Ib.* 579.

42. The executors had the right to institute the action under the general authority conferred upon them by the statute. No special authorization from the probate court is requisite in such cases. *Ib.* 580.

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6. *Costs against an Administrator.*

43. Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been prosecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. 169.

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7. *Of the Judgment against an Administrator.*

44. The only effect of a judgment against an administrator, upon any claim for money, shall be to establish the claim in the same manner as if it had been al-

lowed by the administrator and the probate court. *Belloc v. Rogers*, 9 Cal. 127.

45. A judgment by default may be taken against an administrator as well as any other party. *Chase v. Swain*, 9 Cal. 137; *Hentsch v. Porter*, 10 Cal. 562.

46. Under our system, a judgment against an administrator is little—if any—better than an allowance by him, and approval by the probate judge. *Wells v. Robinson*, 13 Cal. 143.

47. A decree of the probate court, ordering a claim to be paid, rendered on petition of the administrator, and without objection to him, is final and conclusive; and cannot be assailed collaterally nor directly on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

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IV. AN EXECUTOR MAY BE A WITNESS TO THE EXECUTION OF A WILL.

48. An executor named in a will may be a witness to the execution of the will, when he is neither heir nor legatee. *Panaud v. Jones*, 1 Cal. 505.

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V. POWERS OF AN ADMINISTRATOR.

49. When two executors are named in a will, both must ordinarily join in the execution of the powers conferred therein, but the testator may confer upon each of his executors all the power necessary, and he who first enters upon the administration shall proceed to its conclusion. *Panaud v. Jones*, 1 Cal. 511.

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1. *May Assign a Judgment.*

50. An administrator of an estate in New York has the right to assign, for a valuable consideration, a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this State. *Low v. Burrows*, 12 Cal. 188.

## 2. *Liabilities of an Administrator.*

51. If the administrator undertakes to go beyond the strict line of his duty as the law defines it, he acts upon his own responsibility, and while he can receive no profit from a successful issue of his investment, he must bear the loss of a failure. *Estate of Knight*, 12 Cal. 207.

52. An administrator cannot pay out the money of the estate to remove an incumbrance from the property of the estate, which debt the estate is in no way responsible for, upon the notion that the property may increase in value, and thereby speculate for the estate. *Ib.*

53. The administrator, in the absence of special authority, must administer the estate as he finds it, paying taxes and other necessary expenses, and doing such other acts as are necessary to preserve it as left; but he cannot advance money to remove incumbrances unless his intestate was bound to pay the money. *Ib.* 208.

## VI. INVENTORY OF AN ESTATE.

54. Where a full inventory of all the effects of the deceased is embodied in a will, it seems to be unnecessary for the administrators to make out a new inventory; at all events, their neglect or omission to do so will not invalidate the will. *Panaud v. Jones*, 1 Cal. 510.

## VII. CLAIMS AGAINST AN ESTATE.

55. In an action against an administrator the court should, if asked, charge the jury as to the statute time within which the action could be brought when the claim is rejected. *Benedict v. Hoggin*, 2 Cal. 386.

56. Where a foreclosure of a mortgage executed by the deceased is filed against the executor, and fails to aver the presentation and rejection of the account in the complaint, it is demurrable. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 558.

57. Claims against an estate which have been allowed by the administrator and the

probate judge, have the force and effect of judgments; but this applies only to such claims as were debts against the estate, and not to the expenses incurred or disbursements made by the administrator in his management of the estate, which latter claims are conclusive, only having been allowed by the probate court upon settlement of the account after notice to the parties interested. *Deck's Estate v. Gherke*, 6 Cal. 669; *Beckett v. Selover*, 7 Cal. 228.

58. Where the executor or administrator has property which belongs to another, the owner is not required to present his account as if he were a creditor. *Gunter v. Janes*, 9 Cal. 658.

59. The only difference between the claims of an executor or administrator and those of other creditors, as to their presentation after publication of notice, is that the latter must be presented to both the executor or administrator and the probate judge, and the former only to the judge. The time within which the presentation is made is the same in both cases. *Estate of Taylor*, 10 Cal. 482; 16 Cal. 434.

60. An objection that a claim was never presented to the administrator cannot be made after a decree allowing it. *Estate of Cook*, 14 Cal. 130.

61. Where an account presented to an administrator for allowance contains no item for interest, and the face of the paper does not show that interest results necessarily from the facts stated as constituting the claim, interest is not recoverable. *Aguirre v. Packard*, 14 Cal. 172.

62. An executor or administrator, holding a debt against the estate of deceased, cannot pay himself and claim a credit when he has never presented his claim for allowance before the probate judge. The statute requires claims against the estate to be presented in accordance with its directions, whether the claims be held by executors and administrators or by other creditors of the deceased; and if not so presented within ten months from publication of notice for presentation, they are barred. *Estate of Taylor*, 10 Cal. 434.

## VIII. LIENS AGAINST PROPERTY IN THE HANDS OF THE ADMINISTRATOR.

63. A vendor of real estate has an

Property in the hands of an Administrator. — Sales by an Administrator.

equitable lien on the same for the unpaid purchase-money in the hands of the administrator of the purchaser. *Cahoon v. Robinson*, 6 Cal. 226.

64. Mortgages and liens of record form no exception to the rule prescribed by sec. 136 of the act to regulate estates of deceased persons; and the claims secured by them must have been presented to the executor or administrator, and rejected by him, before an action can be maintained on them. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 559.

65. If the sale by the administrator be void, or voidable, the lien of the administrator continues; and it would seem equitable that the purchaser who has paid the debt of the estate should have a lien upon the estate for his purchase-money. *Haynes v. Weeks*, 10 Cal. 120.

66. An agreement between the mortgagor and mortgagee that the land and its proceeds were to be held, not only as security for the debt due the latter, but for debts due third persons—laborers on the land, for instance—operates as an equitable assignment, which does not pass to the administrator of the mortgagee as general assets for the benefit of creditors at large, but is subject in his hands to the same trust which attached to it before the decease of the intestate. *Pierce v. Robinson*, 13 Cal. 121.

67. A decree of foreclosure binds the specific property mortgaged, and the property passes into the hands of the executrix of the husband's estate, subject to its lien. She took only what remained after the lien was satisfied. *Cowell v. Bucklew*, 14 Cal. 641.

## IX. PROPERTY IN THE HANDS OF AN ADMINISTRATOR.

68. The right of enjoyment of possession to public lands may descend among the personal effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Grover v. Hawley*, 5 Cal. 486.

69. In this State, all property of the deceased, real and personal, remains in the hands of the administrator until adminis-

tration of the estate is had, or a decree of distribution is made by the probate court. *Curtis v. Sutter*, 15 Cal. 264.

## X. SALES BY AN ADMINISTRATOR.

70. Upon an application to sell the real estate of a deceased person to pay debts, the heir may dispute the validity of the claims on which the petition is based, although they have been allowed by the public administrator and probate judge. *Beckett v. Selover*, 7 Cal. 228.

71. The administrator or executor is under the control of the probate court. In the sale of property he is the moving party in behalf of creditors, but acts subject to the orders of the court, and the sale is a judicial act. *Halleck v. Guy*, 9 Cal. 195.

72. A substitution of one bidder for another at executor's sale, who fails to comply with the terms of sale, cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give validity to the purchase. *Ib.* 197.

73. The effect of an administrator's deed is to convey to the purchaser the title of the deceased. Such a deed can contain no warranty of title. The purchaser must know the law. In these sales caveat emptor is the rule. *Ib.*

74. The petition by the executor for the sale of real estate must set forth the amount of the personal estate that has come to his hands. This petition, with this averment, are jurisdictional facts, without which the order of sale is void. *Gregory v. McPherson*, 13 Cal. 577.

75. If an executor, claiming power under a will to sell, and in possession under judgment against C. as above, execute a deed to defendant, who takes possession thereunder, then defendant can set up outstanding title in the executor or his testator as against C., even though he could not, from defects in his deed or want of power in the executor, assert title against the estate of the deceased. *Gregory v. Haynes*, 13 Cal. 595.

76. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the Probate Court, stating that she

## Sales by an Administrator.

had agreed to sell the real estate of the intestate to the plaintiff for \$3,000, and to procure an order of court for the sale, asking the court to confirm this agreement; and asking further, that, if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other facts, usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made, in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart v. Allen*, 16 Cal. 498.

77. Held, further, that to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale; that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale, and confirming it afterwards, being still left to the court, uninfluenced by any such agreement. *Ib.*

78. Held, further, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale—the proper course—but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause—asking, as it did, what the court could not grant—yet, as the petition

presented all the facts necessary to give the court jurisdiction of the matter of sale, it was sufficient to support the decree when attacked collaterally. *Ib.* 499.

79. Held, further, that the decree and proceedings are not void, on the ground of inconsistency, in this: that the first order confirms the agreement of plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction, but that these irregularities and defects must be corrected on appeal, and cannot be indirectly attacked. *Ib.*

80. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is insufficient to pay debts, etc. *Ib.* 500.

81. Where the petition for the sale of real estate, after setting out the debts, proceeds, “that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said deponent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;” and after giving some further matter, concludes: “Petitioner further alleges, that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seized, and the condition and value thereof, which said inventory is made a part of this petition:” held, that the petition contains a sufficient averment as to the “amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of,” within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Ib.* 501.

82. Where, upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and, on the same day, a guardian ad litem was appointed for such heirs, who, on the same day, appeared,



## Final Account of an Administrator.

and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void, on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed, and the order to show cause made on the same day. *Ib.* 507.

## XI. FINAL ACCOUNT OF AN ADMINISTRATOR.

82. When an administrator resigns, leaving the administration incomplete, there is no fixed rule of compensation. The probate court should apportion it in reference to the compensation fixed by law for the whole, according to sound discretion. *Ord v. Little*, 3 Cal. 289.

83. An administrator resigned and appeared in court to have a final settlement of his accounts. The judge found him indebted to the estate in a large sum, and ordered him to pay it into court; upon his refusal, he was prosecuted on his bond: held, the action does not lie, as the order was illegal, and he was not bound to pay the money into court. *Wilson v. Hernandez*, 5 Cal. 443.

84. Where an administrator filed his final accounts, and an issue of fact was made thereon, which was certified to the district court for trial, and trial was had, the jury finding on each issue, and the judge rendering his decision on such findings, and this was certified back to the probate court, which court refused to give effect to the decision and judgment of the district court, it was held no error for the probate court to give judgment on such findings as it construed them. *Pond v. Pond*, 10 Cal. 502.

See ADMINISTRATOR, PUBLIC, ESTATES, PROBATE COURT, WILLS.

## ADMINISTRATOR, PUBLIC.

1. A public administrator is personally liable upon contracts made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract. *Dwinelle v. Henriquez*, 1 Cal. 392.

2. The public administrator is authorized to take charge of certain estates, with-

out any prior appointment of the probate court, but still subject to its direction and control, and other estates he may be required to take charge of in the same way. *Beckett v. Selover*, 7 Cal. 231.

3. From the frame work of our various acts concerning estates and public administrators, it must not be deduced that the commission of the public administrator as a public officer stands in the place of letters of administration; consequently it is necessary to issue them in each case, in order to give him control over the property of the estate.\* *Beckett v. Selover*, 7 Cal. 232; *Rogers v. Hoberlein*, 11 Cal. 128.

4. A public administrator, having administration of an estate, continues such administration after the expiration of his term of office, and until his authority is directly set aside or indirectly revoked by another appointment. *Rogers v. Hoberlein*, 11 Cal. 127.

See ADMINISTRATOR, ESTATES, PROBATE COURT, WILLS.

## ADMIRALTY.

- I. Jurisdiction of Courts.
- II. Actions against Vessels.
  1. On Statute Penalties.
  2. By Foreign Seamen.
  3. Attachment against Vessels.
- III. Ownership of Vessels.
  1. Registry of a Vessel.
  2. Lien on a Vessel.
  3. Mortgage of a Vessel.
  4. Sale of a vessel.
- IV. Sale of Merchandise at Sea to Arrive.
- V. Lay days in delivering Cargo.
- VI. Delivery of a Vessel.
- VII. Delivery of a Cargo.
- VIII. Towing.
- IX. Monopoly of Navigating the Waters of the State.
- X. Harbor Dues.

## I. JURISDICTION OF COURTS.

1. The State has an absolute right to

\* The statutes of 1860, p. 16, confirm all sales of real estate previously made by public administrators, before letters of administration were issued, provided they were regularly made under an order of the probate court, and the statutes of 1860, p. 105, authorizes public administrators in counties other than San Francisco and Sacramento, to perform the duties of administration required by law, without being required to obtain letters of administration.



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Actions against Vessels.—Attachment against Vessels.

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control, regulate, and improve the navigable waters within its jurisdiction as an attribute of sovereignty. *Geary v. Gunter*, 1 Cal. 467.

2. The code confers admiralty jurisdiction pro tanto upon the district courts, and the proceedings in such actions must be governed by the principles and forms of admiralty courts, except when otherwise controlled or directed by the act. *Averill v. Steamer Hartford*, 2 Cal. 309.

3. Jurisdiction in rem may exist in several courts at the same time, on the same subject. *Ib.*

4. The judicial power of the national courts in admiralty is not exclusive, and the States have the power to confer that jurisdiction to its fullest extent upon their own courts. *Taylor v. Steamer Columbia*, 5 Cal. 274; *Warner v. Steamer Uncle Sam*, 9 Cal. 710; *Ord v. Steamer Uncle Sam*, 13 Cal. 372.

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## II. ACTIONS AGAINST VESSELS.

### 1. On Statute Penalties.

5. Where a statute required the owners or consignees of every vessel entering a harbor, to give a several bond to the State in a penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for a neglect to give the bond, and an action was brought to recover two hundred dollars for each passenger as a penalty for neglecting to give such a bond: held, that the action could not be sustained. *Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 198.

6. If, in such case, any action at all can be brought, it must be to recover such damages as the plaintiffs can show they have actually sustained by reason of the refusal to give the bond. *Ib.*

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### 2. By Foreign Seamen.

7. A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue

for and recover his wages in a State court. *Pugh v. Gillam*, 1 Cal. 485.

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### 3. Attachment against Vessels.

8. An act of the legislature authorizing the issuing of attachments against boats and vessels "used in navigating the waters of the State," does not apply to vessels belonging to a foreign port, and which visit one of the harbors of this State for a few days only.\* *Souter v. Sea Witch*, 1 Cal. 163; *Ray v. Bark Henry Harbeck*, 1 Cal. 451.

9. Where a bond is given for a release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *McQueen v. Ship Russell*, 1 Cal. 165.

10. When the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel is not liable; the giving the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

11. The rule that requires seizure of the thing to give jurisdiction in actions in rem, is altered by our statute. Service on a person standing in particular relation to the thing, confers jurisdiction on the court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 7 Cal. 408; *Fisher v. White*, 8 Cal. 422.

12. As soon as a vessel is seized by a court of admiralty, a lien attaches in favor of the party at whose instance the seizure is made. *Meiggs v. Scannell*, 7 Cal. 408.

13. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a mechanic or merchant of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some seagoing vessel, to give the necessary bonds to detain her until his suit could be determined, and in the meantime she might be run off and sold free of all such debts or incumbrances. *Ib.*

See ATTACHMENT.

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\* These cases were decided under the code of 1850. The code of 1851 permits these attachments to issue.

## III. OWNERSHIP OF VESSELS.

14. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring v. Illsley*, 1 Cal. 29.

15. The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; nor can a forced sale under execution have a greater effect. *Ib.* 31.

16. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of a vessel. *Brooks v. Minturn*, 1 Cal. 482.

17. The owner of a ship chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Ib.*

18. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 273.

19. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Ib.*

20. The complaint showed that the vessel was in 1855 the property of the plaintiffs; that they appeared and defended the action against the vessel as owners, and there is nothing in the record to raise a presumption that they are not now the owners of it, and a judgment against them will be satisfied out of the vessel. *Russell v. Conway*, 11 Cal. 101.

## 1. Registry.

21. The rules of action prescribed in the shipping acts of congress are very strict, and everything necessary to constitute a "vessel of the United States," is required to appear affirmatively, and for this purpose it requires the oath of the in-

terested party. *Davidson v. Gorham*, 6 Cal. 346.

## 2. Lien.

22. A part owner of a vessel has no lien on the shares of the other part owners, for his advances and disbursements. *Sterling v. Harrison*, 1 Cal. 480.

## 3. Mortgage.

23. In order to maintain that a mortgage on a vessel is void as to creditors, because not properly registered, it is absolutely necessary to show that the vessel in controversy was a "vessel of the United States," within the meaning of the registration acts of congress, at the time of her seizure; and to do this it is necessary to show affirmatively every incident which entitles her to that privilege, or to show as much as would under those acts entitle her to a new register. *Davidson v. Gorham*, 6 Cal. 347.

24. Where a new owner under such sale mortgaged the vessel still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: held, that the mortgage was good against attaching creditors of the new owner, who levied immediately on her arrival, neither party taking the requisite steps to obtain a new registry; as the vessel had lost her national character, and was not therefore subject to the provisions of the law requiring the registry of sales and mortgages. *Ib.* 348.

25. To make a mortgage valid on a sea-going vessel, the act of congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property depends in the contemplation of each act, solely and exclusively upon that which it alone prescribes. *Mitchell v. Steelman*, 8 Cal. 370.

26. Where A, the owner of a sea-going vessel, executes to B a mortgage thereon, which is recorded in the custom house of the home port; B commences suit to foreclose the mortgage, and makes C a party defendant thereto, on the ground that he

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Sale of Merchandise at Sea to Arrive.—Delivery of a Vessel.—Delivery of a Cargo.—Towing.

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has purchased the vessel subject to the lien of plaintiff's mortgage; C in his defense avers that the mortgage was void under our statute of frauds, and that he now held the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. *Ib.*

27. To require a mortgagee in all cases to take possession of the vessel, is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel who is a part owner could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. *Ib.* 374.

See MORTGAGE.

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#### 4. Sale.

28. A sale of a vessel of the United States at sea, to a foreigner, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival at a port of the United States. *Davidson v. Gorham*, 6 Cal. 347.

29. To authorize the captain of a vessel to pledge or sell the property of his owners for necessities, certain facts must be established. The vessel must be in a foreign port, the voyage must be unfinished, the pledge or sale must be indispensable to enable the ship to complete her voyage. *Marziou v. Pioche*, 8 Cal. 534.

30. Where a sale of a vessel is made part cash and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of the vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. *Fowler v. Fisk*, 12 Cal. 112.

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#### IV. SALE OF MERCHANDISE AT SEA TO ARRIVE.

31. An agreement to sell merchandise, and that the contract shall be considered as binding until the vessel arrived, was held to be an executory contract, and depended on the contingency of the ship's arrival, and the arrival of the ship must be shown as a condition precedent. *Middleton v. Ballingall*, 1 Cal. 446.

#### V. Lay days in delivering Cargo.

32. In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge; but when the contract specifies working lay days, Sundays and holidays are excluded in the computation. *Brooks v. Minturn*, 1 Cal. 483.

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#### VI. DELIVERY OF A VESSEL.

33. Where a contract stipulates for the delivery of a vessel, but designates no particular place for such delivery: held, that a notice of a readiness to deliver must be treated under the contract as an actual delivery. *Albretson v. Hooker*, 5 Cal. 178.

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#### VII. DELIVERY OF A CARGO.

34. Where the contract is for goods on a vessel, which are not yet discharged and cannot be delivered, there cannot be a defense of a delivery, which takes the case out of the statute, and a good legal excuse for non-delivery. *Stevens v. Stedart*, 3 Cal. 143.

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#### VIII. TOWING.

35. Towing a vessel out to sea by a steamer is the transportation of property, so as to bring the case within the law of common carriers. *White v. Mary Ann*, 6 Cal. 470.

36. The fact that a vessel lost while being towed out to sea is insured, does not divest the owner of a right of action for damages for her loss, especially in the case of a mere partial insurance; for in such case, the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. *Ib.* 471.

37. Whether a steam tug is a common carrier or not, she holds herself out to the world for engagement in a business for hire, requiring prudence, skill, and the use of adequate means to perform the contracts which she undertakes, and this constitutes a stipulation of their existence,

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 Monopoly of Navigating the Waters of the State.—Constructions of Admission in Evidence.
 

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which, by clear construction, enters into the contract, and forms a part of it. *Ib.*

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 IX. MONOPOLY OF NAVIGATING THE WATERS OF THE STATE.

38. A contract not to navigate certain waters under a penalty is not against public policy, as creating a monopoly; it only licenses the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world besides are left at full liberty to enter upon the same enterprise. *California Steam Nav. Co. v. Wright*, 6 Cal. 262.

39. Where the defendant, being the owner, in whole or in part, of certain steamers, in consideration of a sum of money paid to him, covenanted that he would not run or suffer to be run or employed those steamers on certain waters of the State: held, that he was not released from his covenant by a sale of the steamers, or of his interest therein. *California Steam Nav. Co. v. Wright*, 8 Cal. 590.

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 X. HARBOR DUES.

40. Vessels plying between San Francisco and Sacramento, and San Francisco and Stockton, are liable to the payment of harbor dues to the city and county of San Francisco. *City of San Francisco v. Cal. Steam Nav. Co.*, 10 Cal. 507.

See BILL OF LADING, CHARTER PARTY, COLLISION, DEMURRAGE, FREIGHT, LIEN, MASTER.

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 ADMISSION.

- I. Admission of an Agent as part of the res gestæ.
- II. Construction of Admissions in Evidence.
- III. Construction of Admissions in Pleading.
- IV. Admissions, when an Estoppel.

## I. ADMISSION OF AN AGENT AS PART OF THE RES GESTÆ.

1. The admissions of an agent or servant are evidence against the principal

only when they form a part of the res gestæ, and the declarations of an agent when not made in any way in the discharge of his duty, are not admissible in an action against the principal. *Mateer v. Brown*, 1 Cal. 223; *Innis v. Steamer Senator*, 1 Cal. 461; *Gerke v. California Steam Nav. Co.*, 9 Cal. 256; *Garfield v. Knight's Ferry Water Co.*, 14 Cal. 37.

2. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master are admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 373.

3. An incorporated company is not bound by the acts or admissions of its members, unless acting by its express authority. *Shay v. Tuolumne County Water Co.*, 6 Cal. 74.

4. The declarations of a tenant in possession of land, being made at the time of possession, may sometimes be given in evidence, as a part of the res gestæ, to qualify the possession; that possession being the transactions which the declarations illustrate. But in order, and prior to the introduction of these declarations, it must be proved that the tenant was in possession at the time the proposed declarations were made. *Ellis v. Jones*, 10 Cal. 458.

5. Where a paper, purporting to be an admission by an agent, is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry Water Co.*, 14 Cal. 37.

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 II. CONSTRUCTIONS OF ADMISSIONS IN EVIDENCE.

6. Parties may sometimes, in ignorance of the law, make confessions of record prejudicial to their rights. But courts should put at least a favorable construction upon such admissions, and not force them to a greater admission than is clearly intended. *Sublette v. Melhado*, 1 Cal. 306.

7. The words of an acknowledgment of paternity of an illegitimate child, for the purpose of making it an heir, must be

## Construction of Admissions in Evidence.

clear and exclude all but one interpretation. *Estate of Sandford*, 4 Cal. 12.

8. An express notice of waiver of non-payment of a bill or note is equivalent to an admission that it has been presented, or need not be presented. *Matthey v. Galley*, 4 Cal. 63.

9. Where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract, but the contract may be introduced in evidence by either party, as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. *Reynolds v. Jourdan*, 6 Cal. 111.

10. Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the admissions of the vendor are admissible, and a fortiori, his sworn statement. *Howe v. Scannell*, 8 Cal. 327.

11. The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default must be taken. *Alderson v. Bell*, 9 Cal. 321.

12. Where the declarations of a party in a conversation are given in evidence, the whole conversation must be taken together, but the jury are not bound to give the same weight to all parts of it; they are at liberty to consider how much, under the circumstances, is entitled to credit. *Thrall v. Smiley*, 9 Cal. 537.

13. In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of the parties claiming the homestead, the admissions of the alleged wife to the effect that she is not married are admissible in evidence. *Poole v. Gerrard*, 9 Cal. 595.

14. Where property has been dedicated as a homestead, the husband and wife become joint owners thereof, with the right of survivorship, and their declarations of intention to sell and remove from the premises will not constitute an abandonment. *Dunn v. Tozer*, 10 Cal. 171.

15. Our statute of divorce has not altered any of the ordinary rules of pleading, except that nothing can be taken by admission or default. *Conant v. Conant*, 10 Cal. 254.

16. Declarations of the grantor of land are admissible, not only as against himself, but against parties claiming under him. It matters not whether they relate to the limits of the party's own premises or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises, or lessen his own title, they are admissible. *Stanley v. Green*, 12 Cal. 162.

17. The failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader. *Burke v. Table Mountain Water Co.*, 12 Cal. 409.

18. The declarations of a vendor of personal property after the sale are not good to impeach the title of the vendee. *Landecker v. Houghtaling*, 7 Cal. 392; *Visher v. Webster*, 13 Cal. 61; *Cohn v. Mulford*, 15 Cal. 52.

19. The marriage of parties is regarded as an admission by the husband that the child born to the wife is his; but, as in all cases of acknowledgment, to be effective, there must be knowledge at the time of the fact admitted. *Baker v. Baker*, 13 Cal. 99.

20. In support of an action upon an account stated, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be express or in terms. *Terry v. Sickles*, 13 Cal. 429.

21. An affidavit by defendant admitting the debt sued for is admissible in evidence for plaintiff, though made in a former suit between the parties. *Whitney v. Buckman*, 13 Cal. 539.

22. In an action for mesne profits plaintiff offered in evidence the record of an action by defendant against a third person, for the use and occupation of the same premises for a time prior to the time sued for in this action, in which defendant, under oath, fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other: held, that the evi-



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 Constructions of Admissions in Pleading.
 

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dence was admissible as a solemn admission by a party to the record, in relation to a particular fact; that such admissions are not irrelevant, whether made directly or incidentally. *Shafter v. Richards*, 14 Cal. 126.

23. Every voluntary admission of a material fact by a party to the record is competent evidence against such party of the existence of such fact. *Ib.*

### III. CONSTRUCTIONS OF ADMISSIONS IN PLEADING.

24. When the complaint alleges the making and endorsing of a promissory note, and the answer denies neither signature, the answer should be stricken out and the plaintiff be entitled to judgment. *Grogan v. Ruckle*, 1 Cal. 196; *Whitwell v. Thomas*, 9 Cal. 199; *Kenney v. Osborne*, 14 Cal. 13.

25. Courts will protect the rights of the actual possessor, and if the complaint avers possession by the plaintiff, and is not denied by the answer, it will be assumed by the court as a fact admitted. *Folsom v. Root*, 1 Cal. 376.

26. A fact set forth in the complaint, admitted by the defendant's answer, needs no proof. *Brooks v. Minturn*, 1 Cal. 483.

27. A demurrer admits the facts as alleged in a complaint to be true. *Selkirk v. Sacramento County*, 3 Cal. 326; *Tolumne Water Co. v. Chapman*, 8 Cal. 397; *Halleck v. Mixer*, 16 Cal. 578.

28. Under our practice, and that of the common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded. *De Ro v. Cordes*, 4 Cal. 120.

29. An appearance by attorney at common law, and by the express letter of our statute, amounts to an admission or waiver of service. *Suydam v. Pitcher*, 4 Cal. 281; *Holmes v. Rogers*, 13 Cal. 201.

30. The admission of an attorney of record of the correctness of the amount due for which judgment is taken, when not done in fraud of the rights of his client, must destroy the effect of the denial in the answer. *Taylor v. Randall*, 5 Cal. 80.

31. A default admits the facts as alleged in a complaint to be true. *Harlan v. Smith*, 6 Cal. 174; *Rowe v. Table Moun-*

*tain Water Co.*, 10 Cal. 444; *Hentsch v. Porter*, 10 Cal. 558; *McGregor v. Shaw*, 11 Cal. 48; *Hunt v. City of San Francisco*, 11 Cal. 259; *Curtis v. Herrick*, 14 Cal. 119; *Smith v. Billett*, 15 Cal. 26.

32. A cognovit is good as an admission in pais after answer is filed. *Hirshfield v. Franklin*, 6 Cal. 609.

33. Where parties admit the real facts of the transaction in their pleadings, those admissions are to be taken as a modification of the instrument. *Lee v. Evans*, 8 Cal. 435.

34. There is no necessity of a finding as to a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer so as to raise an issue. *Swift v. Muygridge*, 8 Cal. 445.

35. The statute does not require an admission of service to designate the place where a service is made, it is only to determine the period within which an answer must be filed. *Alderson v. Bell*, 9 Cal. 321.

36. Where the proof of service of process consists in the written admission of defendant, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the party. *Ib.*

37. A wife, to appear and defend an action separately from her husband, must possess, as defendant, all the rights of a femme sole, and be able to make binding admissions in writing in the action, as other parties. *Ib.*

38. And admission of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery v. Tutt*, 11 Cal. 314.

39. Where the complaint called the defendant, not only to answer the character of the possession, but the fact of possession by it, a failure to deny this averment is an admission of it. *Burke v. Table Mountain W. Co.*, 12 Cal. 407.

40. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry and Table Mountain W. Co.*, 14 Cal. 36.

41. Where it appears from the whole conduct of a cause that a particular fact is

## Admissions, when an Estoppel.

admitted between the parties, the jury have a right to draw the same conclusion as to that fact as if it had been proved in evidence, and to draw such conclusions as to all the issues on the record. *Powell v. Oullahan*, 14 Cal. 116.

42. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties as an independent fact, not in issue by the pleadings, but affecting the whole case. *Ib.*

43. If an averment is immaterial and does not require an answer, could it be made to appear with more conclusive effect that the existence of this fact was to be regarded not as the subject of controversy at the trial, but as a matter of admission and agreement between the parties. *Ib.* 117.

44. Where a complaint avers title in an administrator, a default is an admission of that title. *Curtis v. Smith*, 14 Cal. 119.

45. It matters not what the pleadings are, the complaint covering the amount, the defendant was fixed by his admission, or even by evidence to which he did not except, to the damages shown by such admission or evidence. *Van Pelt v. Littler*, 14 Cal. 201.

46. The rules of pleading, both under the old equity system and under our own system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill in substance and in spirit, and not merely by a denial of its literal truth; and whenever the defendant fails to make such denial he admits the averment. *Blankman v. Vallejo*, 15 Cal. 644.

47. An answer, under our statute, is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Ib.* 645.

## IV. ADMISSIONS, WHEN AN ESTOPPEL.

48. Where one of the issues was the condition of the goods in question when they left New York, and defendant had

admitted on the trial that "if merchantable when they left New York he made no claim:" held, that he was concluded by this admission. *Burritt v. Gibson*, 3 Cal. 399.

49. The Mexican government having by a solemn decree declared that the original title to land was in an ancestor, is estopped from denying such admission or regranting the premises to another. *Nieto v. Carpenter*, 7 Cal. 533.

50. Where an express declaration to a third party about the ownership of goods is not confidential but general, and this is afterwards acted on by others, the party making the declaration is estopped. *Mitchell v. Reed*, 9 Cal. 205; *McGee v. Stone*, 9 Cal. 606.

51. In this State the wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess as defendant all the rights of femme sole, and be able to make as binding admissions, in writing, in the action as other parties. *Alderson v. Bell*, 9 Cal. 321.

52. A party will, in many instances, be concluded by his declarations or conduct, which has influenced the conduct of another to his injury; but it must appear first, that the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly on such, and will be injured by allowing its truth to be disproved. *Boggs v. Merced Min. Co.*, 14 Cal. 367.

## ADULTERY.

1. The charge of adultery in the complaint should be stated with reasonable certainty as to the time and place, so as to enable the defendant to prepare to meet

Mortgage, Pledge.—Affidavits.

it on the trial. *Conant v. Conant*, 10 Cal. 254.

2. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. De Diablar*, 13 Cal. 330.

See CRIMINAL LAW, DIVORCE.

ADVANCES.

See MORTGAGE, PLEDGE.

ADVERSE CLAIMS.

1. An action may be brought by one person against another for the purpose of determining an adverse claim which the latter makes against the former, for money or property, upon an alleged obligation. *King v. Hall*, 5 Cal. 84; *Merced Min. Co. v. Fremont*, 7 Cal. 319; *Smith v. Bran- nan*, 13 Cal. 113; *Curtis v. Sutter*, 15 Cal. 263.

2. A party in possession of a mining claim can sustain an action to determine an adverse outstanding claim, and can obtain an injunction to protect the property pending the litigation. *Merced Mining Co. v. Fremont*, 7 Cal. 320.

3. Under the current of decisions of our court, conflicting claims to the use of water, as well as to the possession of mining claims, may be settled by action. *Ib.* 326.

4. The claim of defendant must be affirmatively set forth by him in his answer. The plaintiff is not supposed to know the particulars of the defendant's adverse claim. *Mitchell v. Steelman*, 8 Cal. 369.

5. A debtor has a right to purchase cross demands against a partnership which has filed a bill in chancery for a dissolution, and to set them up as a defense to the debt due by him to the partnership. *Naglee v. Minturn*, 8 Cal. 544.

6. Where a tenant finds that there are

adverse claims to the rent, he should file a bill of interpleader, making all adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the cause. *McDevitt v. Sullivan*, 8 Cal. 597.

ADVICE OF COUNSEL.

1 Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *People v. Talmage*, 6 Cal. 258.

2. The defense that the defendant acted by advice of counsel must show that such advice was given upon a full and fair statement of the facts. *Bliss v. Wyman*, 7 Cal. 257.

3. Whether the defendant acted bona fide under the advice of his counsel, is a question of intention to be determined by the jury in all cases where there is any legitimate evidence to show a want of good faith in following professional advice. *Potter v. Seale*, 8 Cal. 226.

4. A mistaken advice of counsel to his client not to prepare for trial, is no ground for a continuance. *Musgrove v. Perkins*, 9 Cal. 212.

5. When trustees act with good faith in the management of the trust property, and without selfish motives, they are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel. *Ellig v. Naglee*, 9 Cal. 695.

See ATTORNEY, MALICIOUS PROSECUTION.

AFFIDAVITS.

- I. In General.
- II. Of Merits.
- III. On Remedial Process.
  1. On Arrest.

## In General.—Of Merits.

- 2. On Attachment.
- 3. On Injunction.
- IV. Of Jurors to impeach their Verdict.
  - 1. As to the Incompetency of Jurors.
- V. To change the Venue.
- VI. Of newly discovered Evidence.
- VII. On Continuance for absent Witnesses.
- VIII. On Instruments.
  - 1. As to the Loss of the Original.
  - 2. Not possessing the Original.
  - 3. Alteration of the Original.
- IX. To a Bill of Costs.
- X. As an Admission.
- XI. Of Publication of Summons against absent Defendants.
- XII. Of Service of Summons.
- XIII. When to be embodied in a Statement on Appeal.

## I. IN GENERAL.

1. The affidavit to the schedules of an insolvent was made in the language of the statutes, but was attested by the clerk instead of the judge: held, that after the judgment of discharge, the parties could not raise the objection collaterally. *Kohlman v. Wright*, 6 Cal. 231.

2. An affidavit to authorize the appointment of an attorney for an absent and absconding debtor, must show that summons had been issued and placed in the hands of the proper officer, and an effort made to serve the defendant personally. *Jordan v. Giblin*, 12 Cal. 102.

3. The fact that a record is erroneous in stating that the parties waived a jury, cannot be shown by an affidavit of the judge who tried the cause. *Smith v. Brannan*, 13 Cal. 115.

4. In a criminal case, if the court below impose upon counsel against their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived by the limitation of the opportunity of a full defense. *People v. Keenan*, 13 Cal. 584.

5. A refusal by the county court on appeal from a justice, to permit an amendment of the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of the importance of the amendment, the appellate court will not interfere. *Canfield v. Bates*, 13 Cal. 608.

6. A jurat to an answer is, in form and substance, an affidavit, and may be taken before a county recorder. *Pfeiffer v. Riehn*, 12 Cal. 648.

7. The affidavit to a claim against an estate must be made by the claimant in person, and not by his attorney in fact. *Macoleta v. Packard*, 14 Cal. 180.

8. An affidavit need not be signed by the party making it. *Ede v. Johnson*, 15 Cal. 57.

9. Courts take judicial notice of the official character of justices of the peace in their own States, and an affidavit in which the official character of the justice before whom it is taken does not appear, is good. *Ib.*

10. Where plaintiffs were permitted to prove and recover on a title other than the one set up, it was an error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiffs' case but for this surprise. *Egan v. Delany*, 16 Cal. 87.

11. On appeal from a justice's to a county court, the record not showing that notice of appeal had been served on the adverse party, appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 Cal. 368.

12. An affidavit by defendant that he was under the impression, when he retained counsel in a cause, that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he otherwise would, is insufficient to open a judgment by default. *Elliott v. Shaw*, 16 Cal. 377.

## II. OF MERITS.

13. Where an affidavit set forth that defendant has a good and substantial defense, he should set forth specifically wherein that defense consists. *Rogers v. Huie*, 1 Cal. 433.

### III. ON REMEDIAL PROCESS.

#### 1. On Arrest.

14. The defendant can only avail himself of any defect in the affidavit previous to his examination and final order of commitment. *People v. Smith*, 1 Cal. 11.

15. The preliminary evidence upon an application for a warrant of arrest may be either by the affidavit of some person cognizant of the facts, or by his examination under oath, taken by the officer to satisfy the person to whom the application is made that there is reason to believe that a felony or other crime has been actually committed, as also to prove the probability of suspecting the party against whom the warrant is prayed. *Ib.*

16. An affidavit may set forth in positive terms as within the knowledge of the deponent, the commission of the offense charged therein, and proceed upon information as to the names only of the persons who were guilty of the perpetration of them. *Ib.*

17. An affidavit in pursuance of which a warrant is issued is defective, which contains allegations upon information merely, and if it states no fact within the knowledge of the affiant, it can be of little weight in any legal proceeding. *Ib.*

18. In an action to recover money received by a person as agent, he cannot be arrested without the affidavit showing some fraudulent conduct on his part, or a demand on him for the money, and a refusal to pay. *Ex parte Holdforth*, 1 Cal. 440.

19. The affidavit, to sustain an arrest, must show the facts relied upon by positive averment, and it is not sufficient to refer to the complaint, or to any other paper, to show what the affidavit ought itself to disclose. *McGilvery v. Morehead*, 2 Cal. 609.

20. An affidavit for a requisition for a fugitive from justice is sufficient if it does charge the commission of a distinct offense, although it does not set forth the crime with all the legal exactness necessary to be observed in an indictment. *Ex parte Manchester*, 5 Cal. 238.

21. Though the affidavit does not charge in sufficiently distinct words that the prisoner is "a fugitive from justice," yet it is

sufficient if it allege that he committed a crime and then fled. *Ib.*

22. Courts cannot go behind this affidavit to inquire whether it is a forgery or not, because the governor of the State, who issues the requisition, is the only proper judge of the authenticity of the paper. *Ib.*

23. An affidavit for a requisition is certified to be authentic or original when the requisition recites that the affidavit is duly authenticated according to the laws of the State from which it issues. *Ib.* 239.

24. Insufficiency of the affidavit on arrest cannot be taken advantage of by the bail in an action after judgment against the defendant. *Mattoon v. Eder*, 6 Cal. 59.

25. An affidavit for arrest which avers, on information and belief, that the defendant has been guilty of a fraud in the contracting of the debt, or in endeavoring to prevent its collection in the terms required by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. *Ib.*

26. Side issues upon affidavits are not issues upon which juries pass. The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment; and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 412.

#### 2. On Attachment.

27. If the affiant had not good reason to believe the matters set forth on his affidavit on attachment, the defendant, whose name and credit has been impaired by the wrongful issuing out of the writ, has no recourse on the bond, if his property has not been attached, but must resort to a criminal action or to a private action for the tort. *Heath v. Lent*, 1 Cal. 412.

28. An affidavit for an attachment is not sufficient, which avers that the defendant is indebted in the alternative upon an express or implied contract. *Hawley v. Delmas*, 4 Cal. 195.



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Of Jurors to Impeach their Verdict.—To change the Venue.

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### 3. On Injunction.

29. It is not sufficient that the affidavit for an injunction should allege that the injury will be irreparable; it must be shown to the court how and why it would be so, otherwise the injunction will not be allowed. *Waldron v. Marsh*, 5 Cal. 120.

30. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all the matters in controversy, including questions of title. *Hicks v. Michael*, 15 Cal. 117.

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## IV. OF JURORS TO IMPEACH THEIR VERDICT.

31. A new trial should not be granted on the affidavit of a juror made after the verdict, and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial. *People v. Baker*, 1 Cal. 405.

32. The affidavit of jurors will not be admitted to contradict their verdict. *Castro v. Gill*, 5 Cal. 42; *People v. Wyman*, 15 Cal. 75.

33. The affidavit of jurors will not be admitted to impeach their verdict, but will be allowed in order to substantiate it. *Wilson v. Berryman*, 5 Cal. 46.

34. Where the affidavit of a juror is sworn to be correct by the sheriff, it may properly be treated as his original affidavit. *Wilson v. Berryman*, 5 Cal. 46.

35. The affidavit of a juror, purging his conduct from the imputation of corruption or impropriety, will not be admitted, for he would not hesitate to conceal the same by perjury. *People v. Backus*, 5 Cal. 276.

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### 1. As to the Incompetency of Jurors.

36. An affidavit of one of the attorneys in a cause, showing the objections made to the selection of a jury, although copied into the transcript, is no part of the record, and therefore cannot be noticed. *Magee v. Mokelumne Hill C. and M. Co.*, 5 Cal. 259.

37. If affidavits offered to show the incompetency of a juror are not embodied in a bill of exceptions, so as to show that the court below passed upon them, the appellate court is precluded from examining them. *People v. Stonecifer*, 6 Cal. 411; *People v. Honshell*, 10 Cal. 86.

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## V. TO CHANGE THE VENUE.

38. Affidavits on a motion to change the place of trial of a criminal action must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found. *People v. McCauley*, 1 Cal. 383.

39. Upon an application in a criminal case to change the place of trial, on the ground that a fair and impartial trial cannot be had in the county where the prisoner was indicted, it is insufficient to state in the affidavit that a jury cannot be selected, from a certain portion of the county, who would give the prisoner a fair and impartial trial. *People v. Baker*, 1 Cal. 404.

40. The affidavit to change the venue should state the facts in such a manner as to enable the court to draw its own inference whether an impartial trial could be had in the particular case, admitting that a prejudice did exist in the community against the defendant. *Sloan v. Smith*, 3 Cal. 413.

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## VI. OF NEWLY DISCOVERED EVIDENCE.

41. A party ought not to rely on his own single and unsupported statement on a motion for a new trial of the newly discovered evidence, but should, if possible, procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts they will testify. *Rogers v. Huie*, 1 Cal. 432.

42. Motions for new trial on the ground of newly discovered evidence regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach

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On Continuance for absent Witnesses.—Not possessing an Original Instrument.

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a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. (In this case the party himself was present.) *Baker v. Joseph*, 16 Cal. 180.

## VII. ON CONTINUANCE FOR ABSENT WITNESSES.

43. Affidavits upon which a motion is founded to continue a criminal cause should show due diligence in endeavoring to procure the attendance of witnesses and in preparing for trial. *People v. Baker*, 1 Cal. 404.

44. On a motion for new trial on the ground of surprise at the trial by the non-attendance of witnesses, the affidavits, in endeavoring to procure the attendance of the witnesses, should set forth that reasonable diligence has been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers v. Huie*, 1 Cal. 432.

45. Affidavits for a continuance should show that the facts expected to be proved by the absent witnesses cannot otherwise be proved. *People v. Quincy*, 8 Cal. 89; *Pierce v. Payne*, 14 Cal. 420.

46. A new trial not granted on the affidavit of the attorney of record that he, as well as his client and witnesses, were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice on the day of trial, when such affidavit is met by counter affidavits of the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

47. An affidavit for continuance, on the ground that a witness is absent, when the opposite party admits that the witness would testify to the facts set forth, is evidence, but not conclusive proof, of its contents; it must be regarded only as a deposition. *Blankman v. Vallejo*, 15 Cal. 645.

## VIII. ON INSTRUMENTS.

### 1. *As to the Loss of the Original.*

48. Affidavits of the loss of an instrument to be used in court may be taken ex parte, without notice. *McCann v. Beach*, 2 Cal. 31.

49. In this State the evidence necessary to establish the loss of an instrument as a predicate for secondary evidence may be given orally, or offered by affidavit. *Bagley v. Eaton*, 10 Cal. 147.

### 2. *Not possessing the Original.*

50. Courts of this State are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or surveyor general of the United States for California. If these officers have adopted a rule, refusing to allow original papers to be taken from the files, that fact should be shown by affidavit, before evidence of their contents could be admitted. *Hensley v. Tarpey*, 7 Cal. 289.

51. An affidavit by a party to the suit, that the original deed "is not in his possession, or under his control," is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person. *Skinner v. Flohr*, 13 Cal. 638.

### 3. *Alteration of the Original.*

52. An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes but feeble ground upon which to base a motion to set aside a judgment. *Taylor v. Randall*, 5 Cal. 80.

## IX. TO A BILL OF COSTS.

53. The affidavit of an attorney of a

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As an Admission.—Of Publication of Summons against absent Defendants.

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party to the correctness of a bill of costs is good under the statute. *Burnham v. Hays*, 3 Cal. 119.

54. If the original affidavit to a bill of costs is a nullity, the defendant should take proper steps to have it set aside, or appeal from the judgment on the ground that the costs have been waived by operation of the statute; but having himself moved for a retaxation of costs, it was proper for the court to allow such amendments as are necessary. *Ib.*

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X. AS AN ADMISSION.

55. An affidavit by defendant, in effect acknowledging the debt for which suit is brought, is admissible in evidence for plaintiff, though made in a former suit between the parties. *Whitney v. Buckman*, 13 Cal. 539.

56. In an action for mesne profits, plaintiff offered in evidence the record of an action by defendant against a third person for the use and occupation of the same premises, for a time prior to the time sued for in this action, in which defendant, in an affidavit, fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other: held, that the evidence of the affidavit was admissible as a solemn admission by a party to the record, in relation to a particular fact; that such admissions are not irrelevant, whether made directly or incidentally. *Shafter v. Richards*, 14 Cal. 126.

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XI. OF PUBLICATION OF SUMMONS AGAINST ABSENT DEFENDANTS.

57. The affidavit of the attorney of record, showing that defendant conceals himself to avoid the service of process, is sufficient to obtain an order for the service by publication. *Anderson v. Parker*, 6 Cal. 201.

58. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unnecessary for the affidavit to describe

him as principal clerk. *Gray v. Palmer*, 9 Cal. 637.

59. An affidavit which avers a cause of action against the defendant, that defendant cannot after due diligence be found in the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons was issued, and that defendant still has a family residing in said county, is insufficient to authorize the publication of the summons for only thirty days; it must be for three months. *Jordan v. Giblin*, 12 Cal. 102.

60. An affidavit for the order of publication of summons, which states that the defendant could not, after due diligence, be found in Contra Costa county; that he had inquired of an intimate friend of his as to his whereabouts, who was unable to inform him; and that plaintiff did not know where defendant could be found within the State, is insufficient, as it does not show that defendant had left the State. *Swan v. Chase*, 12 Cal. 285.

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XII. OF SERVICE OF SUMMONS.

61. An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of an amended complaint filed in this action," is insufficient, as it does not appear that the copy of the complaint was certified, etc. *McMillan v. Reynolds*, 11 Cal. 377.

62. The affidavit of service of summons must show affirmatively compliance with all the requirements of the law. *Ib.* 378.

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XIII. WHEN TO BE EMBODIED IN A STATEMENT ON APPEAL.

63. Affidavits used upon the hearing of the motion for a new trial upon the report of a referee must be set forth in the record, to enable the defendant to base error upon the denial of the motion on affidavits, but this omission does not affect his rights to raise the question as to errors

## What constitutes an Agency.

apparent upon the face of the report itself. *Branger v. Chevalier*, 9 Cal. 362.

64. On an appeal from an order made on affidavits filed, no statement is necessary. The affidavits must be annexed to the order, in place of a statement, and the certificate of the clerk should specify the affidavits used; and to enable him to do so, he should, at the time, mark them as filed on the motion. *Paine v. Linhill*, 10 Cal. 371.

65. Affidavits used on a motion to open the judgment do not form any part of the record, where there is no certificate of the judge or clerk, or an admission of counsel that they were used for that purpose. *Ritter v. Mason*, 11 Cal. 214.

continues, and in case of a loss it extends to the collection or enforcement of the policy. *De Ro v. Cordes*, 4 Cal. 119.

3. C sold a lot of lumber to B, and A, who claimed it, notified B that the lumber belonged to him, and brought an action to recover the price: held, that the notice and the form of action recognized the right of C to sell the lumber. There was no privity of contract between the plaintiff and the defendant; C was pro tanto the agent of A, and was entitled to collect the price, and the mere notice of A to B was insufficient to interrupt the completion of the performance of the contract between C and B. *Argenti v. Brannan*, 5 Cal. 353.

4. And where the assignee was a commercial firm, and the assignment was made to an agent acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm, and subsequently the firm sold the land to their successors in business, constituting a new firm, of which some of the old firm were members: held, that the purchasers are chargeable with notice of the trust; the transfer of a bond for title to land upon a promise by the assignee to pay a certain debt of the assignor binds the assignee to perform the trust, and the obligation to pay the debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor under the transfer had already vested. *Connelly v. Peck*, 6 Cal. 353.

5. The right of a vendor of goods to a stoppage in transitu exists until they arrive at their final destination, or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitus. *Markwald v. His Creditors*, 7 Cal. 214.

6. A municipal corporation must execute contracts by some agent. The authority to this agent may be general, in reference to certain classes of cases, or it may be special, in reference to a particular case. *Lucas v. City of San Francisco*, 7 Cal. 472; *Argenti v. City of San Francisco*, 16 Cal. 272.

## AGENCY.

I. What constitutes an Agency.

II. Duties of an Agent.

III. How far the Authority of an Agent extends.

IV. What acts bind the Principal.

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VI. Actions.

1. By the Principal.

2. By an Agent.

(a.) When an Agent may sue.

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VII. Evidence.

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VIII. Instruments executed by an Agent.

IX. Property in the hands of an Agent.

1. When he may Pledge.

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3. When a Demand is necessary.

X. When an Agent may be a Witness.

## I. WHAT CONSTITUTES AN AGENCY.

1. The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee, reduced to writing and executed by their mutual agent, who ceases to be such agent after the sale has closed. *Craig v. Godfroy*, 1 Cal. 416.

2. Where an agent authorized to effect insurance retains the policy, his agency

## II. DUTIES OF AN AGENT.

7. It is the duty of a consignee to render an account of his sales, but he is not bound to take upon himself the risk of remittance, nor can he throw such risk upon his principal without orders. *Kane v. Cook*, 8 Cal. 457.

8. To hold that the statute of limitations ran against the principal, where the factor failed to inform the principal of the sale, or remit the proceeds, would be to permit him to take advantage of his own wrong. *Ib.* 461.

9. Where one is an agent to do with the property as if it were his own, he is obligated to act in good faith and without gross negligence, and cannot be held responsible for moneys which he never received, unless he failed to get them because of his gross negligence or bad faith. *Herrick v. Hodges*, 13 Cal. 433.

## III. HOW FAR THE AUTHORITY OF AN AGENT EXTENDS.

10. An authority to an agent to deliver goods, confers no authority to take them back, or to countermand the shipment. *Adams v. Blankenstein*, 2 Cal. 418.

11. When an agent is required to accomplish a certain end, or to do a certain thing, all necessary incidental powers are implied. *Lucas v. City of San Francisco*, 7 Cal. 473.

12. An agent cannot delegate discretionary powers, but he may delegate mere mechanical powers or duties. *Sayre v. Nichols*, 7 Cal. 542.

13. The words "attorney in fact" and "agent," are not synonymous. All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. *Porter v. Hermann*, 8 Cal. 624.

14. An agent for the collection of a note is confined to the taking of money in payment, and has no power to take goods in payment, unless special authority be given, of which there must be proof. *Mudgett v. Day*, 12 Cal. 140.

15. The affidavit to a claim against an estate must be made by the claimant in person, and not by his attorney in fact. *Macoleta v. Packard*, 14 Cal. 180.

16. General words in an agency must be construed in reference to matters specially mentioned. *Taylor v. Robinson*, 14 Cal. 399.

17. Death of the principal revokes the authority of the agent, and a deed of land made by the agent after such death does not bind the representatives of the principal. *Travers v. Crane*, 15 Cal. 16.

18. As to the pueblo lands of San Francisco, the agents of that municipal corporation can sell or dispose of them only in the way, and according to the order of the legislature; and, therefore, the legislature may, by law operating immediately upon the subject, dispose of this property, or give effect to any previous disposition, or attempted disposition of it. The property itself is a trust, and the legislature is the prime and original controlling power, managing and directing the use, disposition and direction of it. *Payne v. Treadwell*, 16 Cal. 233.

19. A power of attorney authorizing the agent to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal whatsoever, giving my said attorney full power to use my name, to release others or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a lease of real estate, containing a clause that the lessee "shall have the privilege of purchasing any part of the said land during the continuation of this lease, at its value, in preference to any other persons. *De Rutte v. Muldrow*, 16 Cal. 512.

20. Where a power of attorney, relative to real estate, authorizes the agent "to grant, bargain and sell the same, or any part or proportion thereof, for such sum or price, and on such terms as to him might seem meet," the agent has no power to make a conveyance in consideration of love and affection in the principal for the grantee in the conveyance, and such conveyance is on its face a nullity. The power of attorney authorizes a sale for a moneyed consideration only. *Mott v. Smith*, 16 Cal. 557.

21. The common council of the city of



What acts bind the Principal.

San Francisco were the mere agents of the corporation, and possessed only the powers which were specially delegated to them by the charter, and when that instrument granted a power with a specific designation as to the mode in which it should be used, the mode was restricted, and no other mode could be followed. *McCracken v. City of San Francisco*, 16 Cal. 619.

IV. WHAT ACTS BIND THE PRINCIPAL.

22. A deed purporting to convey real estate, executed by an agent or attorney in his own name instead of the name of his principal, is not binding upon the latter, and does not transfer the title to the property. *Fisher v. Salmon*, 1 Cal. 413.

23. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile firm in New York, which had been conducted in the name of his principal, derives no authority from such power to bind his principal by a promissory note given for the purchase of real estate in San Francisco. *Ib.*

24. Though a deed executed by an agent having power to convey in his own name be inoperative as a conveyance, it will be good as an agreement, and the principals may be decreed to convey. *Salmon v. Hoffman*, 2 Cal. 142.

25. The assent of an ordinary agent, who had general charge of his principal's business during her temporary absence, will not justify the sheriff who holds an execution against a third person in levying it upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 578.

26. If a ferryman permits a party himself to drive his team upon and from the ferry, he constitutes the driver quoad hoc his agent, and is responsible for any damage which occurs. *May v. Hanson*, 5 Cal. 364.

27. The plaintiff sued to recover for services as agent of defendants, under an alleged agreement with defendants' agent, but there was no proof that the agent had authority to make the agreement: held, that the plaintiff should have sued for work and labor done, and not upon the agreement. *Johnson v. Pacific M. S. S. Co.*, 5 Cal. 408.

28. Where A authorizes B to do all acts in his name concerning their mining operations, followed by an authority to sign B's name to any company articles, does not authorize A to sign B's name to a promissory note, even where the money was used in carrying on the joint mining operations. *Washburn v. Alden*, 5 Cal. 464.

29. A party who authorizes another to transact all business, authorizing the attorney to make, execute, and deliver promissory notes, etc., will be held liable for all such notes executed in his name by his attorney, when they have reached the hands of an innocent holder, although they may have been made for the private purposes of an attorney. *Hellman v. Potter*, 6 Cal. 15.

30. An authority to do a particular act must be exercised in the manner designated, or it is not obligatory; and where A authorizes B to sign his name as surety to a note, and B signs A's name with his own as joint and several makers of the note, A is not liable. *Bryan v. Berry*, 6 Cal. 397.

31. The fact that the owner of a vessel lost while being towed to sea was the agent of the owners of the steam tug, does not relieve the latter from any of the obligations under which they contract with others. *White v. Mary Ann*, 6 Cal. 471.

32. The transfer of a bill of lading constitutes the assignee the agent of the assignor, and this act being for his benefit, his assent must be presumed. *Le Cacheux v. Cutter*, 6 Cal. 519.

33. Where a coach, at the time of the accident, was driven by the servant or agent of the owner, the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120.

34. When the defendant permitted a party to act in his own name, and to hold himself out to plaintiff in a false character, and having enjoyed the supposed advantage of this conduct, he is estopped from denying the character assumed by the party. *Osborne v. Hendrickson*, 7 Cal. 285; *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 591.

35. Where the agent discloses the name of the principal, or that fact is otherwise known to the party receiving a bill of ex-

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 What acts bind the Principal.
 

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change, at the time the same is made, then the agent is not responsible, though the name of the principal be not stated on the face of the paper, and only the name of the agent be signed, with the term "agent" appended to it. *Sayre v. Nichols*, 7 Cal. 542—overruling same case, 5 Cal. 488.

36. The acts of a special agent do not bind the principal, unless strictly within the authority conferred. *Davidson v. Dallas*, 8 Cal. 244.

37. The acts of an agent beyond his authority are as the acts of a stranger, and before the principal can be bound, he must know what has been done, so that he may advisedly exercise his own judgment upon the circumstances, in the same way as if he had originally made the contract himself. *Ib.*

38. Although between the agent and his principal the act was unauthorized, yet the principal is bound by the act of the agent, for the reason that he placed the agent in such a position as to mislead innocent parties. *Ib.* 249.

39. An agent who has power to sue, has the right to give an indemnity bond to the sheriff, when the property attached or levied on in that action is claimed by a third person; it is a necessary instrument to carry the power to sue into effect. *Ib.* 251.

40. An attorney in fact who is not an attorney at law cannot sign his name to a complaint for his principal as "plaintiff's attorney," and an action so commenced is void, as instituted without authority and by an entire stranger to the plaintiff. *Dixey v. Pollock*, 8 Cal. 570.

41. Where the principal of a line of stages, by letter to one acting as his agent in such business, wrote "you will do better by getting new drivers and agents, and horses," and such agent employed a sub-agent, and subsequently the principal was informed of such employment and made no objection, in an action for the wages of the sub-agent: held, that the facts were sufficient to authorize the jury to find the fact of authority in the agent to employ the plaintiff. *McConnell v. McCormick*, 12 Cal. 148.

42. A party in taking the conveyance in the name of his associates must be considered as having acted as their agent, and notice to him was equally notice to them. *Stanley v. Green*, 12 Cal. 168.

43. The knowledge of the agent in the course of his agency is the knowledge of the principal, and if an attorney acquires information apart from any confidential communications, he is not protected from disclosing it. *Hunter v. Watson*, 12 Cal. 377.

44. Where a building is in process of construction by three tenants in common, according to a plan agreed on, a power of attorney from one to an agent, authorizing him "to represent the principal's interest in the property, to cast his vote in relation thereto in all matters relating to the administration or improvement of the property, and to do and perform every act or thing relating to and concerning such interest, except the sale or hypothecation thereof," authorizes the agent to consent to alterations in the plan. *Hastings v. Halleck*, 13 Cal. 211.

45. If the name of the principal and the intention to bind him appear in an instrument not under seal, the agent having authority, the principal alone will be bound, though the instrument be signed in the agent's name only. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 231.

46. Where a power of attorney, not under seal, authorizes the agent to sell a saw-mill, dwelling, etc., by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal, and the vendee takes possession and retains it for several years, he has an equitable estate in the premises, with the right to its full enjoyment, and this right united to possession, enables him to maintain an action for interruption to his possession, or injury to the property. *Ib.* 234.

47. A tax collector has power to contract for publishing the delinquent list of tax payers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of that agency the county is responsible. *Randall v. Yuba County*, 14 Cal. 222.

48. The authority of an agent, however general the terms, to collect or secure a claim of the principal, is not an authority to make a purchase for the principal of the property of the debtor, for the security of the claim. *Taylor v. Robinson*, 14 Cal. 399.

The effects of Ratification.—Actions.—By the Principal.

49. If the agent has a power coupled with an interest—that is, a power which conveys to the agent an interest in the property—then the execution of the power after the death of the principal is good. *Travers v. Crane*, 15 Cal. 19.

50. If, on an executory contract for the purchase of land, made by plaintiff with the agent, during the life of the principal, money due the principal was paid after his death to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled in equity to call for the legal title, and could defend in ejectment by the representatives of the principal. *Ib.* 20.

51. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 109.

52. Where, in such case, proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that, therefore, his possession was not sufficiently proven. *Ib.*

V. THE EFFECTS OF RATIFICATION.

53. It is a well settled rule, that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts, and unless all the circumstances are made known to him, the ratification is void. *Billings v. Morrow*, 7 Cal. 174; *Davidson v. Dallas*, 8 Cal. 244.

54. Where the president of a corporation has an alleged power to make a contract to bind the corporation as agent, if such authority were doubtful, the acts of the corporation may amount to a ratification of the contract. *Shaver v. Bear*

*River and Auburn W. and M. Co.*, 10 Cal. 401.

55. Ratification by a principal of the acts of his agent, depends upon the knowledge of those acts on the part of the principal, and where the knowledge is partial, so will be the ratification. *Marziou v. Pioche*, 8 Cal. 535.

56. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. *Ellison v. Jackson Water Co.*, 12 Cal. 551.

57. Acts of an agent without authority, subsequently ratified by the principal, bind the principal back to the inception of the transaction. *Taylor v. Robinson*, 14 Cal. 400.

58. But such ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification of the principal, as attachments levied on property of the debtor after a sale by or to an agent. *Taylor v. Robinson*, 14 Cal. 401.

See RATIFICATION.

VI. ACTIONS.

1. *By the Principal.*

59. The owner of a ship chartered by and in the name of his agent, may although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Brooks v. Minturn*, 1 Cal. 482.

60. In an action for money had and received by a consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered; such sale must be taken as made for cash, and to the vendor belongs the demand created by the sale against the vendee, and the vendee is liable to the plaintiff for money had and received. *Johnson v. Totten*, 3 Cal. 347.

61. A principal has a right to waive a tort against his factor, and bring an action to compel him to account, and for the net proceeds arising from the sales, when the plaintiff can only recover the net proceeds of sales effected by him, after deducting necessary charges and commissions. *Lubert v. Chauviteau*, 3 Cal. 462.

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Actions by an Agent.—When an Agent may sue.—Actions against an Agent.

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62. A principal may sue in his own name, on a contract made and signed by his agent without disclosing his principal; but he must show the agency and the power of the agent to bind him at the time of making the contract; else there would be no mutuality, and, consequently, no contract. *Ruiz v. Norton*, 4 Cal. 358.

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*By an Agent.*

*(a.) When an Agent may sue.*

63. A note sued on, payable to the plaintiff, although it describes him as agent of another, does not take away the right of the agent to sue in his own name at law. *Ord v. McKee*, 5 Cal. 516.

64. Where two persons were employed by the claimants of a tract of land under a Mexican grant, as agents to procure the confirmation of the grant in the United States, and services are thus rendered, it is individual in its character, and separate actions may be maintained by such agent for his expenses thus incurred. *Conner v. Hutchinson*, 12 Cal. 127.

65. An action brought by an agent in his own name for a trespass in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

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*(b.) When an Agent may not sue.*

66. The endorsement of a bill of lading prima facie vests the property in the goods mentioned therein in the endorsee, but a bill of lading is not a negotiable instrument, so far as to enable an endorsee who has no property, either general or special in the goods, and no lien therein for advance or otherwise, to sue the master of the ship in his own name for non-delivery of the goods, when it appears on the face of the complaint that the plaintiff, the endorsee, is a mere naked agent of the shippers. *Lineker v. Ayeshford*, 1 Cal. 78.

67. An agent ordinarily cannot sue in his own name in respect to the subject

matter of his agency, and this rule applies to consignees and endorsees of bills of lading, when they are in truth but the agent of the shippers. *Lineker v. Ayeshford*, 1 Cal. 82.

68. A, of Liverpool, shipped certain goods to San Francisco, and endorsed the bills of lading to the plaintiff, his agent, and became a bankrupt before the arrival of the goods: held, it appearing on the face of the complaint that the plaintiff was a mere naked agent of the shippers, that he could not recover the goods in his own name of the master of the ship, who claimed to hold the goods for the assignees in bankruptcy of A. *Ib.* 83.

69. An attorney in fact, described as such in the instrument, does not hold the character of trustee, and is not a necessary party to a suit to represent the interest of his principal. *Powell v. Ross*, 4 Cal. 198.

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*3. Against an Agent.*

70. A public officer who stands in the relation of agent of the government, or of the public, is not personally liable upon contracts made by him as such officer, and within the scope of his legitimate duties; but this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Dwinelle v. Henriquez*, 1 Cal. 392.

71. Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: held, that no right of legal complaint will lie against the agent. *Engels v. Heatly*, 5 Cal. 136.

72. In an action against an agent for not accounting, a request to account and pay over must be alleged in the complaint and proven at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

73. When the plaintiff employs an agent to collect a note due from defendant, and the defendant employs the same agent to collect other notes due him, and apply the same on plaintiff's note, and the agent fails, after collecting money on defendant's account: held, that unless the appropriation was actually made, the loss



Evidence of Agency.—Declarations of an Agent.—Instruments executed by an Agent.

occasioned by the failure of the agent must fall on the defendant. *Philips v. Mayer*, 7 Cal. 83.

74. A complaint, alleging that the defendant collected and received certain money as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 625.

75. In suit against an agent for fraudulently appropriating money of plaintiff, defendant cannot, on trial, object that the person making the demand on him before suit did not exhibit his authority so to do, unless defendant questioned his authority at the time of demand. *Baxter v. McKinlay*, 16 Cal. 77.

VII. EVIDENCE.

1. Of Agency.

76. It is competent to show that one or both of the contracting parties were agents for the other persons, and acted as such agents in making the contract on the one hand, so as to give the benefit of the contract on the other to charge the unnamed principals with liability. *Brooks v. Minturn*, 1 Cal. 482.

77. The principle upon which the infant is allowed to collect his wages, is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Swartz v. Hazlett*, 8 Cal. 124.

78. Where a paper purporting to be an admission by an agent is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

79. The person entitled to recover the legal penalty against a telegraph company, for not transmitting a message, is the party who contracts, or offers to contract for the transmission of the dispatch. He may probably do this by his agent or servant; but when the contract is made by

a party as agent of another, in order to give a right of action to the principal the fact of agency must be shown. *Thurn v. Alta Telegraph Co.*, 15 Cal. 475.

2. Declarations of an Agent.

80. The declarations of an agent or servant are admissible in evidence against the principal only when they form a part of the *res gestæ*; and the declarations of a barkeeper to a third person as to the contents of a package left by a guest in the charge of an innkeeper, when not made in any way in the discharge of his duty as barkeeper, are not admissible in an action against the innkeeper to prove the contents of the package. *Mateer v. Brown*, 1 Cal. 225.

81. The declarations of an agent, when but the bare narrator of an act which has already taken place and was fully ended, do not form a part of the *res gestæ*, and are inadmissible in evidence against his principal. *Innis v. Steamer Senator*, 1 Cal. 461.

82. The declarations of an agent will bind the principal, if made during the continuance of the agency, and at the very time of the transaction. These declarations, when thus made, are considered as part of the *res gestæ*. *Gerke v. Cal. St. Nav. Co.*, 9 Cal. 256.

83. Admissions of an agent, to bind the principal, must constitute part of the *res gestæ*; that is, they must be made with reference to the subject matter, or at the time of the act done. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

VIII. INSTRUMENTS EXECUTED BY AN AGENT.

84. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile firm in New York, which had been conducted in the name of his principal, derives no power therefrom to bind his principal by a promissory note given for the purchase of real estate in San Francisco. *Fisher v. Salmon*, 1 Cal. 413.

85. Where A authorizes B to do all acts in his own name concerning their



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Property in the hands of an Agent.—When he may Pledge.

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mining operations, followed by an authority to sign B's name to any company articles, does not authorize A to sign B's name to a promissory note, even where the money was used in carrying on the joint mining operations. *Washburn v. Alden*, 5 Cal. 464.

86. The word "agent" appended to an agent's name has always been held as merely descriptio personæ, and in no respect affects his liability. *Sayre v. Nichols*, 5 Cal. 488.

87. *An agent who signs his own name instead of that of his principal, when he intends to bind the latter, renders himself liable.* *Sayre v. Nichols*, 5 Cal. 488; overruled in *Sayre v. Nichols*, 7 Cal. 538.

88. A party who gives a general power of attorney to another to transact all business, etc., authorizing the attorney "to make, execute and deliver promissory notes," will be held liable for all such notes executed in his name by his attorney, when they have reached the hands of an innocent holder, although they may have been made for the private purposes of an attorney. *Hellman v. Potter*, 6 Cal. 15.

89. When the authority given by the defendant was to sign his name to a promissory note as surety, and not as principal, and the authority was not exercised in the manner delegated, the plaintiff cannot recover. *Bryan v. Berry*, 6 Cal. 397.

90. A person who signs his name and appends the word "agent" to it, does not intend anything else than a designation of the capacity in which he acted, and is not personally liable. *Sayre v. Nichols*, 7 Cal. 538; *Davidson v. Dallas*, 8 Cal. 247, overruling *Sayre v. Nichols*, 5 Cal. 488.

91. In cases of promissory notes it is not necessary that the agent should add to his signature the word "agent," as is the usual and proper way of executing deeds of attorney. *Haskell v. Cornish*, 13 Cal. 47.

92. It is held that generally the mere words agent, trustee, guardian, administrator, and the like, added to the name of the signer, do not qualify the terms of the body of the obligation, when those terms import a duty of payment by such signer. *Ib.*

93. In instruments not under seal, or not required to be executed with any particular formality, it is not important in what form the obligation of the party ex-

ecuting as agent or principal is expressed, if from the entire instrument the true character of it can be gathered. *Ib.*

94. The general rule which governs in such cases is, that although a party acts in making an obligation of this kind as an agent, yet he does not protect himself from liability, unless the instrument shows that in executing it he is such agent, and meant only to contract for his principal. *Ib.*

95. A note stating that "we, the undersigned, trustees of the First African Methodist Episcopal Church, on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is the note of the church and not of the signers. *Ib.*

96. The rule requiring the instrument to be executed or signed in the name of the principal does not apply to instruments not under seal. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 231.

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## IX. PROPERTY IN THE HANDS OF AN AGENT.

### 1. When he may Pledge.

97. The pledgee, in a case of pledge of negotiable securities transferable by delivery, should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises. *Coit v. Humbert*, 5 Cal. 262.

98. The purchase of property by a factor in his own name makes him, to all the world, the apparent owner, and as far as affects the rights of third persons, his power is unlimited. He has the right to sell or pledge. *Leet v. Wadsworth*, 5 Cal. 405.

99. A factor has no right to pledge goods, when his only business is to sell goods consigned to him for that purpose; wherefore, on account of his notorious employment, all the world is charged with notice that the goods in his possession are the property of others, and that he has power only to sell them and no power to pledge them. *Hutchinson v. Bours*, 6 Cal. 385.

See FACTOR, PLEDGE.

When a Demand is necessary.—When an Agent may be a Witness.—Jurisdiction.

2. *When it becomes a Trust.*

100. If a confidential agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent can be held as trustee for the owner of the money. *Wells v. Robinson*, 13 Cal. 139.

101. If property has been rightfully sold by an agent or trustee, if the proceeds of the sale can be distinctly traced, the property belongs in equity, and often in law, to the principal. *Ib.* 141.

3. *When a Demand is necessary.*

102. In an action to recover money received by a person acting as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal and a refusal by him to pay. An arrest in such case is prohibited by sec. 15, art. 1, of the constitution. *Ex parte Holdforth*, 1 Cal. 440.

103. On an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint and proved at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

104. The rule in relation to factors or consignees is well settled, that they are not liable to an action until a demand or instructions to remit. *Kane v. Cook*, 8 Cal. 457.

105. Where a defendant contracted with a factor who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership and a conversion of the property, and no demand was necessary previous to bringing suit. *Scriber v. Masten*, 11 Cal. 306.

X. WHEN AN AGENT MAY BE A WITNESS.

106. From the necessities of commercial and business transactions, it has been found necessary to admit an agent to tes-

tify as to his authority in the performance of acts for his reputed principal. *Tomlinson v. Spencer*, 5 Cal. 293.

107. A broker, whose commissions depend on the result of the suit, is incompetent as a witness, on the ground of interest. *Shaw v. Davis*, 5 Cal. 467.

108. In an action where the defense set up is the negligence of an agent of plaintiff, the agent is not a competent witness for his employer. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 256.

See BAILMENT, POWER OF ATTORNEY.

AGREEMENT.

See CONTRACT.

ALCALDE.

- I. Jurisdiction.
- II. Books of the Alcalde's office.

I. JURISDICTION.

1. It seems that alcaldes alone have no judicial power whatever, nor can their jurisdiction be extended or enlarged by consent of parties. *Ladd v. Stevenson*, 1 Cal. 21.

2. A second alcalde has no jurisdiction of any claim exceeding \$100, and a judgment rendered for a greater sum is void. *Howell v. Gray*, 1 Cal. 134.

3. Alcaldes in California were empowered to perform the functions of judges of the first instance in those districts where there were no such judges, and this rule applied to the pueblo of San Francisco. *Mena v. LeRoy*, 1 Cal. 220: *Panaud v. Jones*, 1 Cal. 508.

4. *A grant made by an American alcalde, not appointed by, nor holding office under the authority of the Mexican Government, to a citizen of the United States du-*

ring the continuance of the war between the United States and Mexico, whilst California was in the temporary occupation of the American forces, and before the title of the United States to the country had become complete, was a grant without any authority in law, and no title could be derived from the grant. *Woodworth v. Fulton*, 1 Cal. 305; *Salmon v. Fisher*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325, overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

5. If there was a vested title in the national domain in the Pueblos of California, an alcalde alien enemy of Mexico, and without authority from the American government, had no power or right to interfere with that vested estate, or grant it to others. *Woodworth v. Fulton*, 1 Cal. 306; *Salmon v. Fisher*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325, overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

6. A grant of land by a Mexican Alcalde before the war will be presumed to have been made in the course of his ordinary and accustomed duties and within the scope of his legitimate authority, and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer and in the form prescribed by law. *Reynolds v. West*, 1 Cal. 326; *Payne v. Treadwell*, 16 Cal. 227.

7. Where it appeared that the petitioner's husband was the owner of two fifty-vara lots at the time of the concession, it would be presumed that the act of the alcalde in making the grant was in conformity with law, until the contrary was shown by the adverse party. *Reynolds v. West*, 1 Cal. 328.

8. Where a petition for a grant of land was presented to an alcalde without the signature of the petitioner, but the prayer of the petition was granted by a writing immediately following the petition, the grant was valid, notwithstanding the want of the petitioner's signature. *Id.*

9. A Mexican alcalde was the head of the ayuntamiento, or town council, and the executive officers of the town, and rightfully exercised the power of granting lots within the town which were the property of the town. *Cohas v. Raisin*, 3 Cal. 449; *Welch v. Sullivan*, 8 Cal. 199; *Hart*

*v. Burnett*, 15 Cal. 616, overruling *Woodworth v. Fulton*, 1 Cal. 305; *Salmon v. Fisher*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325.

10. A grant of land in San Francisco made by an Alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Cohas v. Raisin*, 3 Cal. 450.

11. It is too late to question the authority of an alcalde elected in 1846. If invalid, his acts, as a de facto officer, must be held good by the courts of California. *Cohas v. Raisin*, 3 Cal. 452.

12. The ayuntamiento of San Francisco in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land in conformity with the survey of the town, as near as possible to the location of certain other lots which plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed to plaintiff a lot which had been previously granted by the town to one Gerke: held, that an action for a breach of the covenants of warranty in this deed will not lie against the city. *Findla v. City of San Francisco*, 13 Cal. 535.

13. The true meaning of the order is, that the alcalde was to grant the city's land only, and that neither the town nor its successor is bound for an act done beyond the limit of its authority. *Findla v. City of San Francisco*, 13 Cal. 535.

14. The authority to grant lands in the city of San Francisco was vested in the ayuntamiento, and in the alcalde or other officers who at the time represented it, or had succeeded to its powers and obligations. *Hart v. Burnett*, 15 Cal. 616.

15. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers as here defined and explained, will be presumed to have been done by lawful authority. *Id.*

## II. BOOKS OF THE ALCALDE'S OFFICE.

16. The book of accounts kept in the office of an alcalde is admissible in evidence as a register of the acts of that offi-

## Alien.—Power to inherit.—Power to hold Land.

cer belonging to that office. *Kyburg v. Perkins*, 6 Cal. 675.

17. To entitle a book to the character of an official register, it is not necessary that it be required by an express statute to be kept, nor that the nature of the office should render the book indispensable; it is sufficient that it be directed by the proper officer to be kept. *Ib.*

## ALIEN.

- I. Power to inherit Land.
- II. Power to hold Land.
- III. Power to sue.
- IV. Naturalization
- V. Taxation upon Aliens.

## ALIEN.

1. The treaty of Queretaro defined all Mexicans established in California on the 30th day of May, 1848, and who had not, on or before the 30th day of May, 1849, declared their intention to remain Mexican citizens, are to be deemed American citizens, and laws applicable to aliens will not apply to them. *People v. Naglee*, 1 Cal. 251.

2. Laws regulating the admission of foreigners and aliens, and placing them under peculiar disabilities, on account of some supposed inconvenience which may result to the State, are political laws. *People v. Folsom*, 5 Cal. 378.

## I. POWER TO INHERIT.

3. Treaties made by the United States, removing the disability of aliens to inherit, are valid, and within the intent of the Constitution of the United States. *People v. Gerke*, 5 Cal. 383.

4. A nonresident alien cannot inherit\* land in this State, and consequently cannot maintain ejectment for such alleged in-

heritance. *Siemssen v. Bofer*, 6 Cal. 252.

5. The provisions of the constitution giving to aliens who are bona fide residents the right to inherit, by the rules of construction exclude nonresident aliens. *Siemssen v. Bofer*, 6 Cal. 253; *Farrell v. Enright*, 12 Cal. 456.

6. The probate court has no power to direct that the portion of an estate of an intestate, originally allotted to one of the heirs-at-law, a nonresident, shall be distributed among the other heirs, if the nonresident heir shall fail to appear and claim it within a year. *Pyatt v. Brockman*, 6 Cal. 418.

7. By the settled doctrine of the common law, an alien could not acquire title to real property by descent or other mere operation of law. *Farrell v. Enright*, 12 Cal. 456.

8. A subsequent residence of an alien will not retroact so as to confer upon him any right to inherit any portion of real estate of which the ancestor died possessed. *Ib.*

9. The act of April 19, 1856, permitting nonresident aliens to inherit real and personal estate, is constitutional. The rights which the constitution gives to bona fide resident aliens may be enlarged, but cannot be abridged by the legislature. *People v. Rogers*, 13 Cal. 165.

## II. POWER TO HOLD LAND.

10. An alien may hold real estate against every one, and even against the government, until office found. *People v. Folsom*, 5 Cal. 378.

11. Foreigners may hold property in all the territories, and may inherit land in the absence of legislation upon this subject. *Ib.*

12. The policy of our government has been to encourage the immigration of foreigners, and to this extent a system of preemption has been adopted in all the territories and new States, in which there is no discrimination between foreigners and native citizens. *Ib.* 379.

13. The law of escheats in Mexico was abrogated by the conquest of the country by Americans, so far as citizens of the United States and aliens were affected. *Ib.* 380.

\*The act of April 19, 1856, enlarged the powers of inheritance and extended it to nonresident aliens. See *People v. Rogers*, 13 Cal. 165.

## Power to sue.—Naturalization.—Taxation upon Aliens.

14. An alien cannot be deprived of his land, or of any right incident to its ownership, by proof of his alienage in a collateral proceeding. *Ramirez v. Kent*, 2 Cal. 560.

15. The estate purchased by an alien does not vest in the sovereign until office found; until then the alien is seized, and may sustain actions for injuries to the property. *Ib.*

16. The relation of landlord and tenant exists where the landlord is an alien non-resident, and is obligatory upon the tenant, and he cannot be allowed to controvert the title of the lessor. *Ib.*

## III. POWER TO SUE.

17. One of several defendants to a cause pending in one of the courts of this State, filed his affidavit for its removal to the United States court, on the ground that he was an alien: held, that it must appear that the contest was between a citizen of this State and citizens of a foreign state. *Welch v. Tennent*, 4 Cal. 203.

18. An alien friend may sue an American in the consular courts in China, established under the treaty of 1844. And the assignees of personal property assigned there in trust for foreign creditors, among others, may be compelled by such courts to execute the trust. *Forbes v. Scannell*, 13 Cal. 285.

See PLAINTIFF.

## IV. NATURALIZATION.

19. The provision of the constitution of the United States which gives congress the power to establish "an uniform rule of naturalization," is construed to mean, that the rule, when established, shall be executed by the States. *Ex parte Knowles*, 5 Cal. 303.

See NATURALIZATION.

## V. TAXATION UPON ALIENS.

20. A State may prescribe the conditions upon which aliens may enjoy a resi-

dence within it; it may also declare the terms upon which they shall be permitted to make their residence upon any portion of their territory, and exercise a particular enjoyment. *People v. Naglee*, 1 Cal. 243.

21. A tax upon aliens mining upon public lands, which is collected by the State, can not be viewed as a license to trespass upon the lands, but is rather a restriction on the commission of such trespasses. *Ib.* 244.

22. Under the treaties existing between the United States and foreign powers, even that most liberal to aliens does not exempt them from taxation by a State for the enjoyment of certain privileges. *Ib.* 246.

23. The power of taxation over aliens, and the conditions on which they be permitted to enjoy the protection of the States in a particular place or occupation, cannot be taken away or impaired by acts of congress or treaties with foreign nations, and the justice or expediency of the tax must be left to the discretion of the States, subject to the restrictions which may be imposed by their organic law. *Ib.* 248.

24. Aliens cannot be said to have any property to enjoy in the minerals or public lands, by which the constitution of the State would guarantee them against taxation for working and extracting the metals therefrom. *Ib.* 252.

25. The constitutional provision that requires taxation to be uniform, refers only to property, and not that the entire aggregate amount of taxation upon persons on the value of property in every city and town of the State should be equal to, and uniform with the amount in every city and town. *Ib.* 252.

26. A tax is a compulsory exaction which a government makes upon persons or property within its jurisdiction for the supply of the public necessities. It is, ordinarily, assessed beforehand at stated periods and collected at appointed times. *Ib.* 253.

27. When an alien, subject to a mining tax, was employed by one of a partnership to work a copartnership mine: held, that his employer alone, and not the firm, was liable for his tax. *Meyer v. Larkin*, 3 Cal. 405.

28. The act of 1855, imposing a tax of fifty dollars on every person arriving in this State by sea, who is incompetent to become a citizen, is void. *People v. Downer*, 7 Cal. 171. See TAXATION.



Conveyance, Deed.—Answer, Complaint, Variation.

## ALIENATION.

See CONVEYANCE, DEED.

## ALLEGATION.

See ANSWER, COMPLAINT, PLEADING AND VARIATION.

## ALTERATION.

1. No alteration or erasure will defeat the recovery of a bond, unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent intent to affect the same object. *Turner v. Billagran*, 2 Cal. 522.

2. An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes but feeble ground upon which to base a motion to set aside a judgment. *Taylor v. Randall*, 5 Cal. 80.

3. When an answer alleges the alteration of an instrument, it must aver that it was made with the consent, or knowledge, or authority of the plaintiff. *Humphreys v. Crane*, 5 Cal. 175.

4. An alteration in a note, which does not vary the meaning of the nature or subject matter of the contract, is immaterial. *Id.*

5. The filling up of a blank is not such an alteration of the note as to vitiate it, and prevent a recovery; it supplied an omission by fixing an optional rate of interest not binding on the maker without further proof; but does not avoid the right to recover the principal and legal interest. *Fisher v. Dennis*, 6 Cal. 579; *Visher v. Webster*, 8 Cal. 112.

6. An interlineation or alteration of an instrument could only impart notice from the time it was made, and can in no way impair or defeat a title previously ac-

quired. *Chamberlain v. Bell*, 7 Cal. 294.

7. When arbitrators have published their award by delivering it to the parties as the award: held, that it is not the subject of revision or correction by them, and that any alteration without the consent of the parties will vitiate it. *Porter v. Scott*, 7 Cal. 316.

8. Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular, it can only be altered by a direct proceeding in chancery for the purpose of reforming it. *Osborne v. Hendrickson*, 8 Cal. 32.

9. A defense to a note that it was made payable to order, and was afterwards fraudulently altered, and made payable to bearer, and that defendant paid the note before plaintiff became assignee of it, and that the plaintiff became assignee after the note was due, is good and valid. *Sherman v. Rollberg*, 11 Cal. 41.

10. Equity has jurisdiction to vacate a judgment fraudulently altered so as to include a defendant not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 560.

11. An alteration by the court of a judgment without notice, so as to include a party not served with process, if not void is voidable at the election of the party. *Id.* 561.

12. Where the judgment of the court recites that summons was served on defendant, the fact that years afterwards there appears some erasure or interlineation on the sheriff's return is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery, or alteration. *Gregory v. Ford*, 14 Cal. 144.

## AMENDMENT.

- I. To a Statute.
- II. To a Notarial Acknowledgment.
- III. To Pleadings.
  1. In general.
  2. To the Complaint.
  3. To the Answer.
  4. To a Summons.

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To a Statute.—To a Notarial Acknowledgment.—To Pleadings.—To the Complaint.

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5. To a Verdict.
6. To a Judgment.
7. To a Bill of Costs.
8. To a Sheriff's return.
9. To the Answer of a Garnishee.
10. To a Statement on Appeal.
11. In Justices' Courts.

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### I. TO A STATUTE.

1. A general statute, controlled in some of its provisions by a subsequent special statute, is revised by the amendment of the latter, intended to give effect to the former, and though the first statute gave jurisdiction to a court which could not constitutionally exercise it, the act becomes effectual by an amendment passed still later, transferring the jurisdiction to the proper body. *People v. Phoenix*, 6 Cal. 93.

2. Under the constitution of this State, the amendment of a statute operates as an absolute repeal of the old statute or section so amended, even if the amendment takes nothing away from the old law, but merely adds a proviso in certain cases. *Billings v. Harvey*, 6 Cal. 383.

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### II. TO A NOTARIAL ACKNOWLEDGMENT.

3. A notary derives his power from the statute. The special duty and authority of taking and certifying acknowledgments is given him. But he acts as an officer with a special authority for each particular case. He is to take an acknowledgment and certify it as parts of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. He has no power to amend his return afterwards. *Bours v. Zachariah*, 11 Cal. 292.

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### III. TO PLEADINGS.

#### 1. In general.

4. Great latitude is given to our courts by statute in amending and altering plead-

ings. *Pollock v. Hunt*, 2 Cal. 194; *Stearns v. Martin*, 4 Cal. 229.

5. Referees have no power to allow parties to alter or amend pleadings, after a case has been referred to them. *De La Riva v. Berryessa*, 2 Cal. 199.

6. In reference to amendments, the object of the statute is unquestionably the furtherance of justice, and the applications should be treated favorably, and granted. *Cooke v. Spears*, 2 Cal. 411.

7. A refusal to allow an amendment is presumed to be right, unless the character of the proposed amendment is shown in the records. *Jessup v. King*, 4 Cal. 331; *Canfield v. Bates*, 13 Cal. 608; *Robinson v. Smith*, 14 Cal. 254.

8. A party has a right to have his pleadings amended, so as to conform to the proofs. *Tryon v. Sutton*, 13 Cal. 494.

9. An amendment adding no facts or exceptions cannot affect the merits, and its allowance is in furtherance of justice and matter of discretion, not of power. *Valentine v. Stewart*, 15 Cal. 396.

10. To entitle objections to consideration on appeal, they must be presented to the court below in the first instance; at least, if they are of a character which might have been there obviated by the production of other evidence, or the release of the interest of witnesses, or an amendment to the pleadings, or in any other way. *Mott v. Smith*, 16 Cal. 555.

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#### 2. To the Complaint.

11. When it appears by the plaintiff's testimony, that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just. *Acquittal v. Crowell*, 1 Cal. 192.

12. The misjoinder of parties can be corrected by amendment under the statute. *Heath v. Lent*, 1 Cal. 412.

13. Where on appeal the complaint is so radically defective as not to authorize a judgment, a new trial may be granted with leave to amend upon just terms. *Sterling v. Hansom*, 1 Cal. 479.

14. The discovery of fraud after suit brought would entitle the party to amend

## To the Complaint.

so as to include the newly discovered facts. *Truebody v. Jacobson*, 2 Cal. 285; *Davis v. Robinson*, 10 Cal. 412.

15. Where the proof does not sustain the allegations of the bill, and where by the proof the complainant would be entitled to relief, in a court of equity, if his pleadings had been properly framed, an amendment should be allowed or directed to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits, and whenever this is not done, it is error. *Connally v. Peck*, 3 Cal. 82.

16. It is not error for the court to allow a complaint to be amended. *Mills v. Dunlap*, 3 Cal. 97.

17. A joint claim by two persons cannot be pleaded as a counter-claim by one defendant, but he may amend and allege that the whole interest therein has been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

18. A case may be remitted to a referee, with leave to plaintiff to amend his declaration, and to the defendant to answer over, when it is necessary to enable a correct report to be made. *Montefiori v. Engels*, 4 Cal. 434.

19. The plaintiff sued in assumpsit to recover rent; after a trial and verdict which was set aside by the court, he amended his complaint to make it in form an action of trespass for mesne profits: held, this was erroneous, and should not be permitted, for if the new complaint is to be treated as an amendment to the old one, and to continue the original action, then two ~~cases~~ of action, incompatible in their nature, are joined. *Ramirez v. Murray*, 5 Cal. 224.

20. It would be proper for the court to order the complaint to be amended in an action where the defendant is arrested, so that the question of fraud should be submitted to the jury, and a judgment entered in conformity to the facts found. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

21. A party may amend by striking out a claim for damages without regard to the purpose which may influence him, and it is error to refuse this right. *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 414.

22. The prayer of an amended or supplemental complaint may change the char-

acter of the original bill, and pray for a different relief, if in accordance with the additional facts. *Baker v. Bartol*, 6 Cal. 486.

23. Every supplemental complaint is enlarged or altered by every additional and pertinent fact, and the plaintiff has a right to attach in an amended complaint the assignment for fraud discovered since filing his original complaint. *Ib.*

24. After a motion for a nonsuit, the court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff cannot recover. *Farmer v. Cram*, 7 Cal. 136.

25. When a final judgment on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the court below. *Phelan v. San Francisco County*, 3 Cal. 16.

26. It is always in the power of the court to allow an amendment to the complaint, so it does not affect the substantial rights of the parties. *Polk v. Coffin*, 9 Cal. 58.

27. If defendants were surprised by the amendment, and found it necessary to adopt a different line of defense in consequence of it, they would have been entitled to a continuance, in order to prepare for their defense. *Ib.*

28. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend the complaint, if any matters are set up in the answer which he might wish to anticipate by further allegation. *Moss v. Warner*, 10 Cal. 297.

29. It is error to render a final judgment on demurrer to plaintiff's complaint. Where the complaint is defective, the court should sustain the demurrer, with leave to the plaintiff to amend his complaint; and if the plaintiff then declines, judgment final should be given. *Gallagher v. Delaney*, 10 Cal. 410.

30. An affidavit which avers that affiant, on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering

## To the Complaint.—To the Answer.

and leaving with her a copy thereof attached to a copy of the amended complaint filed in this action," is insufficient; the copy of the amended complaint should be certified. *McMillan v. Reynolds*, 11 Cal. 378.

31. A justice of the peace has the right to allow a complaint to be amended, in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. *Linhart v. Buiff*, 11 Cal. 280.

32. A mere order, permitting an amendment of the complaint, was of no effect, unless and until complied with. *Kimball v. Gearhart*, 12 Cal. 46.

33. A court may order judgment creditors, as subsequent incumbrancers, to be made parties to an action by an amendment of the complaint, as a better course, or by petition on intervention. *Horn v. Volcano Water Co.*, 13 Cal. 70.

34. A refusal by a county court, on appeal from justice, to permit an amendment to the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of importance of the amendment, this court will not interfere. *Canfield v. Bates*, 13 Cal. 608.

35. The amendment of the complaint putting the substantial matters contained therein into two counts, not being answered by defendants, and no default taken therefor, the plaintiff cannot go to trial without objecting to the answer to the original complaint, and after verdict against him, object to the want of an answer to the amended complaint. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

36. Where a demurrer is sustained, and the plaintiff amends by making two counts, instead of one, he cannot, after trial, complain of error in sustaining the demurrer. *Ib.*

37. If after a demurrer to the complaint sustained, defendant does not offer to amend, final judgment against him will not be disturbed. *Smith v. Yreka Water Co.*, 14 Cal. 202.

38. Complaint filed against M. & D. and H. & L. sureties; complaint amended, and H. & L. only named defendants, and on this complaint the issue was framed, and the cause tried: held, that this operated as a discontinuance as to M. & D. *Browner v. Davis*, 15 Cal. 11.

39. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Smith v. Billett*, 15 Cal. 26.

40. Upon the remittitur of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. *McDonald v. Bear River Water and Mining Co.*, 15 Cal. 149.

41. The supreme court will not reverse the judgment of the court below to afford plaintiff an opportunity to amend his complaint, when he did not offer to amend below, there being no error in the record. *Gibbons v. Scott*, 15 Cal. 286.

42. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought, cannot be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Van Maren v. Johnson*, 15 Cal. 311.

43. When suit is brought against a female, who subsequently marries, her husband must be made a codefendant. But this should be done, and an averment of the marriage be made by a supplemental complaint, and not by an amendment to the original. *Ib.*

44. The objection to a complaint in forcible entry and detainer, that it does not aver "actual" possession—the word "possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended, but it cannot be urged in the supreme court for the first time. *Min-turn v. Burr*, 16 Cal. 110.

### 3. To the Answer.

45. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading and subsequently went to trial. After the close of the plaintiff's evidence, his counsel then for the

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To a Summons.—To a Verdict.—To a Judgment.—To a Bill of Costs.

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first time brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer: held, that the court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

46. Two defendants filed a joint plea of the statute of limitation, and the plea being held bad as to one defendant, the court, on the trial, permitted the other defendant to amend and file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to reverse it. *Robinson v. Smith*, 14 Cal. 254.

47. The defense relied on in the answer in this case being invalid, it was not error to refuse permission to amend after judgment sustaining a demurrer to the answer. Besides, the allowance of the amendment was matter of discretion, for the abuse of which only could this court interfere. *Gillan v. Hutchinson*, 16 Cal. 156.

48. It is not error for the court to refuse permission to set up the statute of limitations after answer to the merits. *Stuart v. Lander*, 16 Cal. 375.

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#### 4. To a Summons.

49. The court can allow a summons to be amended by inserting the notice of the cause of action required therein. *Pollock v. Hunt*, 2 Cal. 194.

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#### 5. To a Verdict.

50. The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of the parties. *Perkins v. Wilson*, 3 Cal. 139.

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#### 6. To a Judgment.

51. The defendant was sued and served by the name of George Mott, and judgment entered against him in that name,

without notice to him, the plaintiff, on his own motion, obtained an order from the court to amend the judgment by altering the name from George to *Gordon*: held, that this was error. *McNally v. Mott*, 3 Cal. 235.

52. A court may amend or render a judgment nunc pro tunc, where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. *Morrison v. Dapman*, 3 Cal. 257.

53. Where an amended decree, rendered at the same term as the first decree, is simply what the original decree should have been, and does no injustice to a party, this court will not disturb it on account of any alleged irregularity not affecting the merits. *Gronfier v. Minturn*, 5 Cal. 492.

54. When a judgment is rendered and an appeal taken, the court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 134.

55. While the term lasts, the court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 173.

56. It is not admissible, in a collateral manner, to amend the record of a previous action. If it can be amended at all, or a patent defect be cured, it must be by direct proceeding. *McMillan v. Reynolds*, 11 Cal. 379.

57. The appellate court cannot amend the record for error shown by the affidavit of the judge who tried the cause. *Smith v. Brannan*, 13 Cal. 115.

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#### 7. To a Bill of Costs.

58. The court has power, in the exercise of its discretion, to allow the amendment of a bill of costs and the affidavit accompanying it. *Burnham v. Hays*, 3 Cal. 118.

59. When the original bill of costs is filed within the time prescribed by the act, an amendment, allowed after the time, relates back to the time of filing the original, of which it forms merely a part. *Id.*



## To a Statement on Appeal.—Effect of Filing an Answer.

60. If the original affidavit to a bill of costs is a nullity, the defendant should take proper steps to have it set aside, or appeal from the judgment, on the ground that the costs had been waived by operation of the statute; but having himself moved a re-taxation of the costs, it was proper for the court, in its discretion, to allow such amendments as were just and necessary. *Burnam v. Hays*, 3 Cal. 118.

## 8. To a Sheriff's return.

61. A sheriff has no right, after making a return, to amend it so as to affect rights which had already vested in third parties. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 25.

## 9. To the Answer of a Garnishee.

62. To subserve the purposes of justice, courts should allow a garnishee to amend his answer whenever it appears that he has committed a mistake, or fallen into an error, which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 118.

## 10. To a Statement on Appeal.

63. Where amendments are made to a statement on appeal, a fair copy of the statement as amended should be made; otherwise the supreme court will not look into it. *Marlow v. Marsh*, 9 Cal. 259; *People v. Edwards*, 9 Cal. 291; *Skillman v. Riley*, 10 Cal. 300.

64. A statement agreed on by parties should not probably be amended by the court on motion, except under a very clear showing of mistake or fraud. *Hutchinson v. Bours*, 13 Cal. 52.

65. A statement on motion for a new trial regularly settled and signed by the judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the judge so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. *Valentine v. Stuart*, 15 Cal. 396.

## 11. In Justices' Courts.

66. Amendments should be regularly allowed whenever they will tend to the furtherance of justice, and the greatest liberality in this respect should be extended to pleadings in justices' courts. *Butler v. King*, 10 Cal. 343; *Thornton v. Borland*, 12 Cal. 439.

67. A justice of the peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this whether the defect be in the statement of jurisdiction, or any other fact. The greatest liberality and indulgence should be extended in all such applications. *Linhart v. Buiff*, 11 Cal. 280.

68. Amendments should be liberally allowed by inferior courts in advancement of justice, and to secure a fair and speedy trial on the merits; and an arbitrary refusal to allow them under proper circumstances, would be ground of interference by the supreme court. *Smith v. Yreka Water Co.*, 14 Cal. 202.

## ANSWER.

- I. Effect of filing an Answer.
- II. Appearance of the Wife by Answer.
- III. Failure to Answer.
- IV. Time to Answer.
- V. The Answer is a waiver of Demurrer overruled.
- VI. Jurisdiction admitted by the Answer.
- VII. The Answer as Evidence.
- VIII. Amended Answer.
- IX. Answer after Demurrer.
- X. Sham and irrelevant Answers.
- XI. Answer in an Injunction Suit.
- XII. Effect of a Joint Answer.
- XIII. What an Answer should contain.
  1. Cause of Defense.
  2. Objections to the Jurisdiction.
  3. Objections to Misjoinder, or Nonjoinder of parties.
  4. Objections to the Misjoinder of Actions.
  5. Objections to the Venue.
  6. When the Complaint is verified.
  7. New Matter.
- XIV. Defenses.
- XV. Evidence upon Issue joined.

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Effect of filing an Answer.—Failure to Answer.—Time to Answer.

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### I. EFFECT OF FILING AN ANSWER.

1. The mere fact of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of a jury trial under the code. *Zane v. Crowe*, 4 Cal. 112.

2. The answer of a defendant waives the alleged error as to the change of parties, whereby the name of such defendant has been submitted for that of another, without notice. *Smith v. Curtis*, 7 Cal. 587.

3. Failure of defendant in ejectment, to appear when the cause is called for trial—an answer being in—authorizes the court to try it without a jury. *Waltham v. Carson*, 10 Cal. 180; *Doll v. Feller*, 16 Cal. 433.

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### II. APPEARANCE OF THE WIFE BY ANSWER.

4. If the wife is not made a party to an answer to foreclose a mortgage executed upon the homestead, she may intervene, or by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint, if any matters are set up in the answer which he might wish to anticipate by further allegations. *Moss v. Warner*, 10 Cal. 297.

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### III. FAILURE TO ANSWER.

5. Where a defendant neglected to file his answer, and suffered a default and final judgment, the plaintiff has now the advantage at law, and his rights, obtained through defendant's laches, ought not to be disturbed. *Whipley v. Flower*, 6 Cal. 632.

6. A judgment by default is properly entered where the defendant did not answer and appear, after service was made complete by publication; nor does an appearance on a former appeal absolve him from the necessity of answering, or from the consequences of his neglect to do so. *Grewell v. Henderson*, 7 Cal. 292.

7. If defendants show any reasonable or valid excuse of their failure to answer,

then it would have been proper for the court below to consider the nature of the facts relied on as a defense, in order to determine whether the ends of justice would be promoted by opening the judgment. *Chase v. Swain*, 9 Cal. 137.

8. The amendment of the complaint, putting the substantial matters contained therein into two counts, not being answered by defendants, and no default being taken therefor, the plaintiff cannot go to trial without objecting to the answer to the original complaint, and, after verdict against him, object to the want of an answer to the amended complaint. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

9. An affidavit by defendant, that he was under the impression when he retained counsel in a cause that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; that he was quite ill at the time, and did not as carefully note the time as he would otherwise, is insufficient to open a judgment by default. *Elliott v. Shaw*, 16 Cal. 377.

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### IV. TIME TO ANSWER.

10. Under the Code of 1850,\* the defendant might file his answer at any time before final judgment, even after a default. *Stevens v. Ross*, 1 Cal. 95.

11. Where suit is brought against a person in a county other than that in which he resides, he has forty days to answer, exclusive of the day of service, and a judgment by default before the expiration of that full time will be reversed on appeal. *Burt v. Scrantom*, 1 Cal. 417.

12. Where a defendant was served with process, but was not given the time allowed by statute to appear and answer, it would be a sufficient reason for the court to quash the writ on motion, by an amicus curiæ, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment, or on motion for a new trial; but it cannot be said that the court had no jurisdiction of the person, so as to make its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 64.

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\* This provision does not exist in the Code of 1851, now in force.

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Jurisdiction admitted by Answer.—The Answer as Evidence.—Amended Answer.

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#### V. THE ANSWER IS A WAIVER OF DEMURRER OVERRULED.

13. An answer is a waiver of demurrer previously interposed.\* *Pierce v. Minturn*, 1 Cal. 471; *Brooks v. Minturn*, 1 Cal. 481; *Deboom v. Priestly*, 1 Cal. 107.

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#### VI. JURISDICTION ADMITTED BY ANSWER.

14. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, answers that he has a tax title to the land, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 616.

15. Citation to heirs, to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila v. Padilla*, 14 Cal. 106.

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#### VII. THE ANSWER AS EVIDENCE.

16. The mere fact that plaintiff's counsel had read upon trial a part of the answer which had been stricken out, would not of itself be error on appeal; the defendant could have asked the court to rule out the answer as testimony, and charge the jury to disregard it. *Morgan v. Hugg*, 5 Cal. 409.

17. An answer responsive to, and denying the charges in a bill of equity, is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 169.

18. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Blankman v. Vallejo*, 15 Cal. 645.

19. The equity rule, requiring two witnesses to controvert an answer under oath, does not prevail in this State. The answer is only a pleading, and is not evi-

dence for defendant. *Bostic v. Love*, 16 Cal. 72.

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#### VIII. AMENDED ANSWER.

20. To a complaint verified, the defendant filed a copy of the original verified answer, by mistake; parties took depositions under the pleading, and subsequently went to trial; after the close of the plaintiff's evidence, his counsel, then for the first time, brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer: held, that the court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

21. Two defendants filed a joint plea of the statute of limitation, and the plea being held bad as to one defendant, the court, on the trial, permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

22. The defense relied on in the answer being invalid, it is not error to refuse permission to amend after judgment sustaining a demurrer to the answer. Besides, the allowance of the amendment was matter of discretion, for the abuse of which only could this court interfere. *Gillian v. Hutchinson*, 16 Cal. 156.

23. It is not error for the court to refuse permission to set up the statute of limitations, after answering to the merits. *Stuart v. Lander*, 16 Cal. 375.

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#### IX. ANSWER AFTER DEMURRER.

24. The allowance to file an answer after demurrer overruled, rests in the discretion of the court below, subject to review of course, in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

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#### X. SHAM AND IRRELEVANT ANSWERS.

25. An appeal will not lie from an in-

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\* These decisions were made when an appeal was allowed from an order overruling a demurrer, which provision was restricted by the amendment to the Code, in 1854. The practice now is, to answer over and reserve an exception to the order overruling the demurrer, when the whole matter can be carried up on appeal.

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Sham and irrelevant Answers.—Answer in an Injunction Suit.—Effect of a Joint Answer.

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terlocutory order striking out an answer regularly filed, and rendering judgment without trial. *Stevens v. Ross*, 1 Cal. 97.

26. When the complaint alleges the making and endorsing of a note, and the answer denies neither signature, the answer should be stricken out, and the plaintiff entitled to judgment. *Grogan v. Ruckle*, 1 Cal. 196.

27. A defendant should set forth in his answer the true nature of his defense, or he should not be permitted to insist on it. *Walton v. Minturn*, 1 Cal. 362.

28. When the answer contains no good ground of defense, the court should render judgment on the pleadings for the plaintiff. *Corwin v. Patch*, 4 Cal. 204.

29. Where a defense was set up in the answer, that one partner deceived the other in obtaining the note in an action on the note: held, that all the answer except that portion admitting the execution of the note and denying the indebtedness, was properly stricken out. *Case v. Maxey*, 6 Cal. 277.

30. An answer which denies generally all the allegations of the complaint, is equivalent to the general issue at common law, and ought not to be stricken out as sham or frivolous. *Brooks v. Chilton*, 6 Cal. 642.

31. A copy of a note sued on, being attached to and made part of the complaint, the answer not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Whitwell v. Thomas*, 9 Cal. 499; *Horn v. Volcano Water Co.*, 13 Cal. 69.

32. A simple denial could not be treated as a sham answer, and yet all the purposes of vexation could be as well accomplished by it as by separate defenses, and the provision requiring defenses to be separately stated would be almost useless. *Piercy v. Sabin*, 10 Cal. 29.

33. If, under a simple denial in the answer, the defendant may give in evidence any defense formerly admissible under the general issue, the provision allowing sham answers to be stricken out would possess but very little practical utility. *Ib.*

34. A plaintiff is protected against sham defenses, which may be stricken out on motion. A sham answer is one good in form, but false in fact, and not pleaded in good faith. It sets up new matter, which is false. *Ib.*

35. In a suit on the note, the complaint containing the note or a copy, a denial of the indebtedness, is no denial at all. *Kinney v. Osborne*, 14 Cal. 113.

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## XI. ANSWER IN AN INJUNCTION SUIT.

36. Where the answer to a bill for an injunction denies all the equity, if any, of the bill, a preliminary injunction should not be granted. *Crandall v. Woods*, 6 Cal. 452.

37. Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. The exceptions to the rule depend upon the special circumstances of the particular cases. *Gardner v. Perkins*, 9 Cal. 553.

38. The entire equity of the bill being denied in the answer, and there being no support of the bill, the injunction was dissolved. *Burnett v. Whitesides*, 13 Cal. 157.

39. The privilege of moving for a dissolution of an injunction upon the filing of an answer, is limited to cases where the injunction is originally granted without notice, or expressly reserved when the injunction is granted on a rule to show cause. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551; *Natoma W. & M. Co. v. Parker*, 16 Cal. 85.

40. Where an injunction was granted on the complaint, restraining defendants from surveying or selling the premises, pending suit, and was dissolved on filing an answer setting up paramount title in defendants: held, that the injunction was properly dissolved, because the validity of defendant's title should be judicially determined before its assertion be enjoined. *Curtis v. Sutter*, 15 Cal. 263.

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## XII. EFFECT OF A JOINT ANSWER.

41. Defendants sued in ejectment may answer separately, or demand separate verdicts; unless they do so, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 80.

42. In ejectment, the verdict may be

## Effect of a Joint Answer.—What an Answer should contain.

joint, against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and defendants being in possession. *Mc Garvey v. Little*, 15 Cal. 31.

### XIII. WHAT AN ANSWER SHOULD CONTAIN.

#### 1. Cause of Defense.

43. Where the complaint alleges that the plaintiff was in the quiet and peaceable possession of premises, and was dispossessed by the defendants by force, or under an illegal order by an officer having no jurisdiction, the answer should take issue directly upon these allegations, or confess them, and state directly new matter to avoid them. *Ladd v. Stevenson*, 1 Cal. 22.

44. A party cannot argue an objection to the sufficiency of an answer on appeal, for the first time, the objection being different from that which he raised in the court below. *Grogan v. Ruckle*, 1 Cal. 196.

45. A defendant should set forth in his answer the true nature of his defense, or he should not be permitted to insist on it. *Walton v. Minturn*, 1 Cal. 362.

46. In an action to recover the purchase money of land, founded on a contract in which the plaintiff contracted to deliver a warranty deed for the land, the defendant in his answer denied that the plaintiff was the lawful owner, or that he had any title to the land: held, that to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another; and that, failing in this, his defense to the action was defective. *Thayer v. White*, 3 Cal. 228.

47. What was matter in abatement at common law must be set up in the answer, and with such particularity as to exclude every conclusion to the contrary. *Tooms v. Randall*, 3 Cal. 440.

48. When the defendants are sued as factors, it is not necessary to set forth in

their answer their claim for disbursements, commissions, etc., by way of set-off. *Lubert v. Chauviteau*, 3 Cal. 463.

49. An admission by an attorney of record, of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his client, destroys the effect of a denial in an answer. *Taylor v. Randall*, 5 Cal. 80.

50. In defense to an action on a promissory note, it is not sufficient to plead in general terms want of consideration, and that the note was obtained by fraud. The answer should set out the circumstances under which the note was given, and point out the facts which constitute the fraud. *Gushee v. Leavitt*, 5 Cal. 160.

51. Where an answer contains an allegation of alteration in an instrument, it must state that such alteration was made with the knowledge or consent, or by the authority of the plaintiff. *Humphreys v. Crane*, 5 Cal. 175.

52. A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded. *Osborne v. Endicott*, 6 Cal. 153.

53. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, in which the court rendered judgment against plaintiffs for costs, which was paid: held, that the payment of the judgment as taken, was a complete discharge of plaintiff's sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390.

54. To constitute the justification of a publication of libel, the answer should aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tended to establish the truth of such matter. The averment of its truth was essential, without which the facts detailed could only avail in mitigation of damages. *Thrall v. Smiley*, 9 Cal. 536.

55. An answer which disclosed the fact that the contract was not in writing, but also avers acts of part performance, which took the contract out of the operation of the statute, is not demurrable. *Arguello v. Edinger*, 10 Cal. 160.

56. On an action of trespass, where there is no specific denial of the amount of damage alleged in the complaint, although the alleged cause of damage is specifically traversed, it is doubtful wheth-



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Objection to the Jurisdiction.—Objections to the Misjoinder or Nonjoinder of Parties.

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er such answer amounts to a denial of the damage. *Rowe v. Bradley*, 12 Cal. 231.

57. When the complaint called the defendant to answer not only the character of the possession, but the fact of possession by it, a failure to deny this averment is an admission of it. *Burke v. Table Mt. W. Co.*, 12 Cal. 407.

58. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendants' entry," is insufficient in not setting forth the rules, customs, etc. *Dutch Flat W. Co. v. Mooney*, 12 Cal. 534.

59. Where the controlling fact in issue is evaded in the answer, this evasion in a solemn judicial proceeding is a most significant circumstance. *Baker v. Baker*, 13 Cal. 98.

60. It would require clear proof that the purposes of appropriation of water for a saw-mill had been fully terminated, to hold the title to the water abandoned. This question must, however, be taken in the answer, or made on the trial, and not for the first time raised on appeal. *McDonald v. Bear River & Auburn W. & M. Co.*, 13 Cal. 236.

61. In replevin, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. *Gould v. Scannell*, 13 Cal. 431.

62. It has been held, frequently, that a party cannot set up inconsistent defenses; but if no objection be taken to the answer, on that ground, the defendant on the trial may rely on any of these defenses. *Klink v. Cohen*, 13 Cal. 625.

63. The answer set up that the note sued upon was given for the land, fencing and building materials; that plaintiff falsely represented that there was building material for a barn; that this was so insufficient in quantity that it cost defendant six hundred dollars to buy more, etc.: held, that a special demurrer being put in to the answer, it sets up no defense as to the building material, because neither

quantity or value is given, and the answer is fatally defective in not charging the representations to have been fraudulently made, or that there was a warranty of some particular quantity of lumber. *Kinney v. Osborne*, 14 Cal. 113.

64. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Blankman v. Vallejo*, 15 Cal. 644.

65. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned, is sufficient. Such denial does not reach the substantial matter of the averment. *Castro v. Wetmore*, 16 Cal. 380.

66. Where, in an action on a lost note, the complaint verified alleges the loss, stating particularly the circumstances thereof, an answer denying the note was lost, as alleged, does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Ib.*

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2. Objection to the Jurisdiction.

67. The objection to the jurisdiction of the justice, on the ground of excess in the value of the subject of controversy, is properly made by the answer, and that should be determined before the justice proceeds to hear the merits of the case. *Small v. Gwinn*, 6 Cal. 449.

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3. Objections to the Misjoinder or Nonjoinder of Parties.

68. If there is a misjoinder of parties, the objection should be taken by answer or demurrer, or the same is waived. *Rowe v. Chandler*, 1 Cal. 175.

69. Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313.

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Objections to the Misjoinder of Actions.—Objections to Venue.—When the Complaint is verified.

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70. There are two ways of taking advantage of nonjoinder of parties plaintiff, when the defect does not appear upon the face of the complaint; and these are, at law, either by answer or apportionment of the damages at the trial; and in equity, by answer or demurrer. *Whitney v. Stark*, 8 Cal. 516.

#### 4. *Objections to the Misjoinder of Actions.*

71. If several causes of action are improperly united in the same action, the objection must be taken either by demurrer or answer, or it will be deemed to have been waived. *Macendray v. Simmons*, 1 Cal. 395.

#### 5. *Objections to the Venue.*

72. Where a motion was made to change the venue on the ground of non-residence, and no objection was made thereto in the answer, and nearly six months had elapsed before objection was made: held, it was made too late. *Tooms v. Randall*, 3 Cal. 439.

#### 6. *When the Complaint is verified.*

73. It is no error to allow the defendant to verify his answer before trial, unless it in some way took the plaintiff by surprise, and this must be shown. *Angier v. Masterson*, 6 Cal. 62.

74. The objection to the want of verification to the declaration should have been made either before answer or with the answer. It comes too late after answer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

75. When the complaint is verified, the answer shall contain a specific denial of each allegation controverted by defendant, or a denial thereof according to his information and belief. Every material allegation which is not so denied shall, for the purposes of the action, be taken as true. *Anderson v. Parker*, 6 Cal. 200; *Swartz v. Hazlett*, 8 Cal. 126; *Dewey v. Bowman*, 8 Cal. 149.

76. By verification of the complaint,

the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes by requiring a sworn answer. *Brooks v. Chilton*, 6 Cal. 642.

77. Where a complaint is verified, and there is no denial either of the ownership of the house during the period stated or of the occupancy of the premises by the defendant, there was in fact no denial of the amount claimed for the use and occupation of the premises. *Osborne v. Hendrickson*, 8 Cal. 32.

78. The object of verifying a complaint is to avoid the necessity and expense of producing proof to sustain the allegation of the complaint, in cases where the plaintiff would swear they were true, and the defendant would not deny the truth of the alleged facts under oath. *Dewey v. Bowman*, 8 Cal. 149; *Thompson v. Lee*, 8 Cal. 279.

79. It is truly painful to witness the reckless ease with which defendants, in too many cases, make "general and specific" denials, under oath, of "each and every allegation of the complaint," when it is clear that some of the material allegations of the complaint would never have been separately denied. *Dewey v. Bowman*, 8 Cal. 150.

80. If the facts in the complaint alleged are presumptively within the knowledge of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion. If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information. *Curtis v. Vantine*, 9 Cal. 38.

81. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Id.*

82. There are but two forms in which a defendant can controvert the allegations of a verified complaint, so as to raise an issue; first, positively when the facts are within his own personal knowledge; and second, upon information and belief when the facts are not within his own personal knowledge. *Curtis v. Vantine*, 9 Cal. 38; *Humphreys v. McCall*, 9 Cal. 62; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 474; *Stewart v. Street*, 10 Cal. 373; *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

83. An answer unaccompanied by a

## When the Complaint is verified.—New Matter.

required verification may be stricken out, and judgment ordered for plaintiff, as upon a default. *Drum v. Whiting*, 9 Cal. 423.

84. The language of the statute is imperative, and makes only one exception in which the verification of an answer may be omitted when the complaint is duly verified, and that is when the admission of the truth of the complaint might subject the party to a prosecution for a felony. *Ib.*

85. The statute imposes upon the defendant, if a natural person, and if a corporation upon its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 466.

86. An answer is fatally defective in not denying any of the allegations, either positively or according to information and belief, the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. *Ib.*

87. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial; after the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court, by moving for judgment by default, which motion the court sustained, and refused to allow defendant to then verify his answer: held, that the court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

88. Where the pleadings are verified, every matter of defense not directly responsible to the allegations of the complaint, must be set up in the answer. *Terry v. Sickles*, 13 Cal. 430.

89. In an action upon an account stated, evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting. *Ib.*

90. A verification to an answer before a county recorder is good under the statute. *Pfeiffer v. Rhein*, 13 Cal. 648.

91. An allegation in a verified complaint that "defendants wrongfully and

unlawfully entered upon and dispossessed" plaintiffs, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiffs, because such answer admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 92.

92. A sworn answer must be consistent in itself, and must not deny in one sentence what it admits to be true in the next. *Hensley v. Tartar*, 14 Cal. 509.

93. Where a complaint is verified, an answer denying "generally and specifically each and every allegation in the complaint, the same as if said allegations were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Ib.*

94. In equity, the general denials made by traversing literally and conjunctively the statements of a sworn bill, are not legitimate for the purpose of putting in issue specific allegations, for in this way a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge, or even the substantial fact. *Blankman v. Vallejo*, 15 Cal. 644.

95. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill in substance and in spirit, and not merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment. *Ib.*

## 7. New Matter.

96. Damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and in an action by his vendor against him, cannot be recouped from the plaintiff's claim, unless such damages are specially alleged and set forth in the answer. *Cole v. Swanston*, 1 Cal. 54.

97. An answer is not merely a response to the charges and interrogatories of the complaint, but as a pleading of the de-

## New Matter.—Defenses.

fendant, in which he may set up new matter of defense, whether within his knowledge or not. *Von Schmidt v. Huntington*, 1 Cal. 69.

98. The defendant will not be permitted to insist at the trial that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer. *Kendall v. Vallejo*, 1 Cal. 372.

99. To entitle a defendant to set off a claim against a demand of the plaintiff, he must set forth in his answer the nature of the claim which he intends to set off. *Bernard v. Mullot*, 1 Cal. 368.

100. Where defendants are sued as factors, it is not necessary to set forth in their answer their claim for disbursements, &c., by way of set-off. *Lubert v. Chauviteau*, 3 Cal. 463.

101. Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. *Gaskill v. Moore*, 4 Cal. 235.

102. The want of capacity in a plaintiff to sue should have been specially set up in the answer. The general issue is not sufficient. *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 590; *White v. Moses*, 11 Cal. 70.

103. It is well settled that an officer, in order to justify the seizure of property in the possession of a stranger to the writ which he has executed, must plead specially such justification. *Glazer v. Clift*, 10 Cal. 304.

104. An attorney sued for professional services on a quantum valebant, and the answer denied the value of the services. The rule requiring new matter to be set up in the answer does not here apply. *Bridges v. Hall*, 13 Cal. 641.

105. New matter is where the defendant seeks to introduce into the case a defense not disclosed by the pleadings; something relied on by him, but not put in issue by the plaintiff. *Ib.*

## XIV. DEFENSES.

106. Where an attorney is proceeded against with the object of expelling him from the bar, natural justice entitles him to have notice of the charges against him and an opportunity to answer. *People v. Turner*, 1 Cal. 150.

107. Where the affidavit sets forth that the defendant has a good and substantial defense, he should set forth specifically wherein that defense consists. *Rogers v. Huie*, 1 Cal. 433.

108. Infancy is a good defense to an action on an executory contract, though the defendant did not disaffirm it on coming of age. *Buzzell v. Bennett*, 2 Cal. 102.

109. An endorsee of a promissory note after maturity takes the same interest that the endorser had, and his claim is subject to the same legal and equitable defense. *Folsom v. Bartlett*, 2 Cal. 164.

110. A judgment was had in the district court in favor of the appellant, and against the respondent: held, that after judgment against him it is too late for plaintiff to file his bill for a discovery in aid of his defense, on the ground that it was meritorious, and lies entirely within the knowledge of the judgment creditor. *Norris v. Denton*, 2 Cal. 380.

111. It is better to place the statute of limitation within the discretion of the court, so as to allow it to be pleaded at any time, upon terms, if it be proper, whereby the ends of justice will be attained by it. *Cooke v. Spears*, 2 Cal. 411.

112. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds, and if the consideration is not paid, that fact may be urged specifically as a good ground of defense. *Hoppe v. Stout*, 2 Cal. 462.

113. A general denial has the same influence as the general issue at common law, and under that accord and satisfaction may well be shown. *Gavin v. Annan*, 2 Cal. 497; *Piercy v. Sabin*, 10 Cal. 30.

114. Where the contract was entire and the covenants dependent, and the plaintiff had declared his inability to keep it, and afterwards actually abandoned it: held, these facts formed a defense to his action for a claim under the contract. *Green v. Wells*, 2 Cal. 585.

115. Where the contract is for goods in a vessel, which are not yet discharged and cannot be delivered, there cannot be a defense of a delivery which takes the case out of the statute, and a good legal excuse for nondelivery. *Stevens v. Stewart*, 3 Cal. 143.

116. On a bill for a specific performance, defendant alleged fraud in the contract sued upon, but admitted payment of



## Defenses.

the consideration money under protest affirming the fraud: held, that the receipt of payment was no waiver of the defense, and defendant was not estopped from showing fraud. *Russell v. Amador*, 3 Cal. 402.

117. To avoid circuitry by driving defendant to a cross action on a warranty, he is permitted to set up the breach thereof in defense, either in mitigation of damages, or as a complete answer to the whole case. *Flint v. Lyon*, 4 Cal. 20.

118. A party who sues out a writ of replevin from a justice's court having no jurisdiction, and obtains the property, cannot, in an action in the replevin bond, set up, as a defense, the want of jurisdiction of the court. *McDermott v. Isbell*, 4 Cal. 114.

119. An executed parol agreement is a good defense against an action upon a specialty. *Beach v. Covillaud*, 4 Cal. 315.

120. A negotiable note, taken after maturity, is subject to all subsisting equities between the maker and payee, but not such as subsisted between the maker and every intermediate holder. *Vinton v. Crowe*, 4 Cal. 309.

121. A bare negative qualification need never be averred in an indictment, but must be relied on as matter of defense in the progress of the trial. *People v. Nugent*, 4 Cal. 341.

122. A sued B for twenty-two head of cattle and two wagons, and recovered a verdict for twelve head and the wagon, which was accepted by A and allowed to stand. C, who held under B, was afterwards sued by A for the remainder of the cattle: held, that if A had commenced another suit against B, his former recovery would have been a complete bar to the action, and if B could plead the former recovery in bar, so could C, who claimed immediately through B. *Cunningham v. Harris*, 5 Cal. 81.

123. It is not a good plea to allege that the note sued on is the property of another and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set against the plaintiff. *Gushee v. Leavitt*, 5 Cal. 161.

124. When the defense of the wife is a special one, she can defend for her own right as well when sued jointly with her husband as if the trial was separate. *Deuprey v. Deuprey*, 5 Cal. 388.

125. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim, and this averment is found to be true as alleged by the judge at nisi prius upon an inspection of the record of the case, the judgment upon demurrer is a bar to the suit. *Robinson v. Howard*, 5 Cal. 429.

126. A defense that the affidavit of arrest is insufficient cannot be set up by third parties, and not even by the defendant himself, after judgment in an action on the bail bond. *Mattoon v. Eder*, 6 Cal. 59.

127. When in a proceeding for the protection of the creditor's property, instituted by one of the insolvent firm against his partners, in the same court wherein assignees have been appointed in insolvency proceedings by the firm, which, however, are void, and an order is made that the assignees pay over the fund to a receiver appointed by the court, it is no answer or defense that the fund has been attached in their hands in actions brought by the creditor, or that it had been attached in the hands of a former receiver, appointed by the same court, from whom they, under a like order, had received it. *Adams v. Haskell*, 6 Cal. 116.

128. A defense that promissory notes were made by one partner, in the firm name, but for his own private use, would not be good against the holder without notice of the fraud. *Rich v. Davis*, 6 Cal. 141.

129. A defense which was fully adjudicated in another suit between the same parties cannot be considered a second time. *Ib.* 142.

130. A principal may sue in his own name on a contract in writing, made and signed by his agent, without disclosing his principal. But, in such a case, the defendant may make the same defenses against the newly discovered principal as he could against the agent with whom he dealt as principal. *Ruiz v. Norton*, 4 Cal. 358.

131. The writ of restitution obtained in an action of forcible entry and detainer, does not determine either the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell v. Osgood*, 6 Cal. 148.

132. It is no defense to a note given by one partner to the other, for an interest in land held jointly by both, that the payee of a note had deceived his partner—the



## Defenses.

maker—in the division of partnership stock, and was indebted therefor in an amount equal to, or greater than the sum due on the note. *Case v. Maxey*, 6 Cal. 277.

133. A discharge in insolvency made in chambers by the district judge, in the same district, but in another county from that in which the proceedings were instituted, is no defense to an action against an insolvent. Objections which go to the jurisdiction may properly be taken on trial. *Turner v. McIlhaney*, 6 Cal. 288.

134. Although a party set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. *Lorraine v. Long*, 6 Cal. 453.

135. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system. *Hopkins v. Beard*, 6 Cal. 665.

136. Where, in an action on a promissory note, the defense set up is, that the defendant executed said note as the consideration for a deed from plaintiff for certain land under false and fraudulent representations; that plaintiff had an interest therein; the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

137. The defense that defendant asked by advice of a counsel must show that such advice was given upon a full and fair statement of the case. *Bliss v. Wyman*, 7 Cal. 257.

138. Sureties of a bail bond cannot avail themselves, as a defense to an action thereon, of an insufficiency of the justification of the undertaking. *People v. Carpenter*, 7 Cal. 403.

139. If there be any consideration for the assignment of a note, then the assignee is a holder for value, and the maker is precluded from resorting to any defense that he might make against the payee, were the suit brought by him. *Payne v. Bensley*, 8 Cal. 266.

140. Commercial paper, transferred be-

fore maturity, as collateral security for a preëxisting debt, is not subject to the defenses of payor against payee. *Payne v. Bensley*, 8 Cal. 266; *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454.

141. The claim of defendant must be affirmatively set forth by him, in his answer. The plaintiff is not supposed to know the nature of the defendant's adverse claim. *Mitchell v. Steelman*, 8 Cal. 369.

142. If an answer does not deny specifically that the money was loaned, but admits that interest was to be paid upon the amount, the issue goes to show that it was a loan and not a purchase. *Lee v. Evans*, 8 Cal. 434.

143. If a judgment would not support an action by the plaintiff against the defendants, it must be equally unavailing when offered in defense as a former recovery in an action upon an original demand. *Kane v. Cook*, 8 Cal. 457.

144. In all cases a fraudulent concealment of the fact upon which the existence of the cause of action accrues, is a good answer to the plea of the statute of limitations. *Ib.* 461.

145. A debtor has the right to purchase cross-demands against the partnership, and to set them up as a defense to the debt due by him to the partnership. *Naglee v. Minturn*, 8 Cal. 544.

146. If an assignor is guilty of such fraud as would avoid the contract, and that the assignee was bound by his acts, the defendant could not avail himself of such a defense, unless fraud was alleged in the answer. *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 592.

147. In an action on a promissory note, executed by defendant, the defense was, that he was only a surety for the maker, and that plaintiff had neglected to bring suit in due time, and no notice of demand and protest was given: held, that mere neglect to sue is no defense. *Kritzer v. Mills*, 9 Cal. 23.

148. Where the defendants employed the plaintiff to superintend the erection of a building, of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews*, 9 Cal. 74.

## Defenses.

149. As the plaintiff is compelled to set out every fact necessary to constitute his cause of action, the defendant is, every new matter of defense. This is required by the true principles of pleading. *Piercy v. Sabin*, 10 Cal. 27; *Glazer v. Clift*, 10 Cal. 304.

150. A defense wherein the onus of proof is thrown upon the defendant, that matter to be proved by him is new matter, is where the defendant concedes the plaintiff once had a good cause of action, but insists that it no longer exists. *Piercy v. Sabin*, 10 Cal. 27.

151. A defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible under our system of practice, in an action of ejectment for the recovery of the premises. *Arguello v. Edinger*, 10 Cal. 160.

152. At common law a party was not permitted to plead a want of consideration as a defense to an action upon a sealed instrument, the presumption of the existence of a consideration being absolute and conclusive. *Mc Carty v. Beach*, 10 Cal. 463.

153. A defense that the note was made payable to order, and was afterwards fraudulently made payable to bearer, and that defendant paid the note before the plaintiff became assignee of it, and plaintiff became assignee after the note was due, is good. *Sherman v. Rollberg*, 11 Cal. 41.

154. M., a married woman, had a sum of money left her by bequest, during coverture; she and her husband joined in a power of attorney to O., authorizing him to demand and receipt for the money. O. received the money under said power. Some time after the receipt of the money by O. the husband died. M. sued O. to recover the money, and O. answered: That the money was collected for the husband, and a settlement and discharge since with his administrator, and money from time to time was paid to the husband during his lifetime, with the knowledge of M.: held, that the money was her separate property, and these defenses would not avail. *Dickenson v. Owen*, 11 Cal. 75.

155. The statute on estates denies any present right to the State to take property of a deceased person when there are alien nonresident heirs, and it is a good answer to one in possession to show a

want of power in him who seeks to disturb it. *People v. Rogers*, 13 Cal. 166.

156. In order to charge attorneys with negligence in failing to set up a defense, the plaintiff must prove the existence of such facts, and that they were susceptible of proof at the trial, by the exercise of proper diligence on the part of his attorneys. *Hastings v. Halleck*, 13 Cal. 209.

157. To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Riddle v. Baker*, 13 Cal. 304.

158. A perfect equity united with possession is under our system equivalent for all purposes of defense to a legal title. *Morrison v. Wilson*, 13 Cal. 497.

159. In a criminal case, if the court below impose upon counsel, against their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived of the opportunity of a full defense; for this is his constitutional right, without which he cannot lawfully be convicted. *People v. Keenan*, 13 Cal. 585.

160. Where in a mortgage to secure the purchase money of land for which notes were given, falling due at different times, the condition was: "provided that previous to the dates of said payment, it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession," the holder of one of the notes transferred before maturity may sue on it at maturity, although the title of the land has not been settled, and peaceable possession not given. The fact that the purchaser of the note saw the mortgage and note, was no notice to him of any valid defense to the note. *Robinson v. Smith*, 14 Cal. 100.

161. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceedings. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 202.

162. If parties consent that defenses

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 Defenses.—Evidence upon Issue joined.
 

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other than those alleged in their answers may be set up, they must be presented by regular written allegations in a properly traversable form, or they will be disregarded. *Boggs v. Merced Min. Co.*, 14 Cal. 380.

163. Where there are several separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury, with evidence in support of each, and the verdict is general for the defendants, it cannot be set aside if it be right as to any one issue, though wrong on all the others. *Kidd v. Laird*, 15 Cal. 182.

164. In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl v. Bull*, 15 Cal. 425.

165. Mrs. L., a defendant, when a femme sole contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit against her was brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her, the judgment of the supreme court being conclusive so long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding, impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

166. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. Janu-

ary 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

167. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time, and if the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit had been dismissed, and nothing was realized by the attachment. *Brennan v. Swasey*, 16 Cal. 142.

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 XV. EVIDENCE UPON ISSUE JOINED.
 

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168. In chancery, when a cause is heard on bill and answer, all the material allegations of the answer, whether upon knowledge or upon information and belief, are to be assumed as true, provided the facts and circumstances disclosed by the answer are not wholly inconsistent with a general affirmation or denial contained therein. *Von Schmidt v. Huntington*, 1 Cal. 69.

169. Where a bill was filed to set aside and vacate a judgment on the ground that it was obtained through fraud, venality, and corruption, and these charges were all sufficiently denied in the answer, and the cause was heard on the pleadings: held, that the effect of the denial in the answer was the same as if the charges in the bill had been disproved by testimony. *Belt v. Davis*, 1 Cal. 142.

## Evidence upon Issue joined.

170. A fact set forth in the complaint, admitted by the defendant's answer, needs no proof. *Brooks v. Minturn*, 1 Cal. 483.

171. Under our practice, as well as at common law, a specific denial of one or more allegations is held to be an admission of all others well pleaded. *De Ro v. Cordes*, 4 Cal. 120.

172. A denial that defendant is indebted to the said plaintiff, in the manner and form set forth, is a plea of nil debet at common law, and under it the defendant may prove an eviction, payment, release, and other matters of discharge. *McLaren v. Spalding*, 2 Cal. 512.

173. In an action against a sheriff for refusing to levy an attachment on certain property, as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 157.

174. There is no necessity of a finding by the court of a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer so as to raise an issue. *Swift v. Muggridge*, 8 Cal. 445.

175. The denial of any indebtedness without a denial of any of the facts from which that indebtedness follows, as a conclusion of law, raises no issue. *Curtis v. Vantine*, 9 Cal. 38.

176. The simple denial by the defendants of all right in the plaintiff, only puts in issue the right of the plaintiff to recover as against the defendants. *Humphreys v. McCall*, 9 Cal. 63.

177. Under the old system of pleading, a former recovery should be given in evidence under the general issue, in assumpsit, trover, case and ejectment, but under our code, only two classes of defense are allowed, a simple denial or an allegation of new affirmative matter, and these two classes of cases must be the same in all cases. *Piercy v. Sabin*, 10 Cal. 27.

178. It is unnecessary to decide whether the facts as alleged constitute a title sufficient to maintain this action, as against mere trespassers, as there is no sufficient denial in the answer of the allegation of

actual and peaceable prior possession. *McCormick v. Bailey*, 10 Cal. 232.

179. A court of equity will relieve against mistakes as well as fraud in a deed or contract in writing, and parol evidence is admissible to show it, if it be denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

180. Where the answer of defendants stated that the consideration of a note, sought to be impeached by creditors, was money loaned at the time of its date, and at various times *subsequently*, and the note drew interest from its date upon the whole amount, it admits fraud in the judgment on the note. *Scales v. Scott*, 13 Cal. 78.

181. Pleadings in justices' courts are not held to much strictness, and where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 599.

182. Anything which shows plaintiff has no right of recovery at all, or to the extent claimed on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer. *Bridges v. Paige*, 13 Cal. 641.

183. Where the paper, purporting to be an admission by an agent, is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

184. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but shows it affirmatively, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties as an independent fact, not in issue by the pleadings, but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 116.

185. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, defendant may show anything disproving the contract as averred; as that another party, who in fact sold the cattle, sold them as his own, and not as agent of plaintiff, or that defendant was not to pay until the cattle were fattened and slaughtered. *Hawkins v. Borland*, 14 Cal. 414.



Evidence upon Issue joined.—In general.

186. Where on suit against defendants, as members of a quartz company, one defendant plead that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company, the finding supports a judgment for plaintiff.—*Parke v. Hinds*, 14 Cal. 417.

187. If in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Walker v. Woods*, 15 Cal. 69.

188. Defendants answered to an action on a note, by pleading payment, and averring payment at divers times of money to plaintiff's intestate, which he promised to apply on the note. Plaintiff put the note in evidence and rested. Defendants offered receipts to prove payment. To rebut this, plaintiff offered proof tending to show that these payments applied to an open account against defendants. Defendants then proposed to rebut, by showing that there was no such account made or existing—court refused to permit it: held, that the court erred; that the burden of proof was really on defendants to prove payments under the issue, and that they were entitled to close the proofs; at least, to rebut new matter set up by plaintiff. *Lisman v. Early*, 15 Cal. 200.

189. Where in a suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least, in substance, and he cannot, against defendant's objection, recover on another and different title. *Eagan v. Delaney*, 16 Cal. 87.

## APPEAL.

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### I. IN GENERAL.

1. A party making a motion for a nonsuit on one ground, impliedly waives all others, and cannot avail himself of a different position on appeal from that assumed in the court below. *Ringgold v. Haven*, 1 Cal. 116; *Mateer v. Brown*, 1 Cal. 222.

2. Where a written stipulation is filed by the parties in the court below to govern the proceedings there, but has not been brought to the notice of the court for its adjudication, the appellate court will not regard it. *Clark v. Forshay*, 3 Cal. 291.

3. If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the court in which it is filed, or in some court of original jurisdiction. *Ib.*

4. The supreme court will not decide questions not directly involved in the case and unnecessary to a judgment of affirmance or reversal by that court. *West v. Smith*, 5 Cal. 96.

5. The statute requires that all criminal cases should be disposed of on appeal, without regard to technicalities. *People v. Lockwood*, 6 Cal. 206; *People v. Moore*,



## In general.—Judgment on an Appeal.

8 Cal. 93; *People v. Ah Fong*, 12 Cal. 368.

6. A judgment in insolvency, if not reversed on appeal for an irregularity, is conclusive between the parties. *Kohlman v. Wright*, 6 Cal. 231.

7. An appearance in the supreme court on a former appeal did not absolve the defendant from the necessity of answering a complaint, or from the consequences of his neglect to do so. *Grewell v. Henderson*, 7 Cal. 292.

8. Hereafter the rule is established, that rehearings will not be granted with the same indulgence as formerly. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334.

9. A judgment or order may be reversed as prescribed by the code, but not otherwise. If, therefore, an appeal be given by that title in a particular case, the judgment or order can only be reviewed in the manner therein prescribed. *Haight v. Gay*, 8 Cal. 300.

10. A party who appears and contests a motion in the court below cannot object on appeal that he had no notice of the motion. *Reynolds v. Harris*, 14 Cal. 677.

11. Questions of discretion in the judge below will not be reviewed on appeal, except in cases of gross abuse, to the injury of the party. *Smith v. Billett*, 15 Cal. 26.

12. An appeal from an order refusing to grant an injunction, upon preliminary notice, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. *Hicks v. Michael*, 15 Cal. 109.

13. An appeal does not revive an injunction once dissolved. *Ib.* 110.

14. An appeal cannot operate to create an injunction under any circumstances. *Ib.*

15. On appeal, a judgment by default will be reversed, unless the record show service on the defendant, or appearance, though possibly a judgment so obtained could not be impeached collaterally. *Schloss v. White*, 16 Cal. 68.

16. An enlarged discretion is given to the lower courts in the conduct and management of the public business; and with this discretion an appellate tribunal cannot interfere, unless it affirmatively appear that injustice has been done. *Broadus v. Nelson*, 16 Cal. 81.

17. If a judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here, to enjoin the enforcement of the judgment, should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Logan v. Hillegass*, 16 Cal. 202.

## II. JUDGMENT ON AN APPEAL.

18. The supreme court, on reversing the judgment, may render such judgment as the court below should have done. *Gahan v. Neville*, 2 Cal. 81; *Bidleman v. Kewen*, 2 Cal. 250.

19. Where a jury rendered a verdict which did not carry costs "and costs of suit," the appellate court reversed that part of the judgment which gave costs, and directed the lower court so to modify the judgment. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

20. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

21. At common law, the appellate court either affirms or reverses the judgment upon the record before it, and the opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court have the same rights that they originally had. *Stearns v. Aguirre*, 7 Cal. 448.

22. After the plaintiff had appealed upon a statement agreed upon as containing the facts and evidence of his case, and a judgment has been pronounced against him, going to the whole merits of the controversy, it would be exceedingly improper to allow him an opportunity to alter or change the facts upon a second trial. *Gunter v. Laffan*, 7 Cal. 592.

23. It would only be where there was undoubted error that the appellate court

## Judgment on an Appeal.—The Right to an Appeal.

could review and correct a former decision. *Osborn v. Hendrickson*, 8 Cal. 32.

24. After reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Phelan v. Supervisors of San Francisco*, 9 Cal. 16.

25. Where a final judgment on demurrer to the complaint sustaining the demurrer is reversed on appeal, the plaintiff has the right to amend on application to the court below. *Ib.*

26. The supreme court will reverse the judgment of the court below where the facts found by the court are not sufficient to support the judgment. *Davis v. Caldwell*, 12 Cal. 126.

27. Where a case is appealed from the district court, to the supreme court and the supreme court reverses the judgment of the district court, and directs the entry of a final judgment, such judgment can be entered by the clerk of the district court in vacation. *McMillan v. Richards*, 12 Cal. 468.

28. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

29. Where a suit is pending in the supreme court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue, even between the parties. *Woodbury v. Bowman*, 13 Cal. 634.

30. Where a judgment is against two, one of whom only appeals, and the appeal is dismissed with twenty per cent. damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under a judgment. *McMillan v. Vischer*, 14 Cal. 241.

31. After a judgment has been rendered on appeal, a material modification of such judgment should not be made upon a petition for rehearing; the rehearing should first be granted. *Clark v. Boyreau*, 14 Cal. 638.

32. The provision of the code authorizing the supreme court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court

from exercising the same power. *Reynolds v. Harris*, 14 Cal. 677.

33. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court or the court below, on motion. *Browner v. Davis*, 15 Cal. 11.

34. In theory, issue is joined in the supreme court upon the assignment of errors made upon the record. The case may be regarded as a new and distinct action. Upon the issue thus made the judgment of the court must rest, and that judgment affirms the law on the matter presented for adjudication, and fixes the rights of the parties under the law. *Davidson v. Dallas*, 15 Cal. 83.

35. Where the judgment below is reversed and the cause remanded for new trial, it must be retried in pursuance of the principles of law declared in the opinion of the appellate court. The directions of the opinion become a portion of the judgment. *Ib.* 84.

36. The supreme court will not reverse the judgment of the court below to afford the plaintiff an opportunity to amend his complaint, he not having offered to amend below—there being no error in the record. *Gibbons v. Scott*, 15 Cal. 286.

See JUDGMENT.

### III. THE RIGHT TO AN APPEAL.

37. Where an order granting a new trial was made in the court below upon the payment of costs, and the defendants paid the costs, and the plaintiff then appealed from the order, and a motion was made to dismiss the appeal on the ground that the acceptance of the costs by the plaintiff's attorney was a waiver of the right to appeal: held, that the acceptance of the costs was not a waiver of the right to appeal, and the motion was accordingly denied. *Tyson v. Wells*, 1 Cal. 378.

38. An appeal cannot be prosecuted by a stranger to the record—he must resort to his remedy at law. *Montgomery v. Leavenworth*, 2 Cal. 57; *Adams v. Woods*, 8 Cal. 315.

39. Where parties stipulate not to ap-

## Examination of Errors on Appeal.—Assignment of Errors.—Requisites of the Record.

peal, a court of equity will interfere nevertheless to correct fraud, or mistake appearing on the face of an award. *Muldrow v. Norris*, 2 Cal. 78.

40. Where an appeal is taken and perfected after the death of the appellant: held, that there was no authority to prosecute the appeal, but that all proceedings should have been stayed until the executor or the administrator could be suggested as a party. *Sanchez v. Roach*, 5 Cal. 248.

41. The fact that a bill of exceptions was not signed more than ten days after the trial, cannot defeat a party's right to appeal. *People v. Martin*, 6 Cal. 478; *People v. Woppner*, 14 Cal. 437; *People v. Lee*, 14 Cal. 511.

42. In an action against the husband alone, the homestead right cannot be determined; the wife also must be before the court, and the husband has not even the right of appeal in such a case, as the judgment could not affect the homestead. *Kraemer v. Revalk*, 8 Cal. 75.

43. Where an appeal is given by the statute, that remedy is exclusive, and must be pursued, and a writ of error will only lie in cases where no appeal is given by the act. *Haight v. Gay*, 8 Cal. 300.

44. There can be no doubt of the right of a party to appeal, either from a judgment of an order, or from both at the same time. *Marziou v. Pioche*, 8 Cal. 537.

45. Appeals can be taken only from the judgments of a court; where there is no judgment of any tribunal having jurisdiction, there can be no appeal. *Wicks v. Ludwig*, 9 Cal. 175.

46. A party cannot be permitted to prosecute two separate and distinct remedies, in the supreme court, for a review of the same question at the same time. *Kirk v. Reynolds*, 12 Cal. 99.

47. J. filed his bill in the district court against T., alleging a partnership between them, and praying for an account. J. then filed a petition in the same court, setting forth the bill, and that H. B. had obtained judgment against T., and issued execution upon the partnership property, praying that H. B. be made a party, and for an injunction, which was granted: held, that on an appeal of the case, it does not lie in the mouth of J. and T. to say that H. B. is not a party to the suit and has no right to ap-

peal. *Jones v. Thompson*, 12 Cal. 197.

48. In criminal cases the prisoner is not bound to except to an improper ruling, but may appeal from any ruling of the court which denies him a statutory privilege. *People v. Ah Fong*, 12 Cal. 348.

## IV. EXAMINATION OF ERRORS ON APPEAL.

49. It has been the practice, on appeal, to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent. *Jackson v. Feather River & Gibsonville W. Co.*, 14 Cal. 21; *Seaward v. Malotte*, 15 Cal. 307.

50. Where the respondent takes no appeal, at least where he files no transcript and assigns no errors, judgment will not be reversed at his instance. *Travers v. Crane*, 15 Cal. 20.

51. A demurrer overruled by consent cannot be considered in the supreme court. *Coryell v. Cain*, 16 Cal. 572.

## V. ASSIGNMENT OF ERRORS.

1. *Requisites of the Record.*

52. Where, on appeal, the record contained none of the proceedings of the court below, except the pleadings and judgments, and these were sufficient; no portion of the evidence being returned, the appellate court presumed that the proceedings were regular, and that sufficient of the evidence was adduced at the trial to warrant the judgment. *Gonzales v. Huntley*, 1 Cal. 32; *Palmer v. Brown*, 1 Cal. 42; *Ringgold v. Haven*, 1 Cal. 115; *Kilburn v. Ritchie*, 2 Cal. 148.

53. Where it appears on the face of the judgment record itself, that there was no trial before a jury, and no evidence given to the court, it will not be presumed on appeal that any evidence was adduced in the case, but the court will presume that the cause was heard on the pleadings alone. *Belt v. Davis*, 1 Cal. 137.

54. The appellate court will not review irregularities, where no objection was made to them in the court below, and es-

## Requisites of the Record.

pecially when the court cannot see that they affected in the slightest degree the administration of substantial justice. *People v. McCauley*, 1 Cal. 382; *People v. Baker*, 1 Cal. 405.

55. Where a written or printed instrument, as for instance, a card published in a newspaper, is proposed to be given in evidence, and is rejected by the court, such evidence or the substance of it must be returned with the record, or the appellate court will not review the decision of the court below. *Dwinelle v. Henriquez*, 1 Cal. 389.

56. The appellate court will not review the rulings of the court below, unless presented in proper form in a statement or bill of exceptions. The testimony is taken down by the clerk, but he is not authorized to say what decisions the court did or did not make. *Gunter v. Geary*, 1 Cal. 464; *Pierce v. Minturn*, 1 Cal. 471.

57. Unless the record shows that the interest of the witness was sufficient under our statute to disqualify him, the appellate court will deem the parties entitled to the benefit of his testimony. *Johnson v. Carry*, 2 Cal. 36.

58. Where an action in the district court was founded on a judgment in the court of first instance, and an appeal was taken from the judgment of the district court, the record of the court of first instance was brought up on certiorari, and the judgment examined in that form, and not as a part of the bill of exceptions. *Parsons v. Davis*, 3 Cal. 425.

59. The notice and affidavits filed on an application to retax costs were not introduced in the bill of exceptions or statement: held, that the judgment must be affirmed, upon the presumption that the court below decided properly upon all the evidence before it. *Gates v. Buckingham*, 4 Cal. 286.

60. Every intendment must be on appeal in favor of the decision of the court below, and we have repeatedly held, upon unquestionable authority, that we would not reverse a cause upon error of law, unless it clearly appeared that the party was injured by the error. *Johnson v. Sepulveda*, 5 Cal. 151; *Ford v. Holton*, 5 Cal. 321.

61. An affidavit of one of the attorneys in a cause, showing the objections made to the selection of a jury, although

embodied in the transcript, is no part of the record, and therefore cannot be noticed. *Magee v. Mokelumne Hill C. and M. Co.*, 5 Cal. 259.

62. A judgment by default will be reversed on appeal, where the record shows that the defendant has not been legally served with process. *Joyce v. Joyce*, 5 Cal. 449.

63. If affidavits offered to show the incompetency of a juror are not embodied in a bill of exceptions, so as to show that the court below passed upon them, the appellate court is precluded from examining them. *People v. Stonecifer*, 6 Cal. 411; *People v. Honshell*, 10 Cal. 86.

64. Objections to the introduction of evidence must be taken on the trial below, and unless so taken, cannot be assigned as error on appeal. *Pearson v. Snodgrass*, 5 Cal. 479; *Covillaud v. Tanner*, 7 Cal. 39; *Potter v. Carney*, 8 Cal. 574.

65. The fact of the appellants having objected in the court below to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 112.

66. If a party complains of error, and seeks a reversal, it is due to the court that he should point out particularly wherein the error consists; the court cannot be expected to act in the double capacity of counsel and judges. *Broun v. Tolles*, 7 Cal. 399.

67. It is impossible for us to determine causes upon the record alone, without the assistance of counsel, and that no brief at all is worse than one too voluminous. *Brown v. Tolles*, 7 Cal. 400; *Mokelumne Hill C. and M. Co. v. Woodbury*, 10 Cal. 187.

68. Chancery cases come before the supreme court upon the pleadings, testimony, and decree, and the court must look to the whole record, and see if there is any error in the final decree. *Still v. Saunders*, 8 Cal. 286; *Goode v. Smith*, 13 Cal. 85.

69. In the absence of a proper statement, the case must be decided on the judgment roll alone, which being regular on its face, the judgment should be



## Requisites of the Record.

affirmed. *People v. Quincy*, 8 Cal. 90; *Macomber v. Chamberlain*, 8 Cal. 323; *Adams v. City of Oakland*, 8 Cal. 510; *Caney v. Silverthorn*, 9 Cal. 68; *Escolle v. Merle*, 9 Cal. 95; *Dickenson v. Van Horn*, 9 Cal. 211; *Karth v. Orth*, 10 Cal. 193; *People v. Goldbury*, 10 Cal. 313; *People v. Comedo*, 11 Cal. 70; *Sayre v. Smith*, 11 Cal. 29; *American River W. and M. Co. v. Bear River W. and M. Co.*, 11 Cal. 340; *Mc Gill v. Rainaldi*, 11 Cal. 391; *Neuberg v. Hewson*, 12 Cal. 280.

70. Instruments are sometimes admissible for one purpose and inadmissible for another; and where objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost v. Piper*, 9 Cal. 553.

71. Where parties by an express stipulation agree "that judgment be rendered upon the law and fact so found," they are not precluded from going behind the stipulation and insisting on appeal upon any assignments of error previously made. *Cahoon v. Levy*, 10 Cal. 216; *Glitzback v. Foster*, 11 Cal. 37.

72. By an assignment of errors, as the term is used in this court, is meant a specification of the errors upon which the appellant will rely, with such fullness as to give aid to the court in the examination of the transcript. *Squires v. Firman*, 10 Cal. 298.

73. Where the findings support the judgment, and the record discloses no exceptions to the admission of testimony, or to any ruling of the court, the judgment below will be affirmed. *Hutchinson v. Ryan*, 11 Cal. 142.

74. No errors can be assigned which this court will notice, on an instrument not embodied in the statement on appeal, or a bill of exceptions. *Moore v. Semple*, 11 Cal. 361; *Smith v. Brannan*, 13 Cal. 116.

75. Instead of copying into a statement for a new trial or appeal, deeds and transcripts of record, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose. *Knowles v. Inches*, 12 Cal. 214.

76. Before reversing the judgment of the court below, on the ground that a cer-

tain paper was admitted in evidence, which was irrelevant, the supreme court will require the irrelevancy clearly to appear. *Mc Garrity v. Byington*, 12 Cal. 430.

77. Errors which are immaterial, and do not affect the substantial rights of the parties, are unavailing on appeal, even when the subject of exception; much less so when they are permitted without objection. *Paige v. O'Neil*, 12 Cal. 493.

78. Where there are no grounds or reasons stated on motions of nonsuit and new trial, and no exceptions taken, errors cannot be assigned on appeal. *Holverstot v. Bugby*, 13 Cal. 44.

79. The fact that the record on appeal is erroneous in stating that the parties waived a jury, cannot be shown by an affidavit of the judge who tried the cause. *Smith v. Brannan*, 13 Cal. 115.

80. The supreme court will not review questions of fact in cases of fraud, where the result depends upon various considerations of greater or less force, to be found in the conduct, dealings, and relations of the parties, and various circumstances tending with more or less directness, to prove or repel the ascription of fraud. *Patrick v. Montader*, 13 Cal. 441.

81. An appellant cannot complain of error, when the record shows it was not to his prejudice. *Thompson v. Lyon*, 14 Cal. 42.

82. Where the error of a decree is apparent by reference to the bill and decree, the party aggrieved may assign the error on appeal, though no demurrer be interposed. *Gregory v. Ford*, 14 Cal. 143.

83. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court on the trial permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

84. It is a very simple matter for the party appealing to allege, either at the commencement or the conclusion of his statement, that on appeal he will rely upon certain errors committed by the court. *Barrett v. Tewksbury*, 15 Cal. 353; *Dobbins v. Dollarhide*, 15 Cal. 375.

85. Although it does not appear from the record on appeal that a demurrer to



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Requisites of the Record.—When a new Trial should be sought.

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the complaint was formally disposed of, yet if it does appear in the statement that one of the errors relied on is "the ruling of the court on the demurrer, and that the same should have been sustained;" and if the appellant went to trial without insisting on a disposition of the demurrer, he cannot object in the supreme court that the demurrer was not formally disposed of. *De Leon v. Higuera*, 15 Cal. 494.

86. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *Mc Cartney v. Fitz Henry*, 16 Cal. 185.

## 2. When a new Trial should be sought.

87. An appeal may be taken from a judgment of the district court without moving for a new trial. *Innis v. Steamer Senator*, 1 Cal. 459.

88. The appellate court will decline to review the facts of a case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith v. Phelps*, 2 Cal. 121; *Griswold v. Sharpe*, 2 Cal. 23; *Brown v. Graves*, 2 Cal. 119; *Ingraham v. Gildermeester*, 2 Cal. 484; *Whitman v. Sutter*, 3 Cal. 179; *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Cal. 108; *Marziou v. Pioche*, 8 Cal. 537; *Liening v. Gould*, 13 Cal. 599; *Duff v. Fisher*, 15 Cal. 380.

89. A party should appeal, if aggrieved, from an order granting a new trial during the time allowed by the statute, and cannot, after taking his chances upon a second trial, rely on this fact as error. *Brown v. Tolles*, 7 Cal. 399.

90. Errors in law, occurring in the court below, will be reviewed in the supreme court, although a new trial was not

asked. *Brown v. Tolles*, 7 Cal. 399; *Rice v. Gashirie*, 13 Cal. 54.

91. A notice for motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 8 Cal. 510.

92. Where the statement embodied in the record is filed on a motion for a new trial, the appellate court will only examine the action of the court below in denying the motion, nor will it allow objections to an order entered in the court below by consent of parties. *Meerholz v. Sessions*, 9 Cal. 277; *Brotherton v. Hart*, 11 Cal. 405.

93. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits. *Branger v. Chevalier*, 9 Cal. 362.

94. Where the evidence is conflicting, the granting or refusing a new trial rests in the discretion of the court below, and this court will not interfere, whether the new trial be granted or refused. *Weddle v. Stark*, 10 Cal. 302.

95. If any errors intervened on the trial of a cause, an order of the court below, granting a new trial, ought not to be disturbed. *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

96. The supreme court will not reverse an order of the court below, in granting a new trial, where there has been no abuse of the discretion of the court in granting such order. *Hanson v. Bernhisel*, 11 Cal. 340.

97. The granting a nonsuit on the facts is a question of law, and if the proper exception be taken, may be reviewed on appeal without motion for a new trial. *Cravens v. Dewey*, 13 Cal. 42.

98. A stipulation to the effect that a statement may "be used on a motion for a new trial in this cause, and also on appeal to the supreme court," includes an appeal from the judgment, as well as an appeal from the decisions of the motion for new trial. *Hastings v. Halleck*, 13 Cal. 207.

99. Where the motion for a new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to

When the Verdict may be reviewed.—When an erroneous Instruction may be reviewed.

sustain the verdict. *Myers v. Casey*, 14 Cal. 543.

100. A refusal to grant a new trial is no ground of error, particularly in an equity case where there may have been no necessity for a new trial, as upon application to the court, upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict, or the error corrected by appeal. *Phelan v. Ruiz*, 15 Cal. 90.

101. Refusal to grant a new trial will not be reviewed on appeal, unless such refusal was an abuse of the discretion of the court below. *Burnett v. Whitesides*, 15 Cal. 36; *Stevens v. Irwin*, 15 Cal. 504.

102. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the district court, especially when the case involved complicated facts, and was not tried by the judge by whom the alleged errors were committed. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Cal. 303; *Green v. Doane*, 15 Cal. 304.

103. Where a motion for new trial is denied, and the record contains the statement used on such motion, but no statement on appeal from the judgment, this court can only examine the action of the court below in denying the motion—the judgment cannot be reviewed, except through the order made upon the motion, and from this order, no appeal having been taken, the case stands on the judgment roll. *Burdge v. Gold Hill and Bear River W. Co.*, 15 Cal. 198.

104. Motion for new trial is addressed to the sound discretion of the court, and the supreme court can interfere only in case of plain abuse of such discretion. *Peters v. Foss*, 16 Cal. 358.

See NEW TRIAL.

### 3. When the Verdict may be reviewed.

105. Where the jury has been waived by the parties and the court finds the facts, the appellate court will not review them, and they are conclusive. *Wheeler v. Hays*, 3 Cal. 286.

106. The appellate court must infer in favor of the verdict of the court below, unless error is clearly manifest. *Allen v. Phelps*, 4 Cal. 259.

107. The verdict of a jury, or the finding of a court sitting as a jury, will not be disturbed where there is a conflict of testimony. *Adams v. Pugh*, 7 Cal. 151; *White v. Todd's Valley W. Co.*, 8 Cal. 444; *People v. Ah Ti*, 9 Cal. 17; *Beckman v. McKay*, 14 Cal. 253; *McGarvey v. Little*, 15 Cal. 31; *Weaver v. Eureka Lake Co.*, 15 Cal. 273; *Paul v. Silver*, 16 Cal. 75; *Baker v. Joseph*, 16 Cal. 180.

108. The supreme court will require a case of very palpable mistake or error to be made out, before it will overrule the verdict of the jury on issue of fact joined in an action for the diversion of water. *Brown v. Smith*, 10 Cal. 511.

109. In equity cases, submitted by the court to a jury, this court will not review the testimony, if any proof sustains the verdict and judgment. *Pfeiffer v. Riehn*, 13 Cal. 648.

110. There being some proof of negligence, the supreme court will not on appeal review the verdict based upon negligence. *Algier v. Steamer Maria*, 14 Cal. 171; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 389.

111. This court will not set aside the findings of the court below on conflicting proofs, especially in regard to the value of rents, or damage to property, both being of uncertain ascertainment. *Paul v. Silver*, 16 Cal. 75.

112. Where there is some evidence to support the verdict, and a motion for a new trial is overruled, the supreme court will not interfere. *Baxter v. McKinlay*, 16 Cal. 77.

113. The supreme court will consider only errors of law, to which exceptions have been regularly taken. The findings of the court below on the facts will not be reviewed. *McCartney v. Fitz Henry*, 16 Cal. 185.

See VERDICT.

### 4. When an erroneous Instruction may be reviewed.

114. The charge to the jury should be given with reference to the testimony adduced on the trial, and where the charge is returned on appeal, but no portion of the testimony, the appellate court will not undertake to determine the nature of the

When an erroneous Instruction may be reviewed.—Questions raised on Appeal for the first time.

charge. *People v. McCauley*, 1 Cal. 385.

115. An erroneous instruction may be assigned as error if there is any evidence rendering it pertinent to the issue. *Buzzell v. Bennett*, 2 Cal. 102.

116. Errors assigned upon instructions given by the court below will not be considered by this court, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions. *Nelson v. Mitchell*, 10 Cal. 93.

117. For error in refusing to give an instruction to the jury, the supreme court will not undertake to determine how far the party excepting was prejudiced, but will reverse the judgment. *Busenius v. Coffee*, 14 Cal. 93.

118. Where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

119. In criminal cases, if the instructions to the jury are erroneous under any and every state of facts, the supreme court will review them, even though there be no statement of facts—because it necessarily appears that the court erred, to the prejudice of defendant. *People v. Levison*, 16 Cal. 100.

120. But where the instruction *may be* correct under any state of facts, then the supreme court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *Ib.*

121. A refusal to give an instruction cannot be urged as error for the first time on a petition for a rehearing on appeal. *Payne v. Treadwell*, 16 Cal. 247.

See INSTRUCTIONS.

### 5. Questions raised on Appeal for the first time.

122. A party cannot argue an objection to the sufficiency of the answer in the supreme court for the first time, the objection being different from that which he raised in the court below. *Grogan v. Ruckle*, 1 Cal. 196.

123. Errors cannot be relied upon in an appellate court which are not taken advantage of and raised at the trial. *Morgan v. Hugg*, 5 Cal. 410.

124. An error that there was an excess in the judgment by the calculation of interest and costs cannot be raised for the first time on appeal. *Guy v. Franklin*, 5 Cal. 417.

125. Objections to the form of a complaint cannot be raised for the first time on appeal. *Sutter v. Cox*, 6 Cal. 415.

126. The objection to the form of the verdict should have been made on a motion for a new trial, and not on appeal for the first time. *Hartman v. Burlingame*, 9 Cal. 564.

127. Where parties went to trial upon the issues made, it was afterwards too late to object for the first time on appeal that the proper mode of proceeding was not adopted by intervenors in the action. *McKenty v. Gladwin*, 10 Cal. 228.

128. When the defects in a complaint are of such a serious character as to show that plaintiff could not at any time obtain any judgment upon the cause of action alleged, then the objection may be made for the first time in the supreme court. *Hentsch v. Porter*, 10 Cal. 561.

129. It would require clear proof that the purposes of the water for the saw mill which had been appropriated were terminated, to hold that the title to the water was abandoned, and this question cannot be first raised on appeal. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 236.

130. The question of limitation cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded. *Ib.* 238.

131. Where a bill in equity shows on its face that plaintiff is not entitled to relief, the defect may be taken advantage of in the appellate court, even though no demurrer be filed. *White v. Fratt*, 13 Cal. 525.

132. An objection that an account presented to the supervisors of a county was not “authenticated” as required by statute cannot be taken on appeal for the first time. *Randall v. Yuba County*, 14 Cal. 222.

133. An objection that the court below directed the jury to find specially as to a particular fact, comes too late if made on appeal for the first time, it not appearing

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 Proceedings on Appeal as to Jurisdiction.
 

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that the party objecting was injured by the direction. *People v. Chu Quong*, 15 Cal. 333.

134. An objection that the finding is qualified by the words "as to plaintiff, Parke," and that the facts showing this special relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. *Parke v. Hind*, 14 Cal. 418.

135. The objection to a complaint in forcible entry and detainer, that it does not aver "actual" possession, only "possession" being used, was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended; but it cannot be urged in the supreme court for the first time. *Minturn v. Burr*, 16 Cal. 110.

136. An objection that one of the counts in a complaint is an equitable cause of action, and should not be tried by a jury, must be taken at the time, and cannot be urged on appeal if not so taken. *Baker v. Joseph*, 16 Cal. 177.

137. It cannot be assigned for error in the supreme court, that the court below refused a nonsuit because of no demand made before suit, unless that ground of nonsuit was taken below. *Baker v. Joseph*, 16 Cal. 180.

138. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *Mc Cartney v. Fitz Henry*, 16 Cal. 186.

139. In suit by a vendee for specific performance of a contract of sale, the averment of tender of payment was in general terms—as that the tender had been repeatedly made, and that the plaintiff has been at all times, and still is, ready and willing to pay: held, that the tender should have been stated with greater particularity as to time, but that the objection, in this respect, cannot be taken for the first time in the supreme court. *Duff v. Fisher*, 16 Cal. 382.

140. Objections to evidence will not be noticed in the supreme court, unless taken in the court below in the first instance, if they be of a character which might there have been obviated by the production of other evidence, or the release of the interest of witnesses, or an amendment to the pleadings, or in any other way. *Mott v. Smith*, 16 Cal. 555.

141. Where objections to evidence, though not made in the court below, could not be, under any circumstances, there obviated, such objections may be taken for the first time in the supreme court—as for example, objections to the substantive cause of action, not to its technical form of statement, and to the jurisdiction of the court below, may be presented in the supreme court for the first time, or may be considered by the court, whether its attention be directed to them or not. *Ib.*

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 VI. PROCEEDINGS ON APPEAL AS TO JURISDICTION.
 

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### 1. Of the Supreme Court of the United States.

142. The constitution of the United States gives no authority to the supreme court of the United States to exercise appellate jurisdiction over the State courts, nor can such authority be derived by implication or construction.\* *Johnson v. Gordon*, 4 Cal. 368.

143. Neither a writ of error or appeal lies to take a case from a State court to the supreme court of the United States. *Ib.* 274.

144. In holding the judiciary act of 1789 to be constitutional, we by no means recognize an unlimited right of appeal from the decisions of this court to the supreme court of the United States. *Ferris v. Coover*, 11 Cal. 179.

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### 2. Of the Court of a United States Commissioner.

145. The American consular court of China is not the highest judicial tribunal of the jurisdiction. An appeal lies from the consul to the United States commissioner. *Forbes v. Scannell*, 13 Cal. 286.

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\*Since the rendition of this opinion, the act of April 9th, 1855, provided for writs of error in certain cases from the supreme court of the state to the supreme court of the United States.



## Jurisdiction of the Supreme Court of the State.

3. *Of the Supreme Court of the State.*

146. The supreme court is strictly a court of appellate jurisdiction, but it may exercise its appellate jurisdiction by means of the process of mandamus; so also it seems by means of the writs of habeas corpus, certiorari, supersedeas, prohibition. *People v. Turner*, 1 Cal. 144; *White v. Lighthall*, 1 Cal. 348; *Adams v. Town*, 3 Cal. 248.

147. The supreme court is strictly an appellate court, having no original jurisdiction, and its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. No power was conferred upon the supreme court to review judgments of the county courts\* on appeal. *White v. Lighthall*, 1 Cal. 347; *Adams v. Town*, 3 Cal. 248.

148. Though the plaintiff recover less than \$200, the defendant is entitled to an appeal if the costs, added to the judgment, exceed \$200. *Gordon v. Ross*, 2 Cal. 157; overruled in *Dumpey v. Guindon*, 13 Cal. 30.

149. In equity, the supreme court, on an appeal, has full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape or by whatever party the appeal is taken up. *Grayson v. Guild*, 4 Cal. 125.

150. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and that no jurisdiction can be conferred by the statute in these cases. *People v. Aplegate*, 5 Cal. 296; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

151. Where the constitution gave the supreme court appellate jurisdiction, but the statute failed to provide the manner of appeal, a writ of error would lie to take the case up. *Adams v. Town*, 3 Cal. 248; *Middleton v. Gould*, 5 Cal. 190.

152. It is the right and duty of the supreme court on habeas corpus to review the decisions of inferior courts in cases of contempts. *Ex parte Rowe*, 7 Cal. 182; *Ware v. Robinson*, 9 Cal. 111, overruling *Ex parte Cohen*, 5 Cal. 495.

153. The supreme court has the power

under its rules to reinstate cases which had been dismissed at a previous term. *Haight v. Gay*, 8 Cal. 300.

154. The constitution of this State confers upon the supreme court appellate power in all cases where the amount in controversy exceeds two hundred dollars, and this appellate power, having been conferred by the constitution, cannot be taken away or impaired by act of the legislature. *Adams v. Woods*, 8 Cal. 314.

155. There are but two appellate tribunals under the constitution—the county and supreme courts—and neither of these courts has the right to take original jurisdiction of any case they can hear upon appeal. *People v. Fowler*, 9 Cal. 89.

156. The supreme court possesses appellate power in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost or municipal fine is drawn in question. *Conant v. Conant*, 10 Cal. 253.

157. The supreme court will not entertain jurisdiction in cases where the record fails to show that judgment and costs amount to over two hundred dollars. *Doyle v. Seawell*, 12 Cal. 280.

158. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court, on questions of fraud, made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

159. Plaintiffs obtained a preliminary injunction, restraining defendants from obstructing a road leading to plaintiffs' mine. Upon the answer being filed, the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge thereupon made an order that upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived, and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction, pending the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: held, that the application must be denied, if this court had the power to grant it; that the remedy of plaintiffs under the reviving order is ample to pro-

\*The amendment to the code of May 15, 1854, conferred jurisdiction on the supreme court in appeals from the county courts.



## Jurisdiction of the Supreme Court.—Of the District Court.—Of the County Court.

tect them until the appeal can be heard, or the injunction be dissolved by some competent authority. *Eldridge v. Wright*, 15 Cal. 89.

160. The supreme court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 114.

161. The supreme court has no jurisdiction on appeal of a motion to offset in part a judgment for less than two hundred dollars, against another judgment of six hundred dollars. *Crandall v. Blen*, 15 Cal. 408.

162. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 16 Cal. 188.

163. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—*query*, whether the supreme court has jurisdiction of an appeal from the county court? *Paul v. Silver*, 16 Cal. 76.

See SUPREME COURT.

## 4. Of the District Court.

164. The act of March 18th, 1850, grants an appeal to the district court from the court of sessions in the matter of license to establish a ferry, but does not provide for an appeal from the judgment of the district court; no appeal can then be taken, and unless the party can bring himself within the constitutional provisions of appeals, the judgment of the district court is final and conclusive.\* *Webb v. Hanson*, 3 Cal. 68, 105.

165. The district court has no appellate jurisdiction under our constitution. *People v. Peralta*, 3 Cal. 379; *Caulfield v. Hudson*, 3 Cal. 389; *Hernandes v. Simon*,

3 Cal. 464; *Gray v. Schupp*, 4 Cal. 185; *Reed v. McCormick*, 4 Cal. 342; *Townsend v. Brooks*, 5 Cal. 52; *Zander v. Coe*, 5 Cal. 230; *People v. Fowler*, 9 Cal. 86.

166. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court, is unconstitutional and void. As the power to try de novo issues which have been tried and decided necessarily includes the power to reverse or modify such decisions, the effect of the act would be to confer appellate jurisdiction, which the district court cannot exercise. *Deck's Estate v. Gherke*, 6 Cal. 669.

See DISTRICT COURT.

## 5. Of the County Court.

167. The county court tries causes on appeal de novo, as prescribed by the statute; still, such trial is an exercise of appellate, and not of original jurisdiction. *Townsend v. Brooks*, 5 Cal. 53.

168. An appeal to the county court is to be tried de novo, and the court should hear the merits of the case, and not dismiss the action because the parties defendants had not notice of trial in the justice's court. *Coyle v. Baldwin*, 5 Cal. 75.

169. If the county court has no jurisdiction in cases on appeal, where an appeal bond is not given, as required by the statute, the objection should be made in the court below, and not on appeal from the county court. *Taylor v. Randall*, 5 Cal. 79.

170. On appeal from a justice's court to the county court, on questions of law alone, if a new trial be ordered, it should take place in the county court. *People v. Freelon*, 8 Cal. 517.

171. The county court has the sole appellate jurisdiction in all cases, civil and criminal, arising in justices' courts, subject to such restriction as the legislature may impose, by making the decisions of the justices final, in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 86.

172. A defendant, who has been properly served with process issued out of a justice's court, who allows judgment to be taken against him, by default, admits the facts alleged in the complaint, and no ap-

\*The appellate jurisdiction of the district court was afterwards passed upon, and held to be unconstitutional.

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Jurisdiction of the Court of Sessions.—When an Appeal will lie.

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peal will lie from such judgment in reference to such facts—there being no issue of fact. *People v. County Court of El Dorado County*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328.

173. Where the defendant appeals on questions of law and fact to the county court, and has admitted all the facts by the default, he is not entitled to a trial de novo upon the facts, nor upon the law, unless there is a statement filed in conformity with the statute. *People v. County Court of El Dorado County*, 10 Cal. 20.

174. In all cases of appeal, the issue of fact must be made in the court of original jurisdiction. The county court can only retry the issue tried in the court below. This is what is meant by a trial anew in the county court, under the code. *Ib.*

175. The failure of a justice of the peace to state in his docket that the summons was returned “served,” will not vitiate the judgment on appeal. *Denmark v. Liening*, 10 Cal. 94.

176. A refusal, by the county court, on appeal from a justice’s, to permit an amendment of a complaint, is a matter of discretion with which the supreme court will not interfere, there being no affidavit of the materiality or importance of the amendment. *Canfield v. Bates*, 13 Cal. 608.

177. On appeal from a justice’s court, in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

See COUNTY COURT.

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### 6. Of the Court of Sessions.

178. The court of sessions has no appellate jurisdiction in either civil or criminal cases. Its jurisdiction is original, not appellate. In all cases where an appeal lies from a justice’s court, it must be taken to the county court. *People v. Fowler*, 9 Cal. 87.

See SESSIONS, COURT OF.

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## VII. WHEN AN APPEAL WILL LIE.

179. An appeal lies to the supreme

court from any judgment, order, or determination of the court of first instance, taken before the passage of the statute of February 28th, 1850, and from any judgment, order, or determination made or rendered after the passage of said act. *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 35.

180. An appeal will lie from a judgment by default; for therein may exist error, as well as in a judgment rendered upon issue joined in the pleadings and trial by jury, which error may be corrected on appeal. *Stevens v. Ross*, 1 Cal. 97.

181. District courts cannot entertain jurisdiction of cases by certiorari, where the error complained of might be corrected by an appeal to the county court. *Gray v. Schupp*, 4 Cal. 185.

182. An appeal lies from the trial of an issue of fact in the probate court, sent to the district court, and from its equitable character, the facts are subject to review above. *Keller v. Franklin*, 5 Cal. 434.

183. The probate judge, in his discretion, must decide what issues of fact are to be sent to the district court for trial, which discretion is subject to review on appeal; and in case of gross abuse will be corrected. *Ib.*

184. A mandamus to compel the judge to issue a certiorari, to review the proceedings of the supervisors of a county, is improper; there should be an appeal from a refusal to issue the certiorari. *People v. Hester*, 6 Cal. 680.

185. The objection that the judgment was rendered in vacation, can be taken advantage of upon general appeal from the judgment. *Phelps v. Peabody*, 7 Cal. 53.

186. If the return to the summons is defective, the defendant must appeal from the judgment; a mere irregularity of service is not sufficient to enable him to attack a judgment collaterally. *Dorente v. Sullivan*, 7 Cal. 280.

187. The code prescribes that any party aggrieved may appeal in cases prescribed therein; and the question who is the party aggrieved is, would he have anything if the erroneous judgment had not been given. *Adams v. Woods*, 8 Cal. 315.

188. If any of the parties employed by a receiver should not feel satisfied with his account, in whole or in part, they could then make their objections, and

## When an Appeal will not lie.—Appeal from Orders of Court.

if any one or more of them should feel aggrieved by the final order of the court, they should all appeal, and all the questions should be brought up before the appellate court at once. *Ib.*

189. A plaintiff cannot have a mandamus to compel the issuance of an attachment for contempt, for violating an original injunction which had been subsequently modified *ex parte*; he should appeal from the order modifying the injunction. *Fremont v. Merced Min. Co.*, 9 Cal. 19.

190. It is doubtful whether an appeal would lie from the exercise of discretion by supervisors in establishing a ferry within a mile of one previously located, the statute giving them the discretion. If it does lie, it must be made direct to some superior tribunal. *Waugh v. Chancey*, 13 Cal. 12.

191. Where an application for certiorari shows on its face that the party had an adequate legal remedy by appeal, the writ was denied. *Clary v. Hoagland*, 13 Cal. 175.

192. When a decree is entered by consent of the attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Holmes v. Rogers*, 13 Cal. 203.

193. Plaintiff applies to the supreme court to compel the county court to render judgment for treble damages, in an action of forcible entry: held, that the application must be denied, as plaintiff has an adequate remedy by appeal, pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 150.

194. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation, until the further order of the court; collect money due or to become due it; sell certain stock, and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that

an appeal lies therefrom. *Neal v. Hill*, 16 Cal. 148.

## VIII. WHEN AN APPEAL WILL NOT LIE.

195. No appeal lies from a judgment of a district court, on an appeal\* from an order of the court of sessions upon an application for a ferry license. *Webb v. Hanson*, 2 Cal. 134.

196. Where an informal verdict is entered by consent of plaintiff, and a judgment in form is afterwards entered thereon, the informality will not be considered on appeal. *Treadwell v. Wells*, 4 Cal. 263.

197. *The judgments and orders of courts or judges on contempts are declared by statute to be final and conclusive, and cannot be reviewed, even on a writ of habeas corpus.* *Ex parte Cohen*, 5 Cal. 495; overruled in *Ex parte Rowe*, 7 Cal. 182, and *Ware v. Robinson*, 9 Cal. 11.

198. Where a remedy is perfectly attainable in the court of original jurisdiction—as opening a default—an appellate court will not administer it for any cause that can be assigned. *Guy v. Ide*, 6 Cal. 101.

199. An appeal does not lie in favor of the plaintiff in an action from a judgment of nonsuit, entered on his own motion. *Imley v. Beard*, 6 Cal. 666.

## IX. APPEAL FROM ORDERS OF COURT.

200. An appeal will lie from an interlocutory order when it involves the merits and necessarily affects the judgment, and an order striking out an answer regularly put on file and rendering judgment without trial is within this class.† *Stevens v. Ross*, 1 Cal. 97.

201. Under the code, however incorrect the practice, an appeal lies from every interlocutory order and decision of an inferior court which affects a substantial right. *Burgoyne v. Holmes*, 3 Cal. 54.

202. An appeal will not lie from an or-

\*This appellate jurisdiction of the district court held to be unconstitutional.

†The amendment to the code of May 15, 1851, restricted appeals from interlocutory orders.

## Appeal from Orders of Court.

der of court refusing to set aside a former order; such order is merely negative, a refusal to disturb the first decision. It is the former order which is the subject of complaint, and not the refusal to alter it. *Henley v. Hastings*, 3 Cal. 342; *Stearns v. Marvin*, 3 Cal. 376.

203. No appeal can now be taken before final judgment from a mere decision, on a demurrer. *Moraga v. Emeric*, 4 Cal. 308.

204. An appeal does not lie from an order of the chancellor making a new party defendant. *Beck v. City of San Francisco*, 4 Cal. 375.

205. Under our practice, the correctness of the order setting aside the report of facts found by the referee, if it was questioned and excepted to, can be reviewed upon appeal after final judgment. *McHenry v. Moore*, 5 Cal. 92.

206. By the amendment of 1854 to the code, an appeal does not lie from an interlocutory order. *People v. Thurston*, 5 Cal. 517.

207. An order setting aside the report of a referee appointed to take an account is merely interlocutory, and is not the subject of appeal before final judgment or decree. *Johnston v. Dopkins*, 6 Cal. 84.

208. An order refusing a change of venue on the application of defendant in a criminal prosecution, will only be reviewed in cases of gross abuse of discretion. *People v. Fisher*, 6 Cal. 155.

209. Motions for continuance in criminal cases are subject to review upon appeal. *People v. Diaz*, 6 Cal. 249.

210. An appeal does not lie from an order refusing an injunction.\* *Richards v. McMillan*, 6 Cal. 422.

211. Appeals from interlocutory orders are the creations of statute, and cannot be extended by implication. *Juan v. Ingoldsby*, 6 Cal. 440.

212. An appeal lies from an order refusing to change a venue, but not from an order granting a change of venue. *Juan v. Ingoldsby*, 6 Cal. 440; *Martin v. Travers*, 7 Cal. 253.

213. An appeal may be taken from an order of the county judge, granting an injunction, the same as if granted by a district judge. *Crandall v. Woods*, 6 Cal. 452.

214. No appeal will lie from an order refusing to change the venue in a criminal case. *People v. Stillman*, 7 Cal. 118.

215. No appeal will lie from an order refusing to issue a commission to take testimony. *Ib.*

216. No appeal will lie from an order refusing to dissolve an injunction; it should have been taken from the order granting an injunction. *Martin v. Travers*, 7 Cal. 253.

217. An appeal will lie after final judgment, and only then from an order refusing to discharge an attachment. *Taaffe v. Rosenthal*, 7 Cal. 518.

218. No exception having been taken to the order of the court below overruling the motion to set aside the judgment and quash the execution, the action of the lower court in that respect cannot be reviewed on appeal. *Smith v. Curtis*, 7 Cal. 587.

219. An appeal lies from an order refusing to quash an execution. *Gilman v. Contra Costa County*, 8 Cal. 57.

220. An appeal will lie from the order of the court below, changing the judgment. *Bryan v. Berry*, 8 Cal. 135.

221. When an appeal is taken from all orders and rulings, and the reversal is general, it necessarily applies to all the orders. *Adams v. Woods*, 9 Cal. 25.

222. No appeal lies from an interlocutory order, except in the cases provided by statute. Such order can only be reviewed on appeal from the final judgment. *De Barry v. Lambert*, 10 Cal. 504; *Baker v. Baker*, 10 Cal. 528.

223. No appeal lies from an order overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

224. The statute authorizing an appeal from an order granting or refusing a new trial, or which affects a substantial right, does not apply to interlocutory orders made in the progress of a trial. *Ib.*

225. An appeal lies from an order setting aside a final decree in equity and granting a rehearing. *Riddle v. Baker*, 13 Cal. 301.

226. An appeal should be taken from an order granting an injunction, and not from the order refusing to dissolve it.\* *Curtis v. Sutter*, 15 Cal. 265.

227. An order of a probate court set-

\*The amendment to the code of March 28, 1850, permits appeals to be taken from an order granting or dissolving, or an order refusing to grant or dissolve an injunction.

\*The amendment to the code of March 28, 1850, permits appeals to be taken from an order granting or dissolving, or an order refusing to grant or dissolve an injunction.

## Notice of an Appeal.—Undertaking on Appeal.

ting aside a judgment of that court refusing to admit a will to probate, is not an appealable order, because not within sec. 297 of the act to regulate the settlement of the estates of deceased persons. *Peralta v. Castro*, 15 Cal. 511.

228. An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction. *Natoma W. and M. Co. v. Parker*, 16 Cal. 85.

229. Where the court makes an order requiring plaintiff to appear at a certain time and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 161.

## X. NOTICE OF AN APPEAL.

230. Where a party, in his notice of motion served on the adverse party, asks for a specific relief, or for such other or further order as may be just, the court may afford any relief compatible with the facts of the case presented. *People v. Turner*, 1 Cal. 153.

231. Where notice of argument has been given by the appellant, the respondent may move for an affirmance of the judgment ex parte, although he has given no notice of argument. *Constant v. Ward*, 1 Cal. 333.

232. A decision of the supreme court will be set aside for failure of the appellant to appear, if he had not actual notice, although a formal statutory notice is not necessary. *Lightstone v. Laurencel*, 2 Cal. 106.

233. When the object of a notice of appeal is accomplished, it is immaterial whether the notice is given or not, and if both parties appear, no notice is necessary to be shown. *McLeran v. Shartzer*, 5 Cal. 70.

234. A notice of appeal from a justice's to a county court, stating that the defendant appealed from "the whole judgment,"

is a sufficient notice within the statute to appeal from questions of both law and fact. *Price v. Van Caneghan*, 5 Cal. 124.

235. Notice of appeal must be served upon the party or his attorney in ordinary cases, and this rule must govern appeals from justices' courts, although the word "attorney" is omitted. *Welton v. Garibaldi*, 6 Cal. 246; *Coulter v. Stark*, 7 Cal. 245.

236. An appeal is made by filing and serving the notice of appeal. Both requisites must exist to complete the appeal. A failure to notify the adverse party is fatal. *Whipley v. Mills*, 9 Cal. 641; *Hastings v. Halleck*, 10 Cal. 31; *Hildreth v. Gwindon*, 10 Cal. 491.

237. Where a notice of appeal to the supreme court and undertaking were filed in the county clerk's office on December 16th, and on the next day a copy of the notice was served on the respondent, who within five days after filing the undertaking excepted to the sufficiency of the sureties to the undertaking: held, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokelumne Hill C. and M. Co. v. Woodbury*, 10 Cal. 187.

238. The filing of a notice of appeal must precede the filing of the undertaking on appeal. Until an appeal is taken there is nothing to give effect to the undertaking. *Buckholder v. Byers*, 10 Cal. 481.

239. On appeal from a justice's to a county court—the record not showing that notice of appeal had been served on the adverse party—appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 Cal. 368.

See NOTICE.

## XI. UNDERTAKING ON APPEAL.

240. On an application for justification of bail on appeal, the merits of the appeal will not be considered. *Bradley v. Hall*, 1 Cal. 199.

241. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time, upon terms, for them to file their bond to entitle them to a stay of proceedings. *Id.*

242. The omission of the words "to



## Undertaking on an Appeal.

pay to" will not invalidate the obligation of an appeal bond, or leave should be granted to file a good bond. *Billings v. Roadhouse*, 5 Cal. 71.

243. Where an appeal is dismissed for want of a proper bond and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

244. An objection that there is no undertaking on appeal filed, cannot apply in a case where no right of the defendant is infringed, and a State cannot be denied a hearing in her own courts because no bond has been filed for costs, when a fund has been provided by law for such cases. *People v. Clingan*, 5 Cal. 391.

245. To enable the assignee of a judgment to sue on an appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

246. Where an appeal is withdrawn or dismissed by consent of both parties, no action can be maintained on the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

247. Where the appeal is bona fide, and not taken for delay, appellate courts will always permit a new undertaking to be filed where the original is defective. *Coulter v. Stark*, 7 Cal. 245.

248. Where a motion is made in the county court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: held, that it is error to refuse to allow him so to do. *Cunningham v. Hopkins*, 8 Cal. 83.

249. The appellant must show by the certificate that the notice and undertaking on appeal has been filed in due time, and if not shown to be filed, then the respondent must object thereto by motion to dismiss, and not for the first time in his brief. *Bryan v. Berry*, 8 Cal. 134; *Franklin v. Reiner*, 8 Cal. 340; *Halleck v. Hastings*, 10 Cal. 31.

250. An appeal bond will be so construed as to carry out the obvious intention of the parties. *Swain v. Graves*, 8 Cal. 551.

251. An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Curtis v. Richards*, 9 Cal. 38.

252. A district court has no jurisdiction of an action on an appeal bond to pay all costs and damages not exceeding three hundred dollars, when the costs and damages amount to less than two hundred dollars. *Page v. Ellis*, 9 Cal. 250.

253. When the appellant on an appeal pending from the district court to the supreme court filed in the clerk's office of the district court his notice of appeal and undertaking, the respondent, within the time allowed by law, excepted to the sufficiency of the sureties to the undertaking, and they failed to justify to the satisfaction of the clerk of said court, who issued execution on the judgment: held, that it was error in the judge of said court to make an order of supersedeas, staying said execution. *Mokelumne Hill C. and M. Co. v. Woodbury*, 10 Cal. 188.

254. No undertaking on appeal is necessary when the appeal is taken by the county. The board of supervisors represent the county in legal proceedings. *People v. Supervisors Marin Co.*, 10 Cal. 346.

255. The failure of sureties on appeal to justify where they are excepted to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower v. Knox*, 10 Cal. 480.

256. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below, on the second of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice, soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. *Ib.* 481.

257. In an undertaking on appeal, the names of the sureties need not appear in the body of the paper. *Dora v. Covey*, 13 Cal. 507.

258. The statute accords the effect of a stay of execution to the undertaking on appeal, and this stay is sufficient consideration. *Ib.* 508.

259. Where the bond on appeal is more favorable to the appellee than the statute requires, it has been repeatedly held that he cannot complain that the statute has not been followed. *Ib.* 509.

260. Where an instrument, purporting to be a bond on appeal, contains words of obligation, and has a scroll opposite the

## Costs on an Appeal.

name of one of the two signers, who contemporaneously verify the instrument as their bond, it is the bond of both. *Canfield v. Bates*, 13 Cal. 608.

261. By the code, the undertaking on appeal, providing for the liability of the sureties upon condition of the affirmance of the judgment, operates as a stay, and if by a mere neglect to prosecute the appeal, and for that reason suffering it to be dismissed, after the respondent has been deprived of his rights under the judgment by the undertaking, the sureties could be released, upon the pretense that the judgment was not affirmed, it is evident that great injustice would be in many instances perpetrated, and a fraud practiced upon respondents. *Karth v. Light*, 15 Cal. 327.

262. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case, the justification being made without notice, the appeal was ordered to be dismissed unless appellants within ten days file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark v. Barrett*, 15 Cal. 364.

263. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 375.

264. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

265. Construing sections 348 and 337 of the code together, they provide that an appeal is not effectual for any purpose, unless an undertaking be filed, or a deposit made with the clerk within five days after filing the notice, and failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *Elliott v. Chapman*, 15 Cal. 384.

266. Where an appeal is taken by a

party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of the appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 72.

267. If an undertaking on appeal to the supreme court be sufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin v. Broder*, 16 Cal. 420.

See UNDERTAKING.

## XII. COSTS ON AN APPEAL.

268. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 54.

269. The clerk of the supreme court in entering up the judgment adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue execution thereon. *City of Marysville v. Buchanan*, 3 Cal. 213.

270. The judgment of the supreme court on appeal and the costs consequent thereon is final, and the district court has no authority to prevent immediate execution of the judgment of this court, so remitted. *Ib.*

271. One of the conditions upon which an appeal is allowed from a justice's court, is the payment of the costs of the action, and where this is not done the justice need not certify the appeal. *McDermott v. Douglass*, 5 Cal. 89; *Bray v. Redman*, 6 Cal. 287.

272. In an action for a dissolution of a copartnership, on appeal the appellate court modified the decree, and under the circumstances of the case, the costs of the appeal, were equally divided between the plaintiff and the defendant. *Crosby v. McDermitt*, 7 Cal. 148.

273. Where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welch v. Sullivan*, 8 Cal. 512.

274. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. *Gray v. Gray*, 11 Cal. 341.

275. Where a case is remanded for further proceedings and costs awarded in this court, in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the events of the suit. *Ib.*

276. The costs upon the appeal are properly the costs of the supreme court, and the costs of making up the appeal in the court below, including the costs of making out the transcript. *Ib.*

277. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

278. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

279. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Chapin v. Broder*, 16 Cal. 420.

280. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment, being for possession and damages, was affirmed in the supreme court, upon respondent's remitting the damages and paying the costs of appeal. *Doll v. Feller*, 16 Cal. 434.

### XIII. DAMAGES FOR A FRIVOLOUS APPEAL.

281. Where the record discloses on the part of the appellant facts to satisfy the court that the appeal was taken merely for delay, damages were awarded on dismissing the appeal: (a.) In five per cent. *Pinkham v. Wemple*, 12 Cal. 449. (b.) In ten per cent. *Buckley v. Morse*, 2 Cal. 149; *Pacheco v. Bemal*, 2 Cal. 150; *Russell v. Williams*, 2 Cal. 158; *Bates v. Vischer*, 2 Cal. 357; *Taylor v. McKinley*, 3 Cal. 104; *Bliss v. Wyman*, 7 Cal. 258; *Winans v. Hardenburgh*, 8 Cal. 293; *Harvey v. Fisk*, 9 Cal. 94; *McCann v. Lewis*, 9 Cal. 247; *Primm v. Gray*, 10 Cal. 523; *Heston v. Martin*, 11 Cal. 42; *Hutchinson v. Ryan*, 11 Cal. 142; *Haswell v. Parsons*, 15 Cal. 267. (c.) In fifteen per cent. *Reyes v. Sandford*, 5 Cal. 117; *Parke v. Williams*, 7 Cal. 250; *Dewitt v. Porter*, 13 Cal. 172. (d.) In twenty per cent. *Nickerson v. Cal. Stage Co.*, 10 Cal. 522.

282. Where the questions raised by the record on appeal to this court have been repeatedly settled by this court, or are decided by reference to plain elementary principles of law, the judgment of the court below will be affirmed with damages. *Pinkham v. Wemple*, 12 Cal. 449.

283. If the appellate court is satisfied of an error in the computation of interest, they may permit the error to stand, leaving the excess over the proper amount to go as compensation to the respondent on account of his appeal. *Whitney v. Buckman*, 13 Cal. 539.

See COSTS, DAMAGES.

### XIV. DISMISSAL OF AN APPEAL.

284. An appeal which had been dismissed for failure to file the transcript in time, was reinstated, upon the fact appearing that the clerk of the district court did not prepare the transcript in time, and the appellant was not at fault. *Stark v. Barnes*, 2 Cal. 162.

285. Appeal dismissed where the record disclosed that the court below might or might not have granted a new trial without impeachment of its legal discretion. *Cooke v. Stewart*, 2 Cal. 353.

Dismissal of an Appeal.—Stay of Proceedings.—Lien pending an Appeal.

286. Where an appeal is dismissed for want of a proper bond and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

287. Where a judgment of a justice of the peace is for an amount exceeding his jurisdiction, the county court on appeal should dismiss the whole case. *Ford v. Smith*, 5 Cal. 331.

288. Where a motion is made in the county court to dismiss an appeal on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: held, that it is error to refuse to allow him to do so. *Cunningham v. Hopkins*, 8 Cal. 33.

289. A motion to dismiss an appeal on the ground that the transcript was not filed within the time required by the third rule of the court, is too late after the case has been submitted. *Cook v. Klink*, 8 Cal. 352.

290. Where a party appealed from a justice's court to a county court, and the justice neglected to send up with the record the notice of appeal, the appellant should have an opportunity to compel the justice to send it up, and the appeal should not be peremptorily dismissed. *Sherman v. Rolberg*, 9 Cal. 18.

291. Where an appeal is taken in the same notice, both from a final judgment and an order refusing a new trial after sixty days from the entry of the order for a new trial, the appeal so far as the order is concerned will, on motion, be dismissed. *Lower v. Knox*, 10 Cal. 481.

292. An appeal will be dismissed when the record contains no copy of the pleadings. *Hart v. Plum*, 14 Cal. 152.

293. Dismissal of an appeal in the supreme court for want of prosecution, in accordance with the rules of the court, operates as an affirmance of the judgment below, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term. *Karth v. Light*, 15 Cal. 325; *Chamberlain v. Reed*, 16 Cal. 207.

294. The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence not as an affirmance of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of ap-

peal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits. *Karth v. Light*, 15 Cal. 326; *Chamberlain v. Reed*, 16 Cal. 207. See DISCONTINUANCE.

XV. STAY OF PROCEEDINGS.

295. It seems that an appeal from an order of reference does stay the proceedings. *Smith v. Pollock*, 2 Cal. 92.

296. A stay of proceedings from its nature under an appeal, only operates upon orders, or judgments commanding some act to be done, and does not reach a case of injunction. *Merced Min. Co. v. Fremont*, 7 Cal. 132.

297. A justice of the peace has jurisdiction to grant appeals and to stay proceedings thereupon, and his action cannot be reviewed on certiorari. *Coulter v. Stark*, 7 Cal. 245.

298. It is only of orders or judgments which command or permit acts to be done, that a stay of proceedings on appeal can be had. *Hicks v. Michael*, 15 Cal. 109.

See STAY OF PROCEEDINGS.

XVI. LIEN PENDING AN APPEAL.

299. An appeal from a judgment suspends the lien which is merely an incident, and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate court. *Dewey v. Latson*, 6 Cal. 134; *Low v. Adams*, 6 Cal. 281.

See LIEN.

APPEARANCE.

1. The mere act of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of a jury trial under the civil code. *Zane v. Crowe*, 4 Cal. 113.



## Appearance.

2. The proceedings in the case having been transferred to a magistrate who had jurisdiction, by consent of parties, the appearance of the defendant and his consent fixing the time of trial were a waiver of his right to be brought in by complaint and summons. *Cronise v. Carghill*, 4 Cal. 122.

3. An appearance by attorney, at common law and by the express letter of our statute, amounts to an acknowledgment of waiver of service. *Suydam v. Pitcher*, 4 Cal. 281; *Holmes v. Rogers*, 13 Cal. 201.

4. A party ought not to be allowed the benefit of any proceeding, unless he appears and assumes the responsibility of it. His appearance for one purpose is a good appearance to the action. *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 306.

5. In cases where the statute requires notice to be given to the opposing parties to actions, where both parties appear the full object of notice is accomplished, and it is immaterial whether there was notice or not. *McLeran v. Shartzler*, 5 Cal. 70.

6. The defendant on arrest, by putting in bail and neglecting to move to be discharged, consents to process and waives all irregularity in this respect. *Matoon v. Eder*, 6 Cal. 59.

7. A judgment by default is properly entered where the defendant did not answer and appear after service was made complete by publication, nor does an appearance on a former appeal absolve him from the necessity of answering, or from the consequences of his neglect to do so. *Grewell v. Henderson*, 7 Cal. 292.

8. The only object of a summons is to bring the party into court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith v. Curtis*, 7 Cal. 587.

9. A judgment void for want of personal service, is not cured by the appearance of the party for the purpose of vacating it. *Deidesheimer v. Brown*, 8 Cal. 840; *Gray v. Hawes*, 8 Cal. 569.

10. The failure to deposit in the post-office a copy of the complaint and summons directed to an absent minor, is not cured by the appearance of its mother in her own behalf. *Gray v. Palmer*, 9 Cal. 638.

11. The failure of the defendant to appear at the trial of an action of replevin, when the cause is called, is a waiver of a

jury under the civil code. *Waltham v. Carson*, 10 Cal. 180; *Doll v. Feller*, 16 Cal. 433.

12. When a defendant pleads another suit pending between the same parties and for the same cause of action, and it is shown that no summons was ever issued upon the complaint, and that there was no voluntary appearance by defendant in such suit: held, that there was no suit pending. *Weaver v. Conger*, 10 Cal. 238; *Primm v. Gray*, 10 Cal. 522.

13. The appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Holmes v. Rogers*, 13 Cal. 201.

14. The recital of the appearance of parties is never conclusive, and where the impression is general, it is confined to those parties who have been served with process. *Chester v. Miller*, 13 Cal. 561.

15. Where process is served by a constable out of his township, the party could waive the objection by a voluntary appearance; but the jurisdiction is an affirmative matter to be shown by the record, and the question is not whether the defendant appeared and objected, but whether the affirmative matter is sufficiently patent upon the face of the record. *Lowe v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 15 Cal. 296.

16. On appeal, a judgment by default will be reversed, unless the record show service on the defendant or appearance, though possibly a judgment so obtained could not be impeached collaterally. *Schloss v. White*, 16 Cal. 68.

17. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for non-appearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous and that judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

18. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.*

19. Failure of defendant in ejectment to appear when the cause is called for



trial—an answer being in—authorizes the court to try it without a jury. *Doll v. Feller*, 16 Cal. 434.

## APPOINTMENT TO OFFICE.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment, as well as the first one, was irregular and void. *People v. Fitch*, 1 Cal. 536.

2. An appointment to fill a vacancy in the office of State printer, made by the governor during the session of the legislature, is irregular and void. *Ib.*

3. The power to fill an office carries by implication the power to fill a vacancy, and all necessary authority to carry out the original power and prevent it from becoming inoperative. *Ib.*

4. The power of filling vacancies in office vested in the governor of the State by the constitution, applies only to vacancies occurring under circumstances when the original appointing or electing power cannot act. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power. *People v. Mott*, 3 Cal. 505; *People v. Mizner*, 7 Cal. 525.

5. Though the appointment of a sheriff by a county judge was void, yet the acts of such sheriff, as a de facto officer, are good. *People v. Roberts*, 6 Cal. 215.

6. The act to establish an insane asylum, providing that the resident physician shall hold his office for two years, and until his successor is appointed and qualified: held, that on failure of the legislature to elect at the expiration of the incumbent's term, the office becomes de jure vacant, and can be filled by the governor by appointment. *People v. Reid*, 6 Cal. 289.

7. The legislature having failed to classify the trustees of the insane asylum, extended the term of all the trustees to five years, and the appointments to fill vacancies could not extend beyond the original term. *People v. Baine*, 6 Cal. 510.

8. The legislature failing to elect successors to the board of trustees, the power of appointment vested in the governor. *Ib.*

9. When the time of holding an office is not fixed, the tenure of the office is at the pleasure of the appointing power, and the power to remove is an incident to the power to appoint, as a general proposition. *People v. Hill*, 7 Cal. 102.

10. In making the appointment, the power of the executive is original and unlimited. He can select any one, from all the qualified citizens of the State, while the power of the Senate is the right to advise or refuse to advise the appointment of the particular individual. *People v. Mizner*, 7 Cal. 524.

11. Where the appointment to an office is vested in the governor with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature, and the governor appoints a successor to the office: held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term, subject only to be defeated by the nonconcurrence of the senate. *Ib.* 525; *People v. Addison*, 10 Cal. 7.

12. The power to appoint to a vacancy has to be vested in some department of the government, and the constitution was compelled to vest it in the executive, because it was the only department that could be properly and efficiently charged with such a duty. *People v. Mizner*, 7 Cal. 525.

13. The power to appoint for the full term of the office of resident physician of the insane asylum is vested in the legislature, and the governor has no right to exercise it. *People v. Langdon*, 8 Cal. 13.

14. So far as regards the act of the appointing power, the appointment is complete when the commission is duly issued by the executive; but as regards the appointee, he must perform the conditions precedent before he can hold the office. *People v. Whitman*, 10 Cal. 44.

## Appraisement.—Appropriation of the Revenue.

15. In cases where there is no incumbent to hold over, the law will allow the appointment by the executive to fill the office. *Ib.* 46.

16. The constitution affixes no period of tenure to the office of tax collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged. *People v. Squires*, 15 Cal. 17.

17. A controller must be elected biennially, at the same time and place and manner with the governor and lieutenant governor, and an appointment of a controller by the governor before this biennial general election, whatever its effect otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *People v. Melony*, 15 Cal. 62.

See ELECTION, GOVERNOR, OFFICE, VACANCY.

## APPRAISEMENT.

1. A sale by a sheriff, under execution, of a house, claimed as a homestead by the defendant in execution, and ascertained by appraisement to be worth over \$5,000, should not be made until an exact appraisement of the value of the premises is obtained, so that the sheriff can convey a definite fractional, undivided interest therein. *Gary v. Easterbrook*, 6 Cal. 459.

2. Where a lease contained the usual covenants for payment of rent, and re-entry for nonpayment, and provided for the appraisement of improvements erected by the lessee, and payment of their value by the lessor at the expiration of the term; and the lessor reentered for nonpayment of rent: held, that the lessee could not maintain an action, upon being evicted, for the value of his improvements. *Lawrence v. Knight*, 11 Cal. 298.

## APPROPRIATION.

- I. Of the Revenue.
- II. By Payment.
- III. Of Mining Lands.
- IV. Of Water Courses.

## I. OF THE REVENUE.

1. The common council of Sacramento, by resolution, made an appropriation to the mayor of the city of \$10,000, reciting meritorious services (but such as were within the line of his official duty) as the consideration, which was exclusive of his salary, which was regularly paid. The mayor died the day the appropriation was passed, and did not accept it formally: held, that the appropriation could not be recovered in an action at law. *Heslep v. City of Sacramento*, 2 Cal. 581.

2. The act of May 1st, 1854, which creates the office of State printer, and requires the comptroller to draw his warrants on the treasury for such sums as may be due the State printer, is not a specific appropriation. *Redding v. Bell*, 4 Cal. 333.

3. The revenue act provided that the board of supervisors or courts of sessions shall levy, in addition to a State tax, a tax, not to exceed fifty cents on each one hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. Under this provision, the courts of sessions of Sacramento levied a tax of fifty cents for county purposes, twenty-five cents for funded tax, &c.: held, that the words of the revenue act, authorizing a tax of fifty cents on each one hundred dollars for county purposes, ought not to be restricted to the current expenses of the year as an appropriation, leaving the scrip holders of the county to look for payment to the tax collected for the floating debt. *McDonald v. Griswold*, 4 Cal. 352.

4. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler v. Bates*, 7 Cal. 137.

5. Every municipal appropriation in the contemplation of law is to be paid in money. *People v. Williams*, 8 Cal. 101.

By Payment.—Of Mining Lands.—Of Water Courses.

6. The power of appropriation which the legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town for any purpose connected with their past or present condition, except as such revenues may, by the law creating them, be devoted to special purposes. *Blanding v. Burr*, 13 Cal. 351.

7. To an appropriation, within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. *People v. Brooks*, 16 Cal. 28.

8. When the constitution, therefore, says, that "no money shall be drawn from the treasury but in consequence of appropriations made by law," it only means, that no money shall be drawn except in pursuance of law. *Ib.*

9. When the act of April 13th, 1854, provides, that no warrants shall be drawn except there be "an unexhausted, specific appropriation" to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object. *Ib.*

See MUNICIPAL CORPORATION, REVENUE, WARRANTS.

## II. BY PAYMENT.

10. A draft payable, in terms, out of "an appropriation" for work done by the acceptor, becomes due on payment for the work. *Nagle v. Homer*, 8 Cal. 358.

11. Where it was agreed between the mortgagor and mortgagee that the land and its proceeds were to be held not only as security for the debt due the latter, but for debts due third persons, laborers on the land, for instance: held, that such agreement was an appropriation of said surplus for the benefit of said third persons, not revocable when they have acted on the faith of it; and the mortgagee is a trustee of the same for said third persons. *Pierce v. Robinson*, 13 Cal. 121.

See PAYMENT.

## III. OF MINING LANDS.

12. The government of the United States and State government have not only acquiesced in the universal appropriation of the public lands for mining purposes, but have studiously encouraged them in some instances, and recognized them in all. *Conger v. Weaver*, 6 Cal. 557; *Weaver v. Conger*, 10 Cal. 238.

13. The rights of a quartz miner come from his appropriation; and whenever his claim is defined, there is no reason, in the nature of things, why an appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. *Brown v. '49 and '56 Quartz M. Co.*, 15 Cal. 160.

See LANDS, MINES AND MINING LAW.

## IV. OF WATER COURSES.

14. Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are not dependent on the ownership of the land through which the water flows. *Kelly v. Natoma W. Co.*, 6 Cal. 108; *Hoffman v. Stone*, 7 Cal. 48; *Maeris v. Bicknell*, 7 Cal. 262.

15. There must be an actual appropriation of the water for some useful purpose allowed by law, to give a title in it. *Maeris v. Bicknell*, 7 Cal. 262.

16. Where a party stands by and sees a ditch owner appropriate the water of a creek, at a great expense, and does not inform him of his claim to the waters, he and his vendees are estopped from afterwards claiming the water. *Parke v. Kilham*, 8 Cal. 79.

17. A right to water as a usufruct may be acquired by appropriation, as against a subsequent appropriator who shows no title to the soil; and that by the appropriation of water, and the construction of a canal, the party acquires an easement or franchise which he may enjoy and protect. *Crandall v. Woods*, 8 Cal. 142.

18. An appropriation of land carries with it the water on the land, or a usufruct

in the water; for in such cases the party does not appropriate the water, but the land covered with water. *Ib.* 143.

19. When an action is properly brought to test the question as to the priority of appropriation of water courses, it is proper to pray for an injunction to prevent future injury. *Marius v. Bicknell*, 10 Cal. 224.

20. Parties who first appropriate water for mill purposes are entitled to it to the extent appropriated, and for these purposes to the exclusion of any subsequent appropriation of it for the same or any other use. *Ortman v. Dixon*, 13 Cal. 38.

21. If A erects a mill on a running stream, this shows an appropriation of the water of the mill; but if he suffers a portion of the water, or the body of it, after running the mill, to go down in its accustomed course, we do not see why persons below may not as well appropriate this residuum as he could appropriate the first use. *Ib.*

22. Water taken for a mill is not an article of merchandise to be sold in the market; it is merely used as a motive power, and after it passes the mill and subserves its purposes, it may be appropriated as an aid to working the mines. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 233.

23. There is no difference in respect to the use, or rather purpose, to which water is to be applied, and an appropriation for the uses of a mill stands on the same footing as an appropriation for the use of the mines. *Ib.*

24. It by no means follows that because in an agricultural district a party takes up a mill seat, gets a good title—and we esteem possession of public lands to be—to the land, and makes valuable improvements dependent on the use of water as a motive power, that he means only to use the water appropriated for the first purpose to which he applies it. *Ib.* 237.

25. To render a claim of water by appropriation valid, the claim must be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

See WATER COURSES.

## APPURTENANCE.

1. The act of March 26th, 1851, operated as a grant by which property-holders along the line of Market street, and the public, are entitled to the free enjoyment of the same, and this right or privilege could not be resumed by the State, and was not resumed by the act of April 28, 1851, confirming the contract between the appellant and the sinking fund commissioners. *Breed v. Cunningham*, 2 Cal. 368.

2. Where lots are sold as fronting on or bounded by a certain space, designated in the conveyance as a street, the use of such space as a street passes as an appurtenance to the grant, and vests in the grantee, in common with the public, the right of way over said street. *Ib.*

See FIXTURES, LAND.

## ARBITRATION.

- I. Jurisdiction of Arbitrators.
- II. Submission to Arbitration.
- III. Fees of an Arbitrator.
- IV. Award.

### I. JURISDICTION OF ARBITRATORS.

1. Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson v. Wells*, 2 Cal. 130.

2. Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the county court: held, that it was void in toto, that court having no jurisdiction over the subject matter of the award. *Williams v. Walton*, 9 Cal. 145.

3. The court having no jurisdiction, the arbitrators could have none, nor could they have common law powers when appointed in the mode provided by statute. *Ib.* 146.

## II. SUBMISSION TO ARBITRATION.

4. The submission of a cause to arbitration operates as a discontinuance of the action.\* *Gunter v. Sanchez*, 1 Cal. 47.

5. To constitute a submission to arbitration under our statute so as to give the award the effect of a judgment, the submission must be filed with the clerk in the manner specified, and a motion for a judgment upon the award made after the expiration of a specified time upon notice. *Heslep v. City of San Francisco*, 4 Cal. 3; overruled in *Carsley v. Lindsay*, 14 Cal. 395.

6. A reference or arbitration in which there is no order of court or agreement filed with the clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which the court loses all control over the case and has no authority to enter judgment upon the finding, except by consent of parties. *Heslep v. City of San Francisco*, 4 Cal. 4.

7. Where a submission to arbitration is made an order of court under the code, the clerk may enter the judgment on the award in due time without any further order of the court. *Carsley v. Lindsay*, 14 Cal. 395; overruling *Heslep v. City of San Francisco*, 4 Cal. 3.

## III. FEES OF AN ARBITRATOR.

8. Where parties who submit a matter to arbitration agree as to whom shall pay the arbitrator, if the latter be no party to the agreement he will not be bound by it, but may look to all the parties for compensation for his services. *Young v. Starkey*, 1 Cal. 427.

9. Where an arbitrator refuses to deliver an award made by him until his fees are paid, and a promise to pay him is made and he delivers the award, it takes the case out of the statute of fraud, and the undertaking to pay for the services a reasonable compensation is supported by a sufficient consideration. *Ib.*

\*This decision was rendered under the code of 1850. The code of 1851 permits arbitrations to be submitted under the order of a court.

## IV. AWARD.

10. Arbitrators are not bound to award on principles of dry law, but may decide on principles in equity and good conscience, and make their award ex æquo et bono. If, however, they mean to decide according to law and mistake the law, the courts will set aside the award. *Muldrow v. Norris*, 2 Cal. 77.

11. In case of a general award, courts will not inquire into mistakes by evidence aliunde; but where the arbitrators have made any point a matter of judicial inquiry by spreading it upon the record, and they mistake the law in a palpable and material point, their award will be set aside. *Ib.*; *Tyson v. Wells*, 2 Cal. 130.

12. Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake or accident, either in fact or in law. *Muldrow v. Norris*, 2 Cal. 77; *Peachy v. Ritchie*, 4 Cal. 207.

13. If arbitrators state the reasons of their award, it will be presumed they intend to decide according to law. *Muldrow v. Norris*, 2 Cal. 79.

14. It is correct for courts to distinguish those portions of an award which are good and those which are not, where it is attacked on the ground of fraud, and the subject matter is in its nature divisible. *Muldrow v. Norris*, 2 Cal. 79; *Williams v. Walton*, 9 Cal. 146.

15. Where the object of a submission is to make an end of litigation, and the award is uncertain and incomplete upon its face, it defeats the object of the submission and must be set aside. *Pierson v. Norman*, 2 Cal. 601.

16. Where parties submit to an arbitrator, they are presumed to know that his award will be final, and they must be required to exercise due diligence in procuring the evidence upon which to base a proper award. *Montifiori v. Engels*, 3 Cal. 434.

17. By the terms of an award which were decisive between a landlord and tenant, the latter was to leave the premises on the 9th: held, that the plaintiff had no right to give a notice to quit until the 10th, after which, by the act of forcible entry and detainer, the plaintiff had six days to remove, wherefore the action commenced on the 10th was premature. *Ray v. Armstrong*, 4 Cal. 208.



## Award.—Argument.

18. A having an award in his favor against a city, and a suit pending to enforce the same, and the council made an appropriation for the payment of the award, it was held that A cannot be compelled to litigate his rights with B, who has stood by without notice of his claim. *Wilson v. Heslep*, 4 Cal. 303.

19. An award rendered upon a fair arbitration of the matter in dispute and long concurred in, was conclusive of the rights of the parties, and should so have been held by the courts below. *Jarvis v. Fountain Water Co.*, 5 Cal. 180.

20. When arbitrators have published their award by delivering it to the parties as the award: held, that it is not the subject of revision or correction by them, and that any alteration without the consent of the parties will vitiate it. *Porter v. Scott*, 7 Cal. 316.

21. It is the duty of arbitrators to pass upon the whole subject in controversy, and if it appears on the face of the award that they have not disposed of the whole matter, or if the terms of the award render a further inquiry necessary to ascertain a sum to be paid, or an act to be done, it is void. *Ib.*

22. Arbitrators must pass upon all matter submitted, or their award will be invalid. If several matters are specified in the submission, and the award does not disclose that each is determined, it is defective on its face and can be set aside on motion. *Muldrow v. Norris*, 12 Cal. 339.

23. If the submission provide that an award upon the matter submitted be made, or the condition of the bond be that the parties are bound—provided the award of such matters be made—then such proviso extends to all the matters submitted, and operates to render the submission conditional and the award binding only in case the arbitrators pass upon every subject either specifically referred to them, or brought to their notice under the general terms of the submission. *Ib.* 341.

24. Where all matters in difference are submitted, though without an “ita quod,” the arbitrator must make his award of all matters submitted to him, and whereof he has notice, otherwise the award would be entirely void. *Ib.* 343.

25. An useless and invalid determination upon one item properly presented in the general terms of the submission must,

on principle, be as fatal to the entire action of the arbitrators as an omission intentional or unintentional to notice the item at all. *Ib.* 344.

26. The doctrine that an award may be good in part, or bad in part, applies to instances where there has been an excess of power in the arbitrators by their attempting to determine matters not submitted, or where there is uncertainty or illegality in an independant and distinct matter forming no consideration for other parts of the award, and the settlement of which could not have contributed to induce the arbitration. *Ib.*

27. Where one of the principal matters in dispute, passed upon by the arbitrators, was subsequently set aside by a higher court, and the judgment rendered upon the award vacated by reason of the error of the arbitrators in passing upon said matter, it left the award as though such item submitted had never been passed upon; and consequently, the award did not effect the purposes of the submission by settling all matters of controversy between the parties. The consideration which moved the parties to enter into the submission had failed, and hence the award is void. *Ib.*

28. An award cannot be impeached because contrary to law and evidence. The code prescribes the sole grounds to vacate an award by the court on motion. *Carsley v. Lindsay*, 14 Cal. 394.

29. That the arbitrator did not act upon all the items or property of a partnership, is no ground for vacating his award. Certainly not, if the facts were not brought before him. *Ib.*

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ARGUMENT.

1. On a rehearing, a party will not be permitted to raise any point which was not urged on the first argument. *Grogan v. Ruckle*, 1 Cal. 197.

2. Where notice of argument has been given by the appellant, the respondent may move an affirmance of the judgment ex parte, although he has given no notice of argument. *Constant v. Ward*, 1 Cal. 333.

In General.—Affidavit on Arrest.

3. The plaintiff always in contemplation of law has the affirmative of the argument and the right to open and conclude. *Benham v. Rowe*, 2 Cal. 408.

4. The establishment and enforcement of rules, limiting the argument of counsel to a certain time, are matters resting in the sound discretion of the court, and, unless it appear that injustice has thereby been done, form no ground of appeal. *People v. Tock Chew*, 6 Cal. 636.

5. In a criminal case, if the court below impose upon counsel against their consent a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

See TRIAL.

ARREST.

- I. In General.
- II. Affidavit on Arrest.
- III. Pleadings.
- IV. Judgment.
- V. Liability of Bail.
- VI. Discharge from Arrest.

I. IN GENERAL.

1. If an order of commitment be sufficient in substance, it will be held good on habeas corpus, although it contain more than is necessary to be stated therein. The unnecessary matter will be regarded as surplusage. *People v. Smith*, 1 Cal. 12.

2. An attachment for contempt for disobedience of a mandamus will not issue, unless it appear affirmatively that the mandamus was sought to be enforced by some party. *People v. Turner*, 1 Cal. 189.

3. When the relation subsisting between the parties be that of partners, and not that of principal and agent, an embezzlement of the copartnership property is not such a fraud as will warrant an arrest

under the code. *Soule v. Hayward*, 1 Cal. 346.

4. A defendant cannot be arrested for fraudulent representations in obtaining money, when the representations were made some time after the money was obtained. *Snow v. Halstead*, 1 Cal. 361.

5. Where a party is once arrested and discharged he cannot be arrested again in the same action. *Mc Gilvery v. Morehead*, 2 Cal. 609.

6. As a matter of practice, it is safest to award an arrest, even in cases of doubt, for the defendant is protected by his bond from abuse by the process; without which process the plaintiff may be remediless. *Southworth v. Resing*, 3 Cal. 378.

7. Attendance upon any court as a witness, juror, or party, only exempts the person so in attendance from arrest in a civil action, but not from obeying any ordinary process of a court. *Page v. Randall*, 6 Cal. 33.

8. The provision of the civil code, "that the defendant may be arrested when the action is for willful injury to person or character," is directly in conflict with the constitution. *Ex parte Prader*, 6 Cal. 240.

9. If the plaintiff is about to leave the State, it is no reason to apply for an exercise of equity jurisdiction to protect the defendant's rights; he has his remedy by a writ of ne exeat. *Bell v. Walsh*, 7 Cal. 87.

II. AFFIDAVIT ON ARREST.

10. An affidavit, in pursuance of which a warrant is issued is defective, which contains allegations upon information and belief merely; and if it states no fact within the knowledge of the affiant, it can be of little weight in any legal proceeding. *People v. Smith*, 1 Cal. 11.

11. The defendant can only avail himself of any defect in the affidavit previous to his examination and final order of commitment. *Ib.*

12. An affidavit may set forth in positive terms as within the knowledge of the deponent the commission of the offense charged therein, and proceed upon information as to the names only of the persons who were guilty of the perpetration of them. *Ib.*

13. The preliminary evidence upon an

application for a warrant of arrest may be, either by the affidavit of some person cognizant of the facts, or by his examination under oath, taken by the officer to satisfy the person to whom the application was made, that there is reason to believe that a felony or other crime has been actually committed, as also to prove the probability of suspecting the party against whom the warrant is prayed. *Ib.*

14. In an action to recover money secured by a person as agent, he cannot be arrested without the affidavit showing some fraudulent conduct on his part, or a demand on him for the money and a refusal to pay. *Ex parte Holdforth*, 1 Cal. 440.

15. The affidavit to sustain an arrest must show the facts relied upon by positive averment; and it is not sufficient to refer to the complaint or any other paper to show what the affidavit ought itself to disclose. *Mc Gilvery v. Morehead*, 2 Cal. 609.

16. To entitle a party to the remedy of arrest, it is not necessary that he should know positively the commission of a fraud. It is sufficient if the circumstances detailed would induce a reasonable belief that a fraud was intended. *Southworth v. Resing*, 3 Cal. 378.

17. An affidavit for a requisition for a fugitive from justice is sufficient, if it does charge the commission of a distinct offense, although it does not set forth the crime with all legal exactness necessary to be observed in an indictment. *Ex parte Manchester*, 5 Cal. 238.

18. Courts cannot go behind this affidavit to inquire whether it is a forgery or not, because the governor of the State who issues the requisition is the only proper judge of the authenticity of the paper. *Ib.*

19. Though the affidavit does not charge in sufficiently distinct words that the prisoner is "a fugitive from justice," yet it is sufficient if it allege that he committed a crime and then fled. *Ib.*

20. Insufficiency of the affidavit on which the writ of arrest issues cannot be set up in defense by third parties, nor even by the defendant himself, after judgment. *Mattoon v. Eder*, 6 Cal. 59.

21. An affidavit for arrest which avers on information and belief that the defendant has been guilty of a fraud in the contracting of the debt, or in endeavoring to prevent its collection in the terms required

by statute, and followed by an averment of the facts on which the belief is founded, also stated on information and belief, is sufficient. *Ib.*

22. Side issues upon affidavits are not issues upon which juries pass. The arrest upon affidavit is only intended to secure the presence of the defendant until final judgment, and in order to detain and imprison his person afterwards, the fraud must be alleged in the complaint, be passed upon by the jury, and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 412.

III. PLEADINGS.

23. For the furtherance of justice, courts should allow pleadings to be amended, so as to present a question of fraud to the jury when the defendant has been arrested, that the question may be submitted to the jury and a judgment be entered in conformity to the facts found. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

24. An order of arrest, made by the judge before the complaint in the action in which it is entitled is filed in court, is void. Until the suit is instituted there can be no defendant, consequently no authority under the statute to issue an order of arrest. *Ex parte Cohen*, 6 Cal. 320.

25. A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

IV. JUDGMENT.

26. The judgment should state the fraud affirmatively, for fraud being the gravamen of the arrest, it should be conclusively found before the debtor can be imprisoned or the bail charged. *Mattoon v. Eder*, 6 Cal. 60; *Davis v. Robinson*, 10 Cal. 412.

Liability of Bail.—Discharge from Arrest.

27. The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and that the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

28. To authorize a judgment convicting the defendant of fraud, the facts upon which the charge is based must be specifically alleged in the complaint. *Davis v. Robinson*, 10 Cal. 412.

V. LIABILITY OF BAIL.

29. Where a party offered to surrender himself in discharge of his sureties: held, to be a good surrender and a discharge of the sureties from all liability. *Babb v. Oakley*, 5 Cal. 94.

30. Final process must issue against the judgment debtor on arrest before the bail becomes finally charged; and in the absence of any other provision, it would probably be necessary that a ca. sa. should issue, and be returned non est inventus, before the bail would be liable. *Mattoon v. Eder*, 6 Cal. 60.

31. The sureties on the bail bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, if no execution be issued against him. A surrender within the ten days after the issuance of an execution is good. The ten days are computed from the issuance of the execution, not from the rendition of the judgment. *Allen v. Breslauer*, 8 Cal. 554.

See BAIL.

VI. DISCHARGE FROM ARREST.

32. A person will be discharged on arrest when the process, though proper in form, has been issued in a case not allowed by law. *Soule v. Hayward*, 1 Cal. 347.

33. On a rule to show cause why the arrest of a party, ordered by the court on the allegation of fraud, should not be vacated, the question of fact involved in it must be decided like any other fact, by

weight of evidence. *Southworth v. Resing*, 3 Cal. 378.

34. The defendant on arrest, by putting in bail and neglecting to move to be discharged, consents to process and waives all irregularity in this respect. *Mattoon v. Eder*, 6 Cal. 59.

See BAIL.

ARREST OF JUDGMENT.

1. The defect, that there was no right of action in the plaintiff, would be fatal on motion in arrest of judgment. *Sublette v. Melhado*, 1 Cal. 106.

2. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence; the remedy is by appeal or motion to vacate the judgment. *Pico v. Sunol*, 6 Cal. 295.

3. The defects in an indictment are not cured by verdict, but may be taken advantage of on motion to arrest the judgment. *People v. Wallace*, 9 Cal. 30.

4. Where a defendant was served with process, but was not given the time allowed by law to appear and answer, it would be a sufficient reason for the court to quash the writ on motion by an amicus curiæ, or for extension of the time on defendant's motion, or a good objection on writ of error in arrest of judgment, or on motion for a new trial; but it cannot be said that the court has no jurisdiction of the person so as to make its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 64.

5. The court in which a void judgment is rendered, can, on motion, at any time arrest all process issued by its clerk thereon. *Chipman v. Bowman*, 14 Cal. 158.

See JUDGMENT.

ARSON.

1. An indictment which charges the accused of the crime of arson in this, that

Assault.—Assault and Battery.—Assent.

on a certain day, etc., "he did burn, or cause to be burned, a certain dwelling house," is not sufficient, because the charge is laid in the alternative, whereas it should be special, and does not set forth the facts and circumstances of the alleged offense, so that the accused may be prepared for his defense. *People v. Hood*, 6 Cal. 238. See CRIMINAL LAW.

ASSAULT.

1. Where a defendant was indicted for an assault with intent to commit murder, and the jury found a verdict of guilty of an assault with intent to do bodily injury: held, that the verdict only found the prisoner guilty of an assault and not of a felony. *People v. Vanard*, 6 Cal. 562.

2. The weapon or instrument with which the assault is committed constitutes the gist of the felony, as distinguishing the act from an ordinary assault, and should, therefore, be alleged and found. *Ib.* 563.

3. The owner of property, in the possession of the same, has a right to use so much force as is necessary to prevent a forcible trespass. *People v. Payne*, 8 Cal. 343; *People v. Honshell*, 10 Cal. 87.

4. In a prosecution for an assault with an intent to commit murder, where the prosecuting witness was asked, on cross examination, if he did not, previous to the assault, buy a pistol to use upon the defendant, to which he answered in the affirmative; it was competent for the prosecuting attorney to ask the witness to state his reasons for so doing; and his answer, that he was induced to do so by what he was informed by a third person that the defendant had said, was competent to show the motive of the witness. *People v. Shea*, 8 Cal. 538.

5. The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened. It is sufficient to justify the jury in finding an assault with intent to commit bodily injury. *People v. McMakin*, 8 Cal. 548.

6. Where the defendant was indicted for the crime of an "assault with a deadly weapon with the intent to inflict great bodily injury," and the jury found him "guilty of an assault with a deadly weapon:" held, that it was an error in the court to sentence the prisoner to two years in the State prison. *People v. Wilson*, 9 Cal. 260.

7. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 6 Cal. 188.

See ASSAULT AND BATTERY, CRIMINAL LAW.

ASSAULT AND BATTERY.

1. The recorder of San Francisco has the right to punish for the crime of assault and battery, as fixed by the act of April 18th, 1850. *People v. Ah King*, 4 Cal. 307.

2. An assault and battery is not a case of fraud, in the sense that that term is employed in the constitution, nor can it be so made by the legislature. *Ex parte Prader*, 6 Cal. 240.

3. A party cannot be imprisoned, under a judgment for injury to person in a civil action, for assault and battery; a judgment for damages, in such a case, is as much a debt as though recovered in an action of assumpsit. *Ib.*

See ASSAULT, CRIMINAL LAW.

ASSENT.

1. A decree fairly entered, with the

By a Private Corporation.—By a Municipal Corporation.

assent of an attorney, is as binding upon the client as a decree entered after resistance. *Holmes v. Rogers*, 13 Cal. 201.

2. If an attorney assents to a decree, the assent need not be made in open court by words spoken by the attorney. It may as well be made by stipulation out of court. *Ib.*

3. When a decree is entered with the assent of the attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Ib.* 202.

4. It is not necessary that all the trustees of an assignment should assent to act as such. The presumption is of assent; and the assent of one is enough to give effect to the trust, though the rest expressly repudiate. *Forbes v. Scannell*, 13 Cal. 288.

ASSESSMENT.

- I. By a Private Corporation.
- II. By a Municipal Corporation.

I. BY A PRIVATE CORPORATION.

1. In a suit brought by one of the partners of a mining claim against the company, to recover his share, which had been sold for an alleged nonpayment of assessment, and also to recover his proportionate share of the gold taken out by the said company, the district court had jurisdiction. *Schuepler v. Evans*, 4 Cal. 212.

2. Where the tenant in common or partner goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay or delay in paying the expenses of the business or the assessments, create of itself a forfeiture. *Waring v. Crow*, 11 Cal. 372.

3. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, sys-

tematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct in failing to collect the assessments. *Neall v. Hill*, 16 Cal. 151.

II. BY A MUNICIPAL CORPORATION.

4. The common council of the city of San Francisco had no authority, under the charter of 1850, to impose a penalty of one per cent. a day for the nonpayment of an assessment. *Weber v. City of San Francisco*, 1 Cal. 456.

5. Where an assessment is laid upon property, it is not necessary or proper for a court to interfere by a decree, rendered in an injunction suit, to restrain the collection of the assessment, or to order a sale of the premises; the municipality should be left to make the amount of the assessment in the ordinary way. *Ib.*

6. An assessment was laid for the purpose of improving a street, and thereby benefiting the property of the plaintiff, in common with the property of other persons owning lots on the same street; and after the work was completed, and the benefit possible derived from it, the plaintiff can claim to be exempt from the assessment, on the ground of irregularities in the mode of making the assessment. *Ib.* 457.

7. The act of May 4th, 1852, "to incorporate the town of Oakland," confers no power of taxation directly, but leaves it to be derived from the general act of March 27th, 1850; and an assessment greater than provided in the latter is illegal and void. *Hays v. Hogan*, 5 Cal. 242.

8. Commissioners of street assessments were bound by the municipal charter at the proper time to make the proper assessment, and so apportion the expense among the property holders, in proportion to the advantages respectively derived by

By a Municipal Corporation.

each from the improvement. It is the duty of the mayor to see that all the officers did their duty. *Lucas v. City of San Francisco*, 7 Cal. 473.

9. Where a claim to a tract of land under a Mexican grant somewhere within a certain larger tract was ascertained, and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer v. Boling*, 8 Cal. 389.

10. Where a general repealing statute is passed, and on the next day a supplementary act is passed excepting certain counties from the operation of the repeal to a certain extent: held, that the case was a special one, and there being no doubt of the true intention of the legislature, the supplemental act must be regarded as a part of the repealing act, and must be given the same effect as if passed on the same day. So held in the construction of the act of April 29, 1857, repealing the then existing law concerning all sheriffs as tax collectors, and requiring them to turn over the assessment rolls to their successors, taken in connection with the act of April 30, excepting certain counties from the operation of the repealing law of the day previous. *Manlove v. White*, 8 Cal. 377.

11. The acts of the officer making the assessment must be presumed to be in conformity with the law until the contrary is shown. *Ib.*

12. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings. It is from the list made by the assessor when duly corrected by equalization, that the auditor prepares the duplicate, which gives to the officer his authority to demand the tax, and to levy and sell the property of the delinquent. *Ferris v. Coover*, 10 Cal. 633.

13. A protest against an assessment for opening and grading a street must be presented within the time allowed by law, and must show affirmatively that it is signed by the requisite number of the property holders to make it effectual.

Burnett v. City of Sacramento, 12 Cal. 82.

14. The constitutional provision "that there shall be equality and uniformity of taxation upon property," does not refer to special assessments for local improvements by which individual parties are chiefly benefited in the increased value of their property, and in which the public is only to a limited extent interested. *Ib.* 83.

15. The injustice of general taxation for local purposes has led to the substitution of street assessments, and it seems impossible to deny that in theory they are more equitable than general taxation, for the purposes they are designed for. *Ib.* 84.

16. Taking the third section of the act of 1858, together with the first section, it is evident that the intention of the legislature in the passage of the act of 1858 was to substitute the assessment roll for the delinquent list required by the act of 1857, or rather, to give full and complete effect to that list as a valid warrant for the collection of the taxes therein mentioned, and then to provide, as is done in section three of that act, for their collection. *Moore v. Patch*, 12 Cal. 271.

17. An assessment must be made in order to create a liability on the part of the individual to pay the tax. If no such assessment be made, no liability is created, and of course there can be no default in discharging that which has no existence. *Kelsey v. Abbott*, 13 Cal. 617.

18. The assessment must be as certain in designating the person chargeable with the tax at the commencement of the fiscal year, as it must be in designating the amount of the charge, and the property to which reference is made for the purpose of ascertaining such amount. *Ib.*

19. An assessment of land on "balance of land on rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars," it appearing on the roll that the part of the ranch not assessed was comprehended within the plot of a town, certain lots in which were assessed on the same list to the same owner, is sufficient. *Patten v. Green*, 13 Cal. 328.

20. If the board raised the tax without proper notice to the owner, their action is void, and the assessment remains in full force. *Ib.* 329.

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21. A flume, although not delivered to the company by plaintiff, the contractor, until after the assessment, was the property of the company at the time of assessment; taxable to it, and not to the contractor. *Ib.* 156.

22. An assessment of property as "a ranch commonly known as 'Clark's ranch,' situated on the Auburn road, two miles south of Grass Valley, in Nevada county, State of California," is insufficient, and a deed, on a sale under it, is void. *Lachman v. Clark*, 14 Cal. 133.

23. If the value of the property be rightly fixed by the assessor, the assessment is valid, though that value was arrived at in a way different from that pointed out by the statute. If an assessor cannot find the persons to be taxed, he may nevertheless assess their property. *Hart v. Plum*, 14 Cal. 154.

24. The provision that the assessment must be made on or before a certain day, is directory, and an assessment may be made afterwards. *Ib.* 155.

25. An assessment thus: "Mortgages, (Marysville,) \$100,000," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that a mortgage is held for a given amount does not make the mortgage subject to taxation as for so much money. *Falkner v. Hunt*, 16 Cal. 171.

26. An assessment thus: "Personal property—mortgages (Marysville,) \$100,000," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. *Ib.* 172.

27. Under this act, a lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts. *Ib.*

28. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to ad-

vertise for proposals to grade, plank and sewer a portion of Mission street, in said city, the same to be paid for by the property holders adjacent * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasury and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: held, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committees of the two boards convert-

By a Municipal Corporation.—Assessor.

ed what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Argenti v. City of San Francisco*, 16 Cal. 281.

29. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. *Ib.* 281.

30. In this case, the city having discharged the assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 281.

31. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.* 283.

32. Though a man can only be made to pay a tax according to law, that law may be made as well at one time as another, or by one series of acts as another, and as well after an informal assessment, or no assessment, as before. *People v. Seymour*, 16 Cal. 344.

33. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859 in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of

the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *Ib.*

34. Such a law, making the assessment prima facie proof, merely affects the remedy, and is not therefore liable to any constitutional objection. *Ib.*

See ASSESSOR, CORPORATIONS, TAXATION.

ASSESSOR.

1. Where the account of a deputy assessor for \$1,650 was audited and allowed by the board of supervisors and ordered to be paid in the following words: "Ordered, the sum of four thousand one hundred and twenty-five dollars to be paid out of the fund for current expenses, to equal sixteen hundred and fifty dollars in cash, at the rate of forty cents per dollar, October 29, 1856," and, in pursuance of such order, the county auditor drew his warrant for \$4,125 upon the treasurer, and delivered it to the deputy assessor, who presented it to the treasurer, and by him it was endorsed and registered in its order of presentation among the legal warrants against the county: held, that the order was made without authority and was void, and the fact that the market or cash value of county warrants was only forty per cent. of the nominal amount, and the object of the action of the board was to give that which was at the time an equivalent to cash, did not justify the action of the board. *Foster v. Coleman*, 10 Cal. 281.

2. Assessors and tax collectors are constitutional officers; but it is not necessary, under the thirteenth section of article 11 of the constitution, that every portion of the revenue pass through their hands. *People v. Squires*, 14 Cal. 18.

3. A mandamus does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff. *People v. Su-*

Form of an Assignment.—In general.

pervisors of Santa Barbara County, 14 Cal. 102.

4. If the value of property be rightly fixed by the assessor, the assessment is valid, though that value was arrived at in a way different from that pointed out by the statute. *Hart v. Plum*, 14 Cal. 154.

5. If an assessor cannot find the persons to be taxed, he may nevertheless assess their property. *Ib.*

See ASSESSMENT, OFFICE.

ASSIGNMENT.

I. Form of an Assignment.

II. In general.

1. Of a Mortgage.
2. Of a Lease.
3. Of a Contract.
4. Of a Judgment.
5. Of Covenants or rights to Land.
6. Of an Account.

III. Equitable Assignments.

IV. For the benefit of Creditors.

V. Notice of Assignment.

VI. When the Assignor may be a Witness.

VII. When an Assignee may sue.

I. FORM OF AN ASSIGNMENT.

1. An assignment of an account by the endorsement of the word "assigned," signed by the owner of the account, is sufficient. *Ryan v. Maddux*, 6 Cal. 248.

2. There is no error in permitting a party to fill up an assignment which of itself is sufficient; the additional words may be treated as surplusage. *Ib.*

II. IN GENERAL.

3. The consideration of the assignment of a personal chattel or chose in action may be proven by parol, and a different one established from that expressed in the instrument. *Bennett v. Solomon*, 6 Cal. 138.

4. A cause of action arising out of tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456.

5. It is not necessary, in order to grant

relief from a fraudulent assignment, and to set the same aside, that the assignee should have been a party to the fraud. *Baker v. Bartol*, 6 Cal. 486.

6. And if the assignee, though innocent of the fraud, has, by a misplaced confidence, allowed his assignor to be his agent for the sale of property assigned, and convert the proceeds, he is liable; if he acted in complicity with fraud, he is of course liable. *Ib.*

7. The good faith of the assignment being questioned, evidence going to show a previous pledge of the fraud is admissible. *McEwen v. Johnson*, 7 Cal. 261.

8. A written assignment is not valid where it was never delivered to the plaintiff; the mere act of signing the assignment, without a delivery, is insufficient. *Ritter v. Stevenson*, 7 Cal. 389.

9. An assignment to a receiver in a suit to dissolve a copartnership cannot operate so as to prevent a creditor of the firm from pursuing his remedy at law, before decree, and thereby acquiring a preference or lien upon the partnership assets. *Adams v. Hackett*, 7 Cal. 198; *Adams v. Woods*, 8 Cal. 156; 9 Cal. 26; *Naglee v. Lyman*, 14 Cal. 456.

10. Where a negotiable promissory note not yet due is taken bona fide as collateral for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne v. Bensley*, 8 Cal. 266; *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454.

11. A creditor has not the right to assign the debt in parcels, and thus, by splitting up the cause of action, subject his debtor to the costs and expenses of more suits than the parties originally contemplated. *Marziou v. Pioche*, 8 Cal. 536.

12. A promise of a party that he would not assign the contract to any one, made without consideration, does not bind him, and is in fraud of his rights. *California Steam Nav. Co. v. Wright*, 8 Cal. 591.

13. A defense to a note, that it was made payable to order, and was altered and fraudulently made payable to bearer, and that the defendant paid the note before the plaintiff became assignee of it, and that the plaintiff became assignee after the note was due, is good and valid. *Sherman v. Rollberg*, 11 Cal. 41.

14. A chose in action, not negotiable,

In general.

created by the immediate parties for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making the chose in action. *Wright v. Levy*, 12 Cal. 262.

15. L. executed and delivered his note to N. without consideration, and for the purpose of defrauding, hindering and delaying his creditors. N. had knowledge of the fraud, and attached L.'s property in an action on the note. Then W., a creditor of L., also attached L.'s property. Before judgment, N. assigned the note to J., who was an innocent purchaser: held, that J. was not protected in his purchase. N. having been superseded by W.'s attachment, could not by any act or deed of his put his assignee in any better position than he occupied himself. *Ib.* 263.

16. Parol evidence is admissible to show that a conveyance or assignment, absolute on its face, was intended as a mortgage. *Pierce v. Robinson*, 13 Cal. 124; *Johnson v. Sherman*, 15 Cal. 290, overruling *Lee v. Evans*, 8 Cal. 425, and *Low v. Henry*, 9 Cal. 548.

17. B. and D. contracted to furnish to G. and S., also defendants, twenty-five thousand gallons of turpentine, to be distilled by the latter. The contract was to end, April 1st, 1857. B. and D. were not bound to deliver all the turpentine at once, nor any given quantity per day. Damages for nondelivery of turpentine fixed at \$3750, or fifteen cents per gallon. For accident to distillery, reasonable time to be allowed G. and S. for repairs. Distillery burned last of January, 1857, requiring eighteen days to rebuild. In January and March, 1857, G. and S., respectively, assigned their interest in the contract to plaintiff: held, that the benefit of the suspension of the work by the fire, inured to B. and D., as well as to G. and S.; that the time for the performance of the contract was extended for the eighteen days; that up to April 18th, 1851, G. and S. would be bound to receive turpentine; and even if the assignment, before this time, did not put it out of their power to comply with their contract, at least the assignee could not sue before the expiration of the extended time. *Jackson v. Beers*, 14 Cal. 193.

18. Plaintiff contracts to dig a ditch for a water company, the company agreeing

to pay three dollars per rod—one-third of it in money, on the completion of each mile—the other two-thirds to be paid in water, at the rate of twenty-five cents per square inch, delivered through an orifice under six inches of pressure, any where along and at the main ditch; the company having the right of paying the two-thirds in cash, instead of water, if they so elect. Plaintiff having assigned this contract to L. & Co., as security for a debt due them by plaintiff, they demanded of the company payment of whatever was coming to plaintiff. The company elected to pay, and did pay, in cash, on a statement as of so much due in money: held, that even if L. & Co. had no right to receive money instead of water, yet the payment binds plaintiff, for they were acting ostensibly for him, or by his authority; that if he denied their authority, the payment would not discharge his debt to L. & Co., the assignment would remain in force, and the plaintiff would have no cause of action here; that if he affirmed the arrangement made by L. & Co., in part, he must give full effect to it, and thus confirm the settlement, as the liquidation of a money demand. If the company paid L. & Co. more than was due them from plaintiff, he must look to L. & Co. The assignment being general, L. & Co. were authorized to receive the entire amount, and became trustees of plaintiff for the excess. *Myers v. South Feather River Water Co.*, 14 Cal. 277.

19. Plaintiff assigns to defendant, September 22d, two shares of stock in a mining company, stating in the assignment: "I authorize the transfer to him (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second. The trustees did not, in fact, declare dividends until between noon and one o'clock, on Tuesday: held, that the dividends belong to plaintiff; and that parol evidence was admissible to explain the transaction, and point its meaning. *Brewster v. Lathrop*, 15 Cal. 22.

20. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in

Of a Mortgage.

the hands of the defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application to a case like this. A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Walling v. Miller*, 15 Cal. 40.

21. Parol proof of a written contract, and assignment thereof in writing, is not admissible, so as to charge the assignee, without notice, to produce the original, or account for its loss. *Grimes v. Fall*, 15 Cal. 65.

1. Of a Mortgage.

22. The purchaser of a mortgage cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction, duly entered of record; and a deed from the mortgagee to a third party, for the conveyance of the mortgaged premises, does not operate as an assignment of the mortgage. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336.

23. Where a party cancels a mortgage, and executes a new one, the last mortgagees are, in equity, assignees of the debt paid, and will be subrogated to the rights of the assignors; for in equity, the substance of the transaction would be an assignment of the old mortgage, in consideration of the money advanced. *Dillon v. Byrne*, 5 Cal. 456; *Birrell v. Schie*, 9

Cal. 107; *Carr v. Caldwell*, 10 Cal. 385; *Swift v. Kraemer*, 13 Cal. 530.

24. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with full effect of a regular assignment. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336; *Bennett v. Taylor*, 5 Cal. 502; *Ord v. McKee*, 5 Cal. 516; *Bennett v. Solomon*, 6 Cal. 138; *Phelan v. Olney*, 6 Cal. 483; *Belloc v. Rogers*, 9 Cal. 125; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Hickox v. Lowe*, 10 Cal. 206; *Kock v. Briggs*, 14 Cal. 263.

25. Where two notes are secured by a mortgage, and a purchaser of the second note takes therewith an assignment of the mortgage, he takes with notice of the equity of the holder of the first note, as he was informed of its existence by the mortgage itself. *Phelan v. Olney*, 6 Cal. 483.

26. When the holder of the second note and assignee of the mortgage entered a discharge of the mortgage, and took a new security, the discharge was valid as to him, and divested his lien under the mortgage, though void as to the holder of the note. *Ib.*

27. An assignment operating by its terms as a present and effectual change of ownership in the subject matter, the title is supposed, in law, to remain divested, until it be affirmatively shown that the condition of defeasance has happened. It is not unlike a chattel mortgage, which conveys the thing mortgaged, with power of use until the money secured is paid; and until payment is proven, all the right of the mortgagor to the mortgaged property passes to the mortgagee. *Myers v. South Feather W. Co.*, 10 Cal. 583.

28. Where an assignment of a note and mortgage has been made to the plaintiffs, to indemnify them as sureties on a bail bond for the assignor, and where suit is then proceeding on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure of such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

29. R. assigned a mortgage to F. made by a company to secure him as guarantor

Of a Lease.—Of a Contract.

delivering the mortgage at the same time to F., who retained it a few minutes, and returned it to R., to receive the interest from the company as his agent. The note guaranteed is unpaid. R. owes the company nothing: held, that after the assignment R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F. as guarantor was a sufficient consideration for the assignment; and that such assignment is not a mortgage of a mortgage. *Hall v. Redding*, 13 Cal. 219.

30. A married woman cannot make an assignment of a mortgage without the concurrence of her husband. *Tryon v. Sutton*, 13 Cal. 493.

2. Of a Lease.

31. It is questionable whether a breach of a covenant not to assign a lease would be enforced so as to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law. *Chipman v. Emeric*, 5 Cal. 51.

32. The assignment of a lease as collateral security for the payment of a debt does not vest the estate in the assignee until a breach of the agreement; and an assignee is only entitled to the reversion by privity of estate, or the actual occupation and beneficial enjoyment. *Engles v. McKinlay*, 5 Cal. 154.

33. A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of reëntury upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate. *Smiley v. Van Winkle*, 6 Cal. 606.

34. The valuable privilege of preëmption attached to a lease belongs to the whole property, and is therefore assignable. *Laffan v. Naglee*, 9 Cal. 677.

35. The assignee of a lease may discharge himself from all liability under the covenants of the lease by assigning over;

and the assignment over may be to a beggar, or a femme covert, or a person on the eve of quitting the country forever, provided the assignment be executed before his departure; and even though a premium be given as an inducement to accept the transfer. *Johnson v. Sherman*, 15 Cal. 292; *People v. Brooks*, 16 Cal. 25.

36. If some of the covenants of the lease do not bind the assignee, the State cannot have relief on that ground; she can claim no greater exemption than an individual from the consequences of an unwise contract. *State v. McCauley*, 15 Cal. 457; *People v. Brooks*, 16 Cal. 25.

37. The act of March, 1856, having authorized the commissioners to execute a lease of the State prison, without prescribing any specific form, or containing any restrictions as to assigning; and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment. The security of his bond was not impaired thereby. *State v. McCauley*, 15 Cal. 457; *People v. Brooks*, 16 Cal. 25.

3. Of a Contract.

38. Where a party alleges an assignment to him of a contract made with another, he must aver a positive transfer and the character of it. *Stearns v. Martin*, 4 Cal. 229.

39. An assignment of a contract as security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner v. Wilson*, 4 Cal. 314.

40. A plaintiff, the assignee in good faith for a valuable consideration of an invoice of goods, who demanded the same and tendered the balance of the purchase money in a reasonable time, can recover the value of the goods and need not notify the vendor of the assignment. *Morgan v. Lowe*, 5 Cal. 326.

41. A contract not to run boats on a

Of a Judgment.

certain line of travel, and on failure to comply with such contract to pay \$15,000, is an instrument in writing and assignable by our laws. *California Steam Nav. Co. v. Wright*, 6 Cal. 261; 8 Cal. 592.

42. A principal would be responsible for everything that an agent was permitted to do in his own name before the assignment of a contract; provided the defendant was ignorant of the fact that the contract was made for the benefit of the principal. *Osborn v. Hendrickson*, 7 Cal. 285; *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 591.

43. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 328.

44. Plaintiff made a written contract with the defendants to dig for them a certain mining ditch, to be paid for by the defendants in a specified manner. Plaintiff dug the ditch and subsequently assigned his interest in the contract to L. & Co., to secure them certain payments due, and authorized them to receive the amounts due on the contract until their debt was paid. L. & Co. gave defendants notice of this assignment and the defendants made several payments thereon: held, that plaintiff had no right to demand payment himself, or sue upon the contract, while this assignment was outstanding. *Myers v. South Feather Water Co.*, 10 Cal. 582.

45. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility; provided they are fairly made and are not against public policy; and a contract for such interest will take effect as an assignment when the subjects to which they refer have ceased to vest in possibility and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123.

46. B. & D. contracted to furnish G. & S.—also defendants—twenty-five thousand gallons of turpentine, to be distilled by the latter. The contract was to end April 1st, 1857. B. & D. were not bound to deliver all the turpentine at once, nor any given quantity per day. Damages for nondelivery of turpentine fixed at \$3,750, or fifteen cents per gallon. For accident to distillery, reasonable time to be

allowed G. & S. for repairs. Distillery burned last of January, 1857, requiring eighteen days to rebuild. In January and March, 1857, G. & S. respectively assigned their interest in the contract to plaintiff: held, that the benefit of the suspension of the works by the fire inured to B. & D. as well as to G. & S.; that the time for performance of the contract was extended for the eighteen days; that up to April 18th, 1857, G. & S. would be bound to receive turpentine, and even if the assignment before this time did not put it out of their power to comply with their contract, at least the assignee could not sue before the expiration of the extended time. *Jackson v. Beers*, 14 Cal. 193.

4. Of a Judgment.

47. Where A received an assignment of stock in a corporation, and the stock was subsequently attached under a judgment against the vendor, and afterwards the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached: held, that the assignment of the judgment at once merged the lien of the higher right, and that A, as regarded third parties, became the absolute owner of the stock. *Strout v. Natoma W. and M. Co.*, 8 Cal. 80.

48. The objection that the judgment was assigned before filing the bill, is answered by the fact that upon the record the assignment is admitted to have been fraudulent, and certainly the defendants can claim nothing in a court of equity by reason of such an assignment. *Russell v. Conway*, 11 Cal. 103.

49. An administrator for a foreign estate has the right to assign for a valuable consideration a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this State. *Low v. Burrows*, 12 Cal. 189.

50. The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and stands in the shoes of the assignor as to all the defenses which existed against the judgment be

Of Covenants or rights to Land.—Of an Account.—Equitable Assignment.

tween the parties to it. *Wright v. Levy*, 12 Cal. 262.

51. Plaintiff in execution, after assigning his judgment, pretended, falsely and fraudulently, to be the owner of it, and so pretending, made a contract to discharge the judgment by taking the note of third persons not negotiable, in the mercantile sense, in payment. The makers of the note agreed to this under the supposition, induced by him, that he was the owner: held, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

52. An assignee of a judgment, and of the sheriff's certificate of a sale thereunder, stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant, where no loss or injury will be done to the assignee. *Reynolds v. Harris*, 14 Cal. 681.

5. Of Covenants or rights to Land.

53. The assignment of a covenant to convey will not deprive the land of the lien; it is wholly controlled by the lien, and falls whenever it comes into conflict with it. *Truebody v. Jacobson*, 2 Cal. 287.

54. Where an assignment does not in terms convey real estate, and cannot be fairly construed to do so, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land. *Lord v. Sherman*, 2 Cal. 502.

55. The transfer of a bond for title to land, upon a promise by the assignee to pay a certain debt of the assignor, binds the assignee to perform the trust, and the obligation to pay the debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor under the transfer had already vested. *Connelly v. Peck*, 6 Cal. 353.

56. Nor is the obligation of the assignee affected by the fact that the land was partnership property of the assignor and assigned where it was not so held out to the

world, and where the partnership was unknown to the creditor. *Ib.*

57. Where the assignee was a commercial firm and the assignment was made to an agent acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm, and subsequently the firm sold the land to their successors in business, constituting a new firm of which some of the old firm were members: held, that purchasers are chargeable with notice of the trust. *Ib.*

58. The right to a præemption is not assignable, but may be mortgaged. *Whitney v. Buckman*, 13 Cal. 539.

6. Of an Account.

59. Where an account is verbally assigned to a creditor as a security to pay a debt from the proceeds and return the surplus, the assignment is void, and the assignee cannot sue thereupon in his own name. *Ritter v. Stevenson*, 7 Cal. 389; 11 Cal. 27.

60. The mere signing an assignment of an account, without delivery, is insufficient to pass a title. *Ib.*

III. EQUITABLE ASSIGNMENT.

61. An order drawn upon a defendant for an amount due from the defendant is a prima facie assignment of the debt due. Even if it was only for part of the debt, no one could make the obligation but the defendants. *McEwen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Cal. 97; *Pope v. Huth*, 14 Cal. 408.

62. A party on whom an order is drawn for a certain fund is not unlike that of a party summoned as garnishee after receiving notice of an assignment, by his creditor, of the demand. *Wheatley v. Strobe*, 12 Cal. 98; *Pope v. Huth*, 14 Cal. 408.

63. Between the parties, the assignee of equities stands in the place of his assignor, with no better rights; but as to the claim of third persons, the purchaser of an equity stands unaffected by fraud of which he is ignorant, expressly or constructively. *Wright v. Levy*, 12 Cal. 263.

For the benefit of Creditors.

64. An agreement between the mortgagor and mortgagee that the land and its proceeds were to be held, not only as security for the debt due the latter, but for debts due third persons—as laborers on the land—operates as an equitable assignment of the surplus as soon as any exists which does not pass to the administrator of the mortgagee as general assets for the benefit of creditors at large, but is subject in his hands to the same trust which attached to it before the decease of the intestate. *Pierce v. Robinson*, 13 Cal. 121.

65. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in probabilities, provided they are fairly made, and not against public policy; and an agreement for such interests will take effect, as such assignments, when the subjects to which they refer have ceased to rest in possibility, and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123; *Pope v. Huth*, 14 Cal. 407.

66. An order in the following words: "Messrs. F. Huth & Co.: Please hold to the order of William Pope & Sons, of Boston, five hundred pounds sterling of insurance, effected on cargo of bark *Elvira*, and oblige, etc.," is an equitable assignment of the funds in the hands or to come into the hands of the drawees, to the payees. *Pope v. Huth*, 14 Cal. 407.

67. And the drawees, having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it. *Ib.*

IV. FOR THE BENEFIT OF CREDITORS.

68. The power given in an assignment to sell on credit, is presumptive evidence of a fraudulent intent to hinder and delay creditors. *Billings v. Billings*, 2 Cal. 113.

69. A voluntary assignment, executed for the benefit of creditors, is void if not in conformity with the insolvent statute of May 4th, 1852. *Chever v. Hays*, 3 Cal. 472; *Groschen v. Page*, 6 Cal. 139.

70. After a voluntary assignment for the benefit of creditors, in order to enable the assignee to recover goods belonging to the assignor, from consignees holding the same under a claim for advances and

commissions, the demand must be made in the name and by the authority of the assignee, accompanied by notice and evidence of such authority. A demand by the assignor and a refusal by the consignees will not enable the assignee to maintain his suit for a conversion. *Griffin v. Alsop*, 4 Cal. 408.

71. An assignment for the benefit of certain parties who have undertaken to guarantee the payment of such creditors of the assignor as consent to an extension of time or substitution of security, is void. *Groschen v. Page*, 6 Cal. 139.

72. A partial or special assignment is equally void as a general assignment, and being void because it delays and hinders creditors, as well as because it is against the policy of the statute, cannot be cured by the intervention of third parties who voluntarily assume to do that for the indulgent creditors which the debtor himself could not do. *Id.* 140.

73. Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution, and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to the plaintiffs' judgment: held, that it is no objection to the supplemental bill that it prays for a different relief, and fails to bring in all the other creditors, who are alleged by the defense to be entitled to a rateable distribution. *Baker v. Bartol*, 6 Cal. 486.

74. A party being about to fail, can assign a bill of lading of goods to arrive, not yet paid for, to another, in trust, to devote the proceeds to the payment of the vendor, and such assignment is good against attaching creditors. *Le Cacheux v. Cutter*, 6 Cal. 519.

75. The object of the insolvent law, which provides that no assignment of an insolvent debtor, otherwise than as provided in that law, shall be legal and binding upon creditors, was to do away with all voluntary assignments by a debtor in failing circumstances. It was never intended to prevent an insolvent debtor from transferring his property directly to his creditor, either absolutely in payment of

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his debt, or as security by way of mortgage. *Dana v. Stanfords*, 10 Cal. 274.

76. A debtor has an undoubted right to convey all his property to one of his creditors, in satisfaction of his debt. The insolvent law was not intended to prohibit such a preference. *Dana v. Stanfords*, 10 Cal. 275; *Morgenthau v. Harris*, 12 Cal. 247; *Wellington v. Sedgwick*, 12 Cal. 474; *Gladwin v. Gladwin*, 13 Cal. 332.

77. To avoid an assignment, there must be a real design on the part of the debtor to prevent the application of his property, in whole or in part, to the satisfaction of his debts. A creditor violates no rule of law when he takes payment or security for his demand, though others are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims. *Dana v. Stanfords*, 10 Cal. 277.

78. From the very power which a man possesses over his own property, it follows that he can dispose of it in any manner he may see fit, which does not contravene the general policy of the law. *Ib.*

79. If a creditor is insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact. The insolvency cannot be presumed from the language of the assignment. *Morgenthau v. Harris*, 12 Cal. 247.

80. To constitute an assignment void within the insolvent law, there must be a trust in favor of the assignor or third persons. *Wellington v. Sedgwick*, 12 Cal. 474.

81. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing at the time in the foreign jurisdiction where the property was, and possession being taken by the latter, vests in the assignee according to the lex loci; and his title will be maintained here against execution creditors of the assignor. *Forbes v. Scannell*, 13 Cal. 276.

82. Such an assignment is not void as contravening our insolvent law. *Ib.*

83. Assignments of personal property in China, made there between citizens of the United States resident there, will be tested by the common law. *Ib.* 281.

84. Assignees of personal property assigned in China in trust for foreign creditors, among others, may be compelled by

the American consular courts to execute the trust. *Ib.* 283.

85. An assignment of personal property in trust for creditors need not be delivered as a deed. The making of the trust and its acceptance are sufficient, especially if accompanied or followed by the possession of the property. *Ib.* 287.

86. As no conditions are imposed on the creditors of an assignment, an acceptance by them is presumed, upon the general principle that a party is presumed to assent to acts done for his benefit. *Ib.*

87. An assignment must be taken and the property administered in reference to and according to the rules of law prevailing in the place of contract; and one of the rules of equity jurisprudence is, that the individual property must go to the individual creditors, and firm assets must go to the firm creditors. *Ib.*

88. An assignment of assets or property in trust for creditors, of itself suggests specific and well defined obligations upon the trustees. *Ib.*

89. The want of a schedule of the property in an assignment, though sometimes regarded as a circumstance of fraud, will not of itself avoid the assignment. *Ib.* 288.

90. An assignment in trust for creditors to two firms jointly, and by the firm names simply, is good, and the acceptance of the trust by one of the trustees is sufficient. *Ib.*

91. After the assignee of property in trust for creditors takes possession, the title and trust become fixed and executed, and the assignment is not revocable. *Ib.*

92. One partner of a firm expressly or by implication sole manager, his copartners being absent at a great distance, may assign the firm property in trust for the benefit of creditors, if the assignment be necessary for their protection. *Ib.* 289.

93. If the trustee employ the partner assigning to aid them in winding up the concern, and pay him and allow his wife some furniture, etc., it is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. *Ib.*

Notice of Assignment.—When the Assignor may be a Witness.—When an Assignee may sue.

V. NOTICE OF ASSIGNMENT.

94. If the plaintiff was the assignee in good faith and for a valuable consideration of the goods in controversy, and demanded the same within a reasonable time after the arrival of the vessel, and tendered the balance of the purchase money, no notice of the assignment was necessary to charge the defendants. *Morgan v. Lowe*, 5 Cal. 326.

VI. WHEN THE ASSIGNOR MAY BE A WITNESS.

95. Where the plaintiff was the assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor, before the assignment, it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith v. Truebody*, 2 Cal. 347.

96. The assignor of a chose in action is incompetent as a witness for the assignee. *Jones v. Post*, 4 Cal. 15; *Griffin v. Alsop*, 4 Cal. 408; *Allen v. Citizen's Steam Nav. Co.*, 6 Cal. 402; *Adams v. Woods*, 8 Cal. 321.

97. A substantial and a formal assignee stand upon the same ground; neither can introduce the assignor as a witness. *Adams v. Woods*, 8 Cal. 321.

98. An assignor of an agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, may be a witness for the assignee in an action on the agreement, as it is not for an unliquidated demand. *Gray v. Garrison*, 9 Cal. 328.

99. If in any case one partner can assign to another partner his interest in a firm claim, and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the practice act. *Cravens v. Dewey*, 13 Cal. 42.

100. Where goods are seized by the sheriff on an execution against G., and the owners of the goods so in the sheriff's hands assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assign-

ing a chose in action, but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 218.

VII. WHEN AN ASSIGNEE MAY SUE.

101. An assignment of a contract as security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner v. Wilson*, 4 Cal. 313.

102. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

103. Where an account is verbally assigned to a creditor, with the understanding that, in case he collects it, he will credit his claim with a portion thereof, and return the balance to the assignor, but if nothing is received, no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. *Ritter v. Stevenson*, 7 Cal. 389.

104. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 328.

105. Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. *Bullard v. Kinney*, 10 Cal. 63.

106. Under our system of practice an action may be brought in the name of the assignee as the party beneficially interested. *Wheatley v. Strobe*, 12 Cal. 98.

ASSISTANCE, WRIT OF.

1. A writ of assistance will lie to put a party purchaser in possession of land under a decree of foreclosure of a mortgage. *Wolf v. Fleischacker*, 5 Cal. 244;

Attachment.—In general.

Montgomery v. Tutt, 11 Cal. 191; *Reynolds v. Harris*, 14 Cal. 677.

2. In our system, the order to deliver possession should be first made, unless a direction to that effect is made in the decree; and if upon its service that is disregarded, the court can at once direct the writ of assistance to issue. *Montgomery v. Tutt*, 11 Cal. 193.

3. Prima facie, plaintiff in a foreclosure suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance as against the mortgagor, and those entering under him subsequent to the decree, if they refuse to surrender possession. *Skinner v. Beatty*, 16 Cal. 157.

4. Where in such case a writ of assistance is granted, and the mortgagee and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continually ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Ib.* 158.

5. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Ib.*

ASSOCIATION.

See CORPORATIONS.

ASSUMPSIT.

See COMPLAINT, PLEADING.

ATTACHMENT.

- I. In general.
- II. Affidavit on Attachment.
- III. Undertaking.
 1. On Attachment.

2. On release of Attachment.

3. On indemnity to Sheriff.

IV. Discharge of an Attachment.

V. Damages for a wrongful Attachment.

VI. Levy under the writ of Attachment.

1. Lien by Attachment.

VII. Claims by third persons of property Attached.

VIII. Process of Garnishment.

IX. Attachments against Vessels.

I. IN GENERAL.

1. In an action to recover damages for collision, there being no indebtedness arising upon contract, an attachment cannot issue. *Griswold v. Sharpe*, 2 Cal. 24.

2. The remedy by attachment is given by the statute of this State to those contracts for the direct payment of money which contracts are made in or are payable in this State. *Dulton v. Shelton*, 3 Cal. 207.

3. A debt due for merchandise sold in Boston to residents of San Francisco, and forwarded to the latter, they stipulating to pay by remitting funds to Boston, is not the subject of an attachment under the code. The contract must be made in this State, or must contain a stipulation that the money is to be paid here. *Ib.* 208.

4. The return of an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the collection. *Newhall v. Provost*, 6 Cal. 86; *Webster v. Haworth*, 8 Cal. 25.

5. Property in the custody of the law is not liable to seizure without an order from the court having charge thereof, and such attachment is no defense to an action brought to compel the delivery of the money. *Adams v. Haskell*, 6 Cal. 116; *Yuba County v. Adams*, 7 Cal. 37.

6. A confession of judgment to a bona fide creditor, and the issuance of execution and making levy under the same by the judgment debtor, without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditors. *Ryan v. Daly*, 6 Cal. 239.

7. Where the defendant as sheriff collects money on an attachment, more than sufficient to satisfy the attaching creditor,

In general.

and after the expiration of his term of office another attaching creditor attaches the surplus, and seeks to make the sheriff liable therefor on his official bond: held, that the demurrer to the complaint was properly sustained, as there was no relation between the plaintiff and his bondsmen to render them liable. *Graham v. Endicott*, 7 Cal. 146.

8. In a case where one partner files his bill for a dissolution of the copartnership and the appointment of a receiver, it seems that until a dissolution has been judicially declared and a receiver ordered to make a pro rata distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings, and thereby gaining a preference by attachment. *Adams v. Hackett*, 7 Cal. 199; *Adams v. Woods*, 8 Cal. 156; 9 Cal. 26; *Naglee v. Lyman*, 14 Cal. 456.

9. Where a creditor commenced an attachment suit against his debtor on four promissory notes, one of which was not due, and obtained judgment by default: held, that it was fraudulent and void as to subsequent attaching creditors, and that the judgment must stand or fall as a whole. *Taaffe v. Josephson*, 7 Cal. 356; overruled in *Patrick v. Montader*, 13 Cal. 442.

10. The suit commenced, the affidavit and undertaking in form are a necessary predicate for the writ of attachment, and should be given in evidence to justify the officer. *Thornburgh v. Hand*, 7 Cal. 562.

11. The attaching creditors do not stand in the position of joint trespassers, the seizure of the second being subject to the first, and the sheriff is the separate agent of both, and must look to that attaching creditor for whose benefit alone he disposed of the property. *Davidson v. Dallas*, 8 Cal. 253; questioned, 4 Cal. 80.

12. The object of the attachment is to obtain security for the judgment, and the statute will not allow the party who already has this security to use this process to obtain that which he already possesses. *Payne v. Bensley*, 8 Cal. 567.

13. Where husband and wife execute a conveyance of their property, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterwards fraudulently attached in a suit brought by the real though not the ostensible purchaser against the husband alone: held, that equity will compel a can-

celation of the deed so obtained. *Still v. Saunders*, 8 Cal. 287.

14. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before maturity of these notes, B., apprehending that G. & Co. would fail before the paper became due, and that other creditors of G. & Co. would exhaust their assets by attachments, obtained by agreement an antedated note for the amount due by G. & Co. at the date thereof, and attached G. & Co.'s property: held, that B.'s attachment and claim was valid against subsequent attaching creditors, the case not being one of either actual or constructive fraud. *Brewster v. Bours*, 8 Cal. 505.

15. Where an attachment was issued on a complaint which was a printed form, with the blanks filled up by the clerk at the request of the plaintiff, but no name signed to it till next day and after other attachments on the same property, when it was signed by the clerk with the name of plaintiff's attorney: held, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. *Dixey v. Pollock*, 8 Cal. 572.

16. In a contest between the attaching creditors, all the equities are in favor of the most diligent, and an irregularity cannot be taken advantage of by a stranger to the action in which it occurs. *Ib.*

17. The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. *Ib.*

18. Proceedings by attachment are statutory and special, and must be strictly pursued. Having once invoked the stringent provisions in reference to attachments, the plaintiffs could not resort to other remedies to the prejudice of the defendant, so long as they relied upon their attachment lien. *Roberts v. Landecker*, 9 Cal. 265.

19. After the issuance of certificates of deposit, there is nothing in the possession of a banker belonging to the depositor upon which an attachment could fasten, as the certificates are negotiable. *McMillan v. Richards*, 9 Cal. 418.

20. A judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of

In general.

the sheriff to sell it. *Low v. Henry*, 9 Cal. 551.

21. An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it. *Ib.* 552.

22. After the issuance of a promissory note, there is nothing in the possession of the maker belonging to the payee upon which an attachment could fasten. *Gregory v. Higgins*, 10 Cal. 340.

23. Where a clerk of the court refuses to issue execution on a judgment in his office, because the judgment has been attached at the suit of another party, a bill in equity cannot be sustained to release the attachment and compel the clerk to issue execution, as the remedy is at law by an action on the official bond of the clerk. *Miller v. Sanderson*, 10 Cal. 490.

24. Where A., who carried on a printing office, and was indebted to the hands of the office, placed in the hands of B. a certain amount of money, with directions to B. to pay the hands, which B. neglected to do, and where there was no evidence showing that the hands agreed to look to B. for their money, or that A. was indebted to the hands in an amount equal or approximate to the sum in B.'s hands, and the money was subsequently attached in the hands of B. at the suit of C.: held, that the money was liable to attachment. *Chandler v. Booth*, 11 Cal. 342.

25. Money in the hands of a bailee until there is a privity of contract between the bailee and the third persons, for whose benefit the trust is made, may be attached. *Hardy v. Hunt*, 11 Cal. 348.

26. An attaching creditor of the bailee, levying on the money in the hands of a stakeholder, with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof. *Ib.*

27. Lawful possession of personal property is prima facie evidence of ownership, and property thus possessed is prima facie liable to be seized on a writ of attachment against the party in possession of the property. *Killey v. Scannell*, 12 Cal. 75.

28. After the presentation and accept-

ance of a bill of exchange, there is nothing in the possession of the drawee belonging to the drawer upon which an attachment could fasten. *Wheatley v. Strobe*, 12 Cal. 98.

29. An officer who puts a receiver in possession of the property of another against whom he has no process, or asserts through himself or another, an unlawful dominion over such property, is a trespasser. *Rowe v. Bradley*, 12 Cal. 230.

30. L. executed and delivered his promissory note to N. without consideration, and for the purpose of defrauding, hindering and delaying his creditors. N. had knowledge of the fraud and sued, and attached upon the note, L.'s property. After this, W., a creditor of L., sued and attached the same property. Before judgment, N. sold and assigned the note to J., an innocent purchaser: held, that J. is not protected in his purchase. N. having been superseded by W.'s attachment, could not by an act or deed of his put his assignee in any better position than he occupied himself. *Wright v. Levy*, 12 Cal. 263.

31. A deputy sheriff who seizes property under an attachment is not authorized, by virtue of his office, to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. *Krum v. King*, 12 Cal. 413.

32. A sheriff who levies a writ of attachment upon personal property in obedience to the command of the writ, has no right to let the property go out of his hands, except in due course of law; and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Sandford v. Boring*, 12 Cal. 541.

33. Where A contracts with a telegraph company to have his despatch transmitted, authorizing his agent to secure a debt due him from a third party by attachment, and this is so negligently performed that other creditors of the common debtor obtain the first attachment, and exhaust the assets of the debtor, which would not have been the case had the telegraph company performed its contract within a reasonable time, the company is liable, not only for the cost of the despatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. *Parks v. Alta Telegraph Co.*, 13 Cal. 425.

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34. An attachment issued before the maturity of the debt is prima facie void as against a subsequent attachment. *Patrick v. Montader*, 13 Cal. 441.

35. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors subsequently attaching cannot complain that the suit was prematurely brought. *Patrick v. Montader*, 13 Cal. 442; overruling *Taaffe v. Josephson*, 7 Cal. 356.

36. Where, under the fourth section of the attachment act of 1858,* defendant puts in issue the truth of the facts alleged in the affidavit, to wit: "That defendant was about fraudulently to convey his property to hinder, delay or defraud creditors," proof that defendant was able to pay the debt, that he put plaintiff off from time to time, and threatened to assign his property for the benefit of his creditors if sued, is sufficient to go to the jury on the question of fraud. *White v. Leszynsky*, 14 Cal. 166.

37. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was*fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved *all* of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker v. Woods*, 15 Cal. 68.

38. But even if any proof aliunde of C.'s indebtedness were required, when the

attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was prima facie sufficient to admit the attachment papers in proof. *Ib.* 69.

39. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Ib.* 70.

40. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by plaintiff. *Ib.*

41. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of the court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he be-

*This section has been amended April 28th, 1860, restoring the former provisions, and allowing an attachment upon the contract without averring any fraud.

Affidavit on Attachment.—Undertaking on Attachment.

came the agent of plaintiff, and must be looked to as such. *Schloss v. White*, 16 Cal. 68.

42. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Brennan v. Swasey*, 16 Cal. 142.

43. If the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit had been dismissed, and nothing was realized by the attachment. *Ib.*

44. Plaintiff, January 10th, 1858, in a suit entitled "*C. & M. et al., composing the Wisconsin Quartz Mining Co.*" a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14th, 1858, the property sold, and plaintiff, the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following, W. the purchaser. Defendants here are in possession under sheriff's sale on the decree. Plaintiff derives title under his judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's right only attached from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 403.

II. AFFIDAVIT ON ATTACHMENT.

45. If the affiant had not good reason to believe the matters set forth in his affidavit on attachment, the defendant, whose

name and credit has been impaired by the wrongful issuing out of the writ, has no recourse on the bond if his property has not been attached, but must resort to a criminal action, or to a private action for a tort. *Heath v. Lent*, 1 Cal. 412.

46. The affidavit for an attachment is not sufficient which avers that the defendant is indebted in the alternative, upon an express or implied contract. *Hawley v. Delmas*, 4 Cal. 195.

III. UNDERTAKING.

1. On Attachment.

47. In an action on an attachment bond for damages accruing from a wrongful issuing out of an attachment, counsel fees cannot constitute damages. *Heath v. Lent*, 1 Cal. 412; overruled in *Ah Thaie v. Quan Wan*, 3 Cal. 219.

48. The undertaking should precede the writ and accompany the affidavit. *Benedict v. Bray*, 2 Cal. 254.

49. If a justice issue an attachment and take a bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action can lie on the bond. *Ib.*

50. An attachment bond executed before the writ has been levied and the attachment dismissed by the plaintiff is void. *Ib.*

51. In an action on an attachment bond, if the bond is void, the obligee cannot recover on the bond damages sustained by the attachment. *Ib.* 255.

52. An undertaking on attachment need not be executed in form to the defendants; it need only specify the conditions it shall contain. *Taaffe v. Rosenthal*, 7 Cal. 518.

53. A mistake in the recital of the bond, as to the amount for which attachment issued, may be explained and corrected on parol. *Palmer v. Vance*, 13 Cal. 556.

2. On release of Attachment.

54. To charge the sureties on the release attachment bond, it is necessary to allege the consideration of the undertaking, and aver that the property was released. *Palmer v. Melvin*, 6 Cal. 652.

Discharge of an Attachment.—Levy under an Attachment.

3. *On an indemnity to Sheriff.*

55. An agent who has power to sue has the right to give an indemnity bond to the sheriff, when the property attached or levied on in that action is claimed by a third person; it is a necessary instrument to carry the power to sue into effect. *Davidson v. Dallas*, 8 Cal. 251.

56. Where property was seized under two attachments and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it and paid the proceeds to the first attaching creditor, the amount not equalling his judgment, and afterwards the claimant obtained judgment against the sheriff for the value of the property: held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Ib.* 253; questioned 15 Cal. 80.

57. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *White v. Fratt*, 13 Cal. 525.

III. DISCHARGE OF AN ATTACHMENT.

58. An order improperly dissolving an attachment will be reversed. *Reiss v. Brady*, 2 Cal. 132.

59. After final judgment an appeal may be taken from an order refusing to discharge an attachment. *Taaffe v. Rosenthal*, 7 Cal. 518.

60. A motion to discharge a writ of attachment "because the said writ was improperly issued" is insufficient. The notice should specify the grounds of the motion and wherein it will be urged that the writ was improperly issued. *Freeborn v. Glazer*, 10 Cal. 338.

IV. DAMAGES FOR A WRONGFUL ATTACHMENT.

61. Where real property is attached

and the possession of the owner not disturbed, it is difficult to perceive how anything further than nominal damages can be recovered for the injury caused by the attachment. *Heath v. Lent*, 1 Cal. 411.

62. Damages caused by the depreciation of real estate under an attachment, and the injury caused to the credit and reputation of the defendant, are too remote to submit to the consideration of a jury in an action on the undertaking on attachment. *Ib.* 412.

63. The fact that defendants had a probable cause of action, arising from the protest of the second of exchange, is no defense in a suit brought for malicious prosecution in having the plaintiff's property attached, for a party may willfully sue for a much greater amount than is due, and attach the property of the other and put him to charges. *Weaver v. Page*, 6 Cal. 684.

V. LEVY UNDER THE WRIT OF ATTACHMENT.

64. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient prima facie to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

65. T. commenced suit against I. by attachment; the writ was levied upon certain personal property by the plaintiff, H., as sheriff. M. I., wife of I., claimed the property, and brought her action of replevin under the code, which action was decided in favor of the sheriff. Other creditors attached the same property, which the sheriff sold and paid the proceeds into court. In an action on the replevin bond it was held that T. had a lien by attachment upon the goods, which continued even after the replevy by M. I. *Hunt v. Robinson*, 11 Cal. 272.

66. No parol instructions of the plaintiff in an attachment or execution respecting property seized by the sheriff under either writ will discharge such sheriff from liability. The statute is express that such instruction, including the care and disposition of the property levied upon, must be in writing. *Sandford v. Boring*, 12 Cal. 541.

 Levy under the writ of Attachment.—Lien by Attachment.

67. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ, which he must execute with all reasonable celerity. *Whitney v. Butterfield*, 13 Cal. 338.

68. In the service of process, the sheriff is responsible only for unreasonably or not reasonably executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. *Ib.*

69. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact; and the first levy was made under the last writ at one o'clock Monday morning—the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Ib.* 340.

70. The sheriff need not on Sunday endorse on the writ of attachment the fact of its reception. *Ib.* 341.

71. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy; and the attachment first levied, by our statute, has the priority. *Ib.*

72. The sheriff could no more officially receive a writ on Sunday, for service on Sunday, than he could execute it on Sunday. It can only be considered officially in his hands when Sunday has expired. *Ib.* 342.

73. A writ of attachment is effectual to change the title of personal property only from the time of levy. *Taffls v. Manlove*, 14 Cal. 50.

74. Attachment issues against H., and the sheriff proceeds with the writ to his store, which is locked and fastened, front and rear, by iron shutters. The sheriff, with his deputy, stands at the doors guarding all entrance. H. now files his petition in insolvency, and the usual order of stay of proceedings is made. H. returns to the store and advises the sheriff of these things. The sheriff threatens to break open the store, when H. gives him the key, and he enters and levies: held, that the sheriff had no right to levy the attachment; and that the property vested in the assignee of the insolvent, subsequent-

ly appointed, by relation from the filing of the petition and schedule. *Ib.* 51.

75. A ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification by the principal, as attachments levied on property of a debtor after a sale by or to an agent. *Taylor v. Robinson*, 14 Cal. 401

1. Lien by Attachment.

76. The remedy by attachment is not a distinct proceeding, in the nature of an action in rem, but is an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment which may be obtained. *Low v. Adams*, 6 Cal. 281.

77. A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Heyneman v. Dannenberg*, 6 Cal. 379; *Conroy v. Woods*, 13 Cal. 633.

78. As soon as a vessel is seized by service of process in a court of admiralty, a lien attaches in favor of the party at whose suit the seizure is made; it is not necessary that the vessel should be attached. *Meiggs v. Scannell*, 7 Cal. 708; *Fisher v. White*, 8 Cal. 423.

79. The lien of attachment having become fixed upon funds in the hands of a receiver follows the property in the hands of his successor. *Adams v. Woods*, 9 Cal. 29.

80. The lien of an attachment takes effect immediately upon the fulfillment of the statutory provisions, and cannot be divested by a failure of the sheriff to make a proper return. *Ritter v. Scannell*, 11 Cal. 249.

81. A deposit in the recorder's office of a copy of the writ of attachment, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ib.*

82. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior

Claims by third persons of Property attached.—Garnishment.

diligence the fraud had been discovered. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 Cal. 444.

83. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 631.

VI. CLAIMS BY THIRD PERSONS OF PROPERTY ATTACHED.

84. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 514; *Daumiell v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Cal. 75.

85. In an action against a sheriff for refusing to levy an attachment on certain property, as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried by a jury and decided in favor of claimant, is irrelevant and inadmissible where those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 157.

86. An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person who claims to be the owner thereof, if on execution, he must show the judgment and execution; if on attachment, the writ of attachment, and as we think, the proceedings on which it is based. *Thornburgh v. Hand*, 7 Cal. 561.

87. So far as a sheriff is concerned, when the property is attached and claimed by a third person, the agent of the plaintiff has to determine whether he would at once give up the levy and lose the debt, or take a trial by sheriff's jury, or indemnify the officer without trial. *Davidson v. Dallas*, 8 Cal. 251.

88. Under our practice, if the property attached be claimed by a third person, the sheriff may protect himself by a trial before a jury of six; and if the verdict be in favor of the claimant, the sheriff may

relinquish the attachment, unless indemnified. *Ib.* 258.

89. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. But if he fails to make known his claim, and thus influences the conduct of the officer, he is estopped from afterwards asserting it, provided the facts of his claim were known to him at the time. *Bleven v. Freer*, 10 Cal. 177.

VII. GARNISHMENT.

90. A sheriff who levies an attachment by virtue of the powers of the court has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Melhado*, 1 Cal. 105.

91. The liability of a garnishee dates from the service of the attachment and affidavit, and not from the notice to appear. *Johnson v. Carry*, 2 Cal. 36.

92. The service of the writ of attachment is sufficient to put a garnishee upon notice of the plaintiff's demand, and any payment thereafter is a fraud upon his rights. *Ib.*

93. Where a garnishee is called to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take the answer, and a term expires without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. *Ogden v. Mills*, 3 Cal. 254.

94. Where a garnishee, in discharge of a rule, answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court, unless this be controverted by the plaintiff. *Ogden v. Mills*, 3 Cal. 254.

95. Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly dis-

Garnishment.

posed of; and is not the subject of attachment or garnishment. *Clymer v. Willis*, 3 Cal. 365.

96. The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner. *Ib.*

97. Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be entered for the amount he admits due. *Cahoon v. Levy*, 4 Cal. 244.

98. A garnishee can only be required to answer as to his liability to the debtor defendant, at the time of the service of the garnishment. *Norris v. Burgoyne*, 4 Cal. 410.

99. A garnishee should be allowed to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided; and the appellate court will not interfere except in case of gross abuse of discretion. *Smith v. Brown*, 5 Cal. 118.

100. An order requiring a garnishee to pay into court the amount for which judgment has been rendered against him, may be considered as improper. *Ib.*

101. The doctrine of garnishment, although partially regulated by statute, is not the less a common law proceeding, and therefore, in proceedings against a garnishee, the parties are entitled to a jury trial. *Cahoon v. Levy*, 5 Cal. 294.

102. It was no defense that before A had notice of the assignment of a debt, attachments in favor of the creditors of B had been served upon him, and that he sold the goods, and paid the proceeds to the attaching creditors after such notice. *Morgan v. Lowe*, 5 Cal. 326.

103. In proceedings against a garnishee, it is the duty of the court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor. An order that the garnishee pay over the money into court is improper. *Brumagin v. Boucher*, 6 Cal. 17.

104. Service of copy of execution and notice of garnishment upon a third party, constitutes no lien on property of the debtor in his hands, capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196.

105. A garnishment served on the owner, in a suit against the head contractor,

after the commencement of the building and before notice served, must prevail over the lien of a subcontractor. *Cahoon v. Levy*, 6 Cal. 296; contra, *Tuttle v. Montford*, 7 Cal. 360, per force of the amendment to the statute.

106. Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and on attachment of his interest in the corporation. *Edwards v. Beugnot*, 7 Cal. 165.

107. Where B was garnisheed in a suit against C, the day before he accepted an order drawn by A in favor of C, but failed to inform C thereof, and C, for a valuable consideration, sold the order to D, an innocent purchaser: held, that B, having made the order negotiable, could not plead the garnishment. *Garwood v. Simpson*, 8 Cal. 105.

108. An attachment may be served on funds in the hands of a receiver, as it is not the bringing of an action against the receiver, nor does it change the custody of the funds. The receiver holds it for whoever can make out a title to it. *Adams v. Woods*, 9 Cal. 28.

109. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property and bring suit for the value of the property against the garnishee. *Roberts v. Landecker*, 9 Cal. 266.

110. The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. *Gregory v. Higgins*, 10 Cal. 340.

111. An attaching creditor of the bailee, levying on the money in the hands of a stockholder with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question, and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof. *Hardy v. Hunt*, 11 Cal. 350.

112. B. assigned a mortgage to F.

Garnishment.—Attachment against Vessels.—In general.

against a company, to secure him against his liability as surety, delivering the mortgage at the same time to F., who retained it a few moments, and then returned it to R. to receive the interest from the company, as his agent. The note guaranteed was unpaid, and R. owes the company nothing: held, that after the assignment R. had no interest in the mortgage which a judgment creditor could reach by garnishment. *Hall v. Redding*, 13 Cal. 219.

113. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants after this received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application. *Walling v. Miller*, 15 Cal. 40.

114. A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Ib.*

1 Cal. 163; *Ray v. Bark Henry Harbeck*, 1 Cal. 451.

116. Where a bond is given for a release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *McQueen v. Ship Russell*, 1 Cal. 165.

117. When the bond is given, the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel is not liable. The giving the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

118. The rule that requires seizure of the thing to give jurisdiction in actions in rem is altered by our statute. Service on a person standing in particular relation to the thing confers jurisdiction on the court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 7 Cal. 408; *Fisher v. White*, 8 Cal. 422.

119. As soon as a vessel is seized by a court of admiralty, a lien attaches in favor of the party at whose instance the seizure is made. *Meiggs v. Scannell*, 7 Cal. 408.

120. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a mechanic or merchant of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined; and in the meantime she might be run off, and sold free of all such debts or incumbrances. *Ib.*

IX. ATTACHMENT AGAINST VESSELS.

115. An act of the legislature authorizing the issuing of attachments against boats and vessels "used in navigating the waters of the State," does not apply to vessels belonging to a foreign port, and which visit one of the harbors of this State for a few days only.* *Souter v. Sea Witch*,

*These cases were decided under the code of 1850. The code of 1851 permits these attachments to issue.

ATTORNEY.

- I. In general.
- II. Negligence by an Attorney.
- III. Compensation of an Attorney.

I. IN GENERAL.

1. Where an attorney is proceeded against, with the object of expelling him from the bar, he is entitled to have notice

In general.

of the charge against him, and an opportunity to make his defense. This is dictated by natural justice, and the uniform practice in such cases. *People v. Turner*, 1 Cal. 150.

2. It is not usual for courts to interpose by a proceeding for contempt against an attorney, for any act independent of his profession, or not connected with his professional employment as an attorney. *Ib.*

3. Being officers of the court, attorneys are, in many respects, subject to the orders of the court; but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled discretion. *Ib.*

4. An attorney licensed to practice in the supreme court is, by the rules of the court, authorized by virtue thereof to practice in all the courts of this State; and a district court cannot expel him from the bar. *Ib.* 190.

5. A writ of mandamus will lie from the supreme court to an inferior court, to restore an attorney removed by it from the bar. *Ib.*

6. An attorney has power to bind his client, by consenting to elect an order of court for relief, made in lieu of a money judgment; and the client has no power to refuse it. *Hart v. Spalding*, 1 Cal. 214.

7. An agreement of an attorney or counsel to waive a jury trial must be in writing, and filed with the clerk or entered on the minutes, to conclude his client. *Smith v. Pollock*, 2 Cal. 94.

8. An attorney at law took an assignment of a lot upon which there was a lien for purchase money, after suit brought against the assignee for recovery of the money. The attorney defended the suit throughout all the stages, without disclosing his claim: judgment was rendered for the plaintiff, and all right, title and interest of the defendant in the lot was sold by the sheriff, and purchased by the plaintiff. The attorney also claimed the lot in possession of his tenant, refusing to pay rent in arrear, and denying a lien existed. In a new action, he was made a party, and in view of these facts, it was held that his silence in relation to his own claim, throughout his connection with the former suit, was a fraudulent concealment; and he was decreed to deliver possession to the plaintiff, and pay all costs of this and the former suits, and the arrear rents. *Truebody v. Jacobson*, 2 Cal. 288.

9. An agreement of an attorney for the continuance of a cause, not reduced to writing, will not be regarded by the court. *Peralta v. Maria*, 3 Cal. 187.

10. An appearance by attorney at common law, and by our code, amounts to a waiver of service of summons. *Suydam v. Pitcher*, 4 Cal. 281; *Holmes v. Rogers*, 13 Cal. 200.

11. An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his clients, destroys the effect of a denial in the answer. *Taylor v. Randall*, 5 Cal. 80.

12. A confidential counselor, solicitor, or attorney of the party, cannot be compelled to disclose communications made to him, or entries made by him, in that capacity, and from necessity extends to their respective clerks to sustain the confidential relations between attorney and client. *Lansberger v. Gorham*, 5 Cal. 451.

13. Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. *Grant v. White*, 6 Cal. 55.

14. An affidavit by an attorney, showing that defendant conceals himself to avoid service of process, is sufficient to authorize an order for the service on defendant by publication. *Anderson v. Parker*, 6 Cal. 201.

15. We are very reluctant to believe that any officer of the court would designedly endeavor, by omission in the transcript, to mislead the court, and thus procure by fraud a favorable decision. Such a proceeding, if shown to the satisfaction of the court, would unquestionably result in depriving the offender of an opportunity of again misleading it. *Ib.*

16. Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party. *Welton v. Garibaldi*, 6 Cal. 246; *Coulter v. Stark*, 7 Cal. 245.

17. A receiver when fully appointed should retain his own solicitor and counsel, who ought not to be the same as are employed by any of the parties in the suit. *Adams v. Woods*, 8 Cal. 318.

18. An attorney in fact who is not an attorney at law cannot sign his name to a complaint for his principal as plaintiff's attorney; and an action so commenced is

In general.

void, as instituted by an entire stranger to the plaintiff, without authority. *Dixey v. Pollock*, 8 Cal. 572.

19. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

20. The provision of the code authorizing judgment, personal and final, against an absent defendant, for whom the court has appointed an attorney with privilege to defend within six months, is not unconstitutional. *Ware v. Robinson*, 9 Cal. 111.

21. Surprise by an attorney at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 526.

22. The employment of new counsel, after a decision is rendered, is no ground for an extension of the time prescribed by the court for filing a petition for a rehearing. *Ferris v. Coover*, 10 Cal. 633.

23. An attorney is not permitted to disclose the confidential communications of his clients, yet if he acquires information apart from any such communications, he is not precluded from disclosing it. *Hunter v. Watson*, 11 Cal. 377.

24. An affidavit which avers a cause of action against the defendant—that defendant cannot, after due diligence, be found in the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons issued; and that defendant still has a family residing in said county, is insufficient to authorize the court to appoint an attorney to represent such absent defendant. *Jordan v. Giblin*, 12 Cal. 102.

25. The authority of an attorney who appears will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be renewed, on the ground of mistake, unless the mistake be unmixed with any fault or negligence of either the party or his attorney. *Holmes v. Rogers*, 13 Cal. 200.

26. A decree fairly entered by consent of an attorney is as binding upon his clients as a decree entered after resistance. *Ib.*

27. It seems that the appearance of an attorney wholly unauthorized, there being

no fraud or allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Ib.* 201.

28. If the attorney assents to a decree, the assent need not be made in open court, by words spoken by the attorney. It may be made by stipulation out of court. *Ib.*

29. When a decree is made by consent of the attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Ib.* 203.

30. A new trial will not be granted on the affidavit of the attorney of record that he, as well as his client and witnesses, were absent on the trial of the case, because of a verbal agreement by opposing counsel to give notice of day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

31. If the charter of a municipal corporation provides for a city attorney to attend to the business of the city, other counsel may be employed when necessary, especially if the law suit was abroad. *Smith v. City of Sacramento*, 13 Cal. 533.

32. In a criminal case, if the court below impose upon counsel against their consent a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

33. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *Ib.*

34. Where the judge below requires a statement of the evidence in a chancery case and the attorney does not object, but fails to furnish it, and in consequence thereof the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. The court below must take the steps by it deemed necessary or proper in the prem-

In general.—Negligence of an Attorney.

ises. It may rehear the cause on the pleadings and proof, or possibly it may require the attorney to prepare the statement. *Purcell v. McKune*, 14 Cal. 232.

35. On an indictment for murder, the court of sessions is not bound to assign counsel for the prisoner. *People v. Moice*, 15 Cal. 331.

36. There were pending before the board of U. S. land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558 known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before the said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case No. 558, and on file therein; and to use their “best endeavors to procure the confirmation of said claim No. 558.” B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558 he acted for the U. S. law agent in taking said depositions, which were important to the government in defeating claim 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement: held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine v. Stuart*, 15 Cal. 397.

37. An attorney, when acting for his client, is bound to the most scrupulous good faith. Even where the attorney purchases the subject of the suit, the client may set aside the purchase at will, unless the attorney show, by clear and conclusive proof, that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable, and that the depositions having

become regularly a part of the records of the land commission, and the government being thus entitled to use them, like other public archives, the agreement to withdraw them, and thus to interpose obstacles to the exercise of this right of the government, is contrary to public policy and void, and this whether the depositions were true or false, or whether the government would be benefited or not by their possession. *Ib.* 401.

38. An attorney, after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, cannot go over and render assistance to the adverse side, and then enforce, in a court of equity, a contract based on such assistance. *Ib.*

II. NEGLIGENCE OF AN ATTORNEY.

39. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained; but if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error. *Covillaud v. Yale*, 3 Cal. 110.

40. In order to charge attorneys with negligence in failing to set up a defense, the plaintiff must prove the existence of such facts, and that they are susceptible of proof at the trial by the exercise of proper diligence on the part of his attorneys. *Hastings v. Halleck*, 13 Cal. 209.

41. Skillful or unskillful and negligent conduct of a case in an unimportant subject of inquiry in an action by an attorney for the value of his professional services; anything which shows the services were not of the value claimed—as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, absence of skill—is competent, under the issue of value. *Bridges v. Paige*, 13 Cal. 641.

42. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill or neglect may put the client to great expense to redeem his mistakes. *Ib.* 642.

Compensation of an Attorney.

III. COMPENSATION OF AN ATTORNEY.

43. In an action brought for the distribution of the effects of a corporation, it being for the interest of all parties that the company should be legally dissolved: held, that costs and a counsel fee on each side should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 75.

44. District courts had no right under the code of 1850 to allow counsel fees in admiralty cases. *Selby v. Bark Alice Tarleton*, 1 Cal. 104.

45. An attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 12 Cal. 103.

46. If a retainer be absolute upon its face, but did not specify in what manner or by whom the fees were to be paid, evidence should be admitted to show whether the fee was contingent or not. *Dwinelle v. Henriquez*, 1 Cal. 391.

47. An attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. *Covillaud v. Yale*, 3 Cal. 110.

48. In an action upon an injunction bond to recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of an injunction was properly allowed as part of the damages. *Ah Thae v. Quan Wan*, 3 Cal. 217; overruling *Heath v. Lent*, 1 Cal. 412.

49. Generally, the recovery of counsel fees as part of the damage is not allowed—as where the loss is consequential; but where the loss is direct—as in the case of an improper commencement and prosecution of a writ, or other process, in a suit—it should be allowed. *Summers v. Farish*, 10 Cal. 353; *Heyman v. Landers*, 12 Cal. 111; *Prader v. Grim*, 13 Cal. 587.

50. Counsel fees, not exceeding five per cent., were stipulated to be paid in the mortgage on foreclosure: held, that it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, but like costs, they were a mere incident to the debt, and might be fixed by the court at its discretion, not exceeding five

per cent. *Carriere v. Minturn*, 5 Cal. 435; *Gronfier v. Minturn*, 5 Cal. 492.

51. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services in another action. *Hart v. Vidal*, 6 Cal. 56.

52. A witness who is not an attorney is incompetent to prove the value of an attorney's services in a cause. *Hart v. Vidal*, 6 Cal. 57.

53. Where an individual doing business under the firm name of "D. W. & Co." incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters formed a partnership with two others under the same firm name, and one of the new members of the firm thus formed subsequently dismissed the suit in the firm name, and when payment for the services was demanded did not deny the liability of the firm, but refused payment and disputed the amount charged: held, that the firm was estopped from denying their liability. *Burrittt v. Dickson*, 8 Cal. 115.

54. But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: held, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. *Ib.* 117.

55. A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report among his disbursements the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. *Adams v. Woods*, 8 Cal. 316.

56. Counsel for the plaintiff in a suit for dissolution cannot claim compensation as associate counsel for the receiver. *Ib.* 10 Cal. 317.

57. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim

Compensation of an Attorney.—Attorney, District.

priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered; but the plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Patrick v. Montader*, 13 Cal. 444.

58. When an attorney sued for professional services on a quantum valebant, and the answer denied the value of the services: held, that the rule requiring new matter to be set up in the answer does not apply. *Bridges v. Paige*, 13 Cal. 641.

59. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion, the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene if a proper case be made, or prosecute his rights independently, or wait until the recovery and then claim his rights under the contract with relator. *People v. Norton*, 16 Cal. 440.

ATTORNEY, DISTRICT.

1. The district attorney can bring suit against bail at any time after the adjournment of the term at which the recognizance was declared forfeited. *People v. Carpenter*, 7 Cal. 403.

2. District attorneys, however, should do their duty faithfully, but no more. They should never act as employed coun-

sel, nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. *People v. Butler*, 8 Cal. 440.

3. The fact that a district attorney has, or is entitled to a per centage on a judgment in favor of the State, will not prevent the legislature from the passage of a law releasing the judgment. *People v. Bircham*, 12 Cal. 55.

4. An assistant prosecuting district attorney appointed by the board of supervisors of the city and county of San Francisco, under the act of April 23, 1858, (238) is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court and shall assist the district attorney in the discharge of his various duties. *People v. Magallones*, 15 Cal. 428.

5. One of these duties is the prosecution of charges before the grand jury, and if the assistant may perform the duty, he must be deemed to be clothed with the powers and privileges necessary for that purpose. While acting for the district attorney his acts possess the same validity and must be regarded in the same light as if done by that officer in person. *Ib.* 429.

6. It is no objection to an indictment found in said court of sessions, that such assistant prosecuting district attorney was present during the session of the grand jury while the charge embraced in the indictment was under consideration. *Ib.*

7. The constitution of this State does not fix the term of the office of district attorney, but merely directs (art. 6, sec. 7) that the legislature shall provide for his election by the people, and shall fix by law his duties and compensation. *People v. Brown*, 16 Cal. 442.

8. The act of 1851, (Wood's Dig. 64) providing for the election of a district attorney in each county at the general election of that year, and every two years thereafter, etc., and the act of 1855, (Wood's Dig. 561, secs. 46 and 49) providing that the board of supervisors in each county shall fill vacancies in the office of district attorney, their appointee to hold until the next general election, the person then elected to hold for the balance of the term of the person whose place he is elected to fill, apply to the city and

Attorney General.—Auctioneer.

county of San Francisco, and are not repealed by the ninth, nor by the last section of the consolidation act of 1856. *Ib.* 443.

9. The policy of the act of 1851 was to create uniformity in the official terms of district attorneys by filling those terms at fixed periods. *Ib.*

ATTORNEY GENERAL.

1. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *People v. Talmage*, 6 Cal. 258.

ATTORNEY IN FACT.

See AGENT, POWER OF ATTORNEY.

ATTORNEY, POWER OF.

See AGENT, POWER OF ATTORNEY.

AUCTIONEER.

1. The memorandum required by the statute of frauds to be entered by an auctioneer in his sale book, must be made at the very time of the sale, or the vendee will not be bound by the contract; and the memorandum made in the afternoon or next day after the sale is insufficient. *Craig v. Godeffroy*, 1 Cal. 415.

2. An auctioneer who receives and sells stolen property is liable for the conversion

to the same extent as any other individual, both upon principle and authority. *Rogers v. Huie*, 1 Cal. 433; overruled in *Rogers v. Huie*, 2 Cal. 572.

3. Where a testator in his will appointed two persons as executors, and gave to each the power to sell his property as to them should seem proper, and the same as fully as in law may be required: held, that one of the executors could sell at private sale; and need not sell at auction, as no statutory provision then existed. *Panaud v. Jones*, 1 Cal. 511.

4. An auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is not liable to the true owner for a conversion. *Rogers v. Huie*, 2 Cal. 571; overruling *Rogers v. Huie*, 1 Cal. 433.

5. Where an auctioneer sells a balance of goods without specifying their quality, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money, or a portion of it, the contract became executed, and the auctioneer will not afterwards be permitted to allege a mistake in quantity. *Burgoyne v. Middleton*, 4 Cal. 66.

6. A sale of land at auction where no note or memorandum of sale is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People v. White*, 6 Cal. 75.

7. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State v. Poulterer*, 16 Cal. 523.

8. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

9. The forty-ninth section of the act makes the auctioneer liable to pay this duty, and the meaning is, that he shall be legally held to pay it. The fact that a bond is required of the auctioneer, conditioned for the performance of his duty, shows that the legislature did not mean to

 Levy under the writ of Attachment.—Lien by Attachment.

67. When process of attachment or execution comes to the hands of the sheriff, he must obey the exigency of the writ, which he must execute with all reasonable celerity. *Whitney v. Butterfield*, 13 Cal. 338.

68. In the service of process, the sheriff is responsible only for unreasonably or not reasonably executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. *Ib.*

69. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact; and the first levy was made under the last writ at one o'clock Monday morning—the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Ib.* 340.

70. The sheriff need not on Sunday endorse on the writ of attachment the fact of its reception. *Ib.* 341.

71. Attachments do not bind the property of the defendant from the time of the issuance, but only from the time of the actual levy; and the attachment first levied, by our statute, has the priority. *Ib.*

72. The sheriff could no more officially receive a writ on Sunday, for service on Sunday, than he could execute it on Sunday. It can only be considered officially in his hands when Sunday has expired. *Ib.* 342.

73. A writ of attachment is effectual to change the title of personal property only from the time of levy. *Taff's v. Manlove*, 14 Cal. 50.

74. Attachment issues against H., and the sheriff proceeds with the writ to his store, which is locked and fastened, front and rear, by iron shutters. The sheriff, with his deputy, stands at the doors guarding all entrance. H. now files his petition in insolvency, and the usual order of stay of proceedings is made. H. returns to the store and advises the sheriff of these things. The sheriff threatens to break open the store, when H. gives him the key, and he enters and levies: held, that the sheriff had no right to levy the attachment; and that the property vested in the assignee of the insolvent, subsequent-

ly appointed, by relation from the filing of the petition and schedule. *Ib.* 51.

75. A ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification by the principal, as attachments levied on property of a debtor after a sale by or to an agent. *Taylor v. Robinson*, 14 Cal. 401

 1. *Lien by Attachment.*

76. The remedy by attachment is not a distinct proceeding, in the nature of an action in rem, but is an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment which may be obtained. *Low v. Adams*, 6 Cal. 281.

77. A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Heyneman v. Dannenberg*, 6 Cal. 379; *Conroy v. Woods*, 13 Cal. 633.

78. As soon as a vessel is seized by service of process in a court of admiralty, a lien attaches in favor of the party at whose suit the seizure is made; it is not necessary that the vessel should be attached. *Meiggs v. Scannell*, 7 Cal. 708; *Fisher v. White*, 8 Cal. 423.

79. The lien of attachment having become fixed upon funds in the hands of a receiver follows the property in the hands of his successor. *Adams v. Woods*, 9 Cal. 29.

80. The lien of an attachment takes effect immediately upon the fulfillment of the statutory provisions, and cannot be divested by a failure of the sheriff to make a proper return. *Ritter v. Scannell*, 11 Cal. 249.

81. A deposit in the recorder's office of a copy of the writ of attachment, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ib.*

82. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior

Claims by third persons of Property attached.—Garnishment.

diligence the fraud had been discovered. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 Cal. 444.

83. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 631.

VL CLAIMS BY THIRD PERSONS OF PROPERTY ATTACHED.

84. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 514; *Daumiell v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Cal. 75.

85. In an action against a sheriff for refusing to levy an attachment on certain property, as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried by a jury and decided in favor of claimant, is irrelevant and inadmissible where those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 157.

86. An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person who claims to be the owner thereof, if on execution, he must show the judgment and execution; if on attachment, the writ of attachment, and as we think, the proceedings on which it is based. *Thornburgh v. Hand*, 7 Cal. 561.

87. So far as a sheriff is concerned, when the property is attached and claimed by a third person, the agent of the plaintiff has to determine whether he would at once give up the levy and lose the debt, or take a trial by sheriff's jury, or indemnify the officer without trial. *Davidson v. Dallas*, 8 Cal. 251.

88. Under our practice, if the property attached be claimed by a third person, the sheriff may protect himself by a trial before a jury of six; and if the verdict be in favor of the claimant, the sheriff may

relinquish the attachment, unless indemnified. *Ib.* 258.

89. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. But if he fails to make known his claim, and thus influences the conduct of the officer, he is estopped from afterwards asserting it, provided the facts of his claim were known to him at the time. *Bleven v. Freer*, 10 Cal. 177.

VII. GARNISHMENT.

90. A sheriff who levies an attachment by virtue of the powers of the court has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Melhado*, 1 Cal. 105.

91. The liability of a garnishee dates from the service of the attachment and affidavit, and not from the notice to appear. *Johnson v. Carry*, 2 Cal. 36.

92. The service of the writ of attachment is sufficient to put a garnishee upon notice of the plaintiff's demand, and any payment thereafter is a fraud upon his rights. *Ib.*

93. Where a garnishee is called to answer on a certain day, and appears, and the summoning party declines, or is not prepared to take the answer, and a term expires without any action on the garnishment, the summons is discontinued, and the party discharged from liability to answer. *Ogden v. Mills*, 3 Cal. 254.

94. Where a garnishee, in discharge of a rule, answers on oath that he was released by the plaintiff, and that the plaintiff had abandoned his examination, he should be discharged by the court, unless this be controverted by the plaintiff. *Ogden v. Mills*, 3 Cal. 254.

95. Money in the hands of the sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly dis-

Garnishment.

posed of; and is not the subject of attachment or garnishment. *Clymer v. Willis*, 3 Cal. 365.

96. The sheriff cannot attach money collected on execution in his own hands. If at any time such money is subject to other process in his hands, such process must be executed by the coroner. *Ib.*

97. Unless the answer of a garnishee discloses liens having priority of claim upon the funds in his hands, judgment must be entered for the amount he admits due. *Cahoon v. Levy*, 4 Cal. 244.

98. A garnishee can only be required to answer as to his liability to the debtor defendant, at the time of the service of the garnishment. *Norris v. Burgoyne*, 4 Cal. 410.

99. A garnishee should be allowed to amend his answer whenever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided; and the appellate court will not interfere except in case of gross abuse of discretion. *Smith v. Brown*, 5 Cal. 118.

100. An order requiring a garnishee to pay into court the amount for which judgment has been rendered against him, may be considered as improper. *Ib.*

101. The doctrine of garnishment, although partially regulated by statute, is not the less a common law proceeding, and therefore, in proceedings against a garnishee, the parties are entitled to a jury trial. *Cahoon v. Levy*, 5 Cal. 294.

102. It was no defense that before A had notice of the assignment of a debt, attachments in favor of the creditors of B had been served upon him, and that he sold the goods, and paid the proceeds to the attaching creditors after such notice. *Morgan v. Lowe*, 5 Cal. 326.

103. In proceedings against a garnishee, it is the duty of the court simply to render judgment against the garnishee for the amount found due by him to the judgment debtor. An order that the garnishee pay over the money into court is improper. *Brumagin v. Boucher*, 6 Cal. 17.

104. Service of copy of execution and notice of garnishment upon a third party, constitutes no lien on property of the debtor in his hands, capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196.

105. A garnishment served on the owner, in a suit against the head contractor,

after the commencement of the building and before notice served, must prevail over the lien of a subcontractor. *Cahoon v. Levy*, 6 Cal. 296; contra, *Tuttle v. Montford*, 7 Cal. 360, per force of the amendment to the statute.

106. Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and on attachment of his interest in the corporation. *Edwards v. Beugnot*, 7 Cal. 165.

107. Where B was garnished in a suit against C, the day before he accepted an order drawn by A in favor of C, but failed to inform C thereof, and C, for a valuable consideration, sold the order to D, an innocent purchaser: held, that B, having made the order negotiable, could not plead the garnishment. *Garwood v. Simpson*, 8 Cal. 105.

108. An attachment may be served on funds in the hands of a receiver, as it is not the bringing of an action against the receiver, nor does it change the custody of the funds. The receiver holds it for whoever can make out a title to it. *Adams v. Woods*, 9 Cal. 28.

109. A plaintiff who has sued out an attachment, and given the necessary notice to a garnishee that the property in his hands is attached, and subsequently the garnishee fraudulently disposes of the property, has a right to waive his lien on the property and bring suit for the value of the property against the garnishee. *Roberts v. Landecker*, 9 Cal. 266.

110. The indebtedness of the maker upon a promissory note, before its maturity, is not the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. *Gregory v. Higgins*, 10 Cal. 340.

111. An attaching creditor of the bailee, levying on the money in the hands of a stockholder with whom it had been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question, and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the bailor by reason thereof. *Hardy v. Hunt*, 11 Cal. 350.

112. B. assigned a mortgage to F.

Garnishment.—Attachment against Vessels.—In general.

against a company, to secure him against his liability as surety, delivering the mortgage at the same time to F., who retained it a few moments, and then returned it to R. to receive the interest from the company, as his agent. The note guaranteed was unpaid, and R. owes the company nothing: held, that after the assignment R. had no interest in the mortgage which a judgment creditor could reach by garnishment. *Hall v. Redding*, 13 Cal. 219.

113. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants after this received coin made of the dust, and a creditor of C. attached the coin, by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin, and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application. *Walling v. Miller*, 15 Cal. 40.

114. A garnishment does not give the creditor precedence over assignees of the fund, when the assignment is prior to the service of the garnishment. *Ib.*

1 Cal. 163; *Ray v. Bark Henry Harbeck*, 1 Cal. 451.

116. Where a bond is given for a release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *McQueen v. Ship Russell*, 1 Cal. 165.

117. When the bond is given, the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel is not liable. The giving the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

118. The rule that requires seizure of the thing to give jurisdiction in actions in rem is altered by our statute. Service on a person standing in particular relation to the thing confers jurisdiction on the court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 7 Cal. 408; *Fisher v. White*, 8 Cal. 422.

119. As soon as a vessel is seized by a court of admiralty, a lien attaches in favor of the party at whose instance the seizure is made. *Meiggs v. Scannell*, 7 Cal. 408.

120. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a mechanic or merchant of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined; and in the meantime she might be run off, and sold free of all such debts or incumbrances. *Ib.*

IX. ATTACHMENT AGAINST VESSELS.

115. An act of the legislature authorizing the issuing of attachments against boats and vessels "used in navigating the waters of the State," does not apply to vessels belonging to a foreign port, and which visit one of the harbors of this State for a few days only.* *Souter v. Sea Witch*,

* These cases were decided under the code of 1850. The code of 1851 permits these attachments to issue.

ATTORNEY.

- I. In general.
- II. Negligence by an Attorney.
- III. Compensation of an Attorney.

I. IN GENERAL.

1. Where an attorney is proceeded against, with the object of expelling him from the bar, he is entitled to have notice

In general.

of the charge against him, and an opportunity to make his defense. This is dictated by natural justice, and the uniform practice in such cases. *People v. Turner*, 1 Cal. 150.

2. It is not usual for courts to interpose by a proceeding for contempt against an attorney, for any act independent of his profession, or not connected with his professional employment as an attorney. *Ib.*

3. Being officers of the court, attorneys are, in many respects, subject to the orders of the court; but these orders must be the result of sound and legal, and not of arbitrary and uncontrolled discretion. *Ib.*

4. An attorney licensed to practice in the supreme court is, by the rules of the court, authorized by virtue thereof to practice in all the courts of this State; and a district court cannot expel him from the bar. *Ib.* 190.

5. A writ of mandamus will lie from the supreme court to an inferior court, to restore an attorney removed by it from the bar. *Ib.*

6. An attorney has power to bind his client, by consenting to elect an order of court for relief, made in lieu of a money judgment; and the client has no power to refuse it. *Hart v. Spalding*, 1 Cal. 214.

7. An agreement of an attorney or counsel to waive a jury trial must be in writing, and filed with the clerk or entered on the minutes, to conclude his client. *Smith v. Pollock*, 2 Cal. 94.

8. An attorney at law took an assignment of a lot upon which there was a lien for purchase money, after suit brought against the assignee for recovery of the money. The attorney defended the suit throughout all the stages, without disclosing his claim: judgment was rendered for the plaintiff, and all right, title and interest of the defendant in the lot was sold by the sheriff, and purchased by the plaintiff. The attorney also claimed the lot in possession of his tenant, refusing to pay rent in arrear, and denying a lien existed. In a new action, he was made a party, and in view of these facts, it was held that his silence in relation to his own claim, throughout his connection with the former suit, was a fraudulent concealment; and he was decreed to deliver possession to the plaintiff, and pay all costs of this and the former suits, and the arrear rents. *Truebody v. Jacobson*, 2 Cal. 288.

9. An agreement of an attorney for the continuance of a cause, not reduced to writing, will not be regarded by the court. *Peralta v. Maria*, 3 Cal. 187.

10. An appearance by attorney at common law, and by our code, amounts to a waiver of service of summons. *Suydam v. Pitcher*, 4 Cal. 281; *Holmes v. Rogers*, 13 Cal. 200.

11. An admission by an attorney of record of the correctness of an amount due, for which judgment is taken, when not done in fraud of the rights of his clients, destroys the effect of a denial in the answer. *Taylor v. Randall*, 5 Cal. 80.

12. A confidential counselor, solicitor, or attorney of the party, cannot be compelled to disclose communications made to him, or entries made by him, in that capacity, and from necessity extends to their respective clerks to sustain the confidential relations between attorney and client. *Lansberger v. Gorham*, 5 Cal. 451.

13. Where a party changes his attorney in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorney of record. *Grant v. White*, 6 Cal. 55.

14. An affidavit by an attorney, showing that defendant conceals himself to avoid service of process, is sufficient to authorize an order for the service on defendant by publication. *Anderson v. Parker*, 6 Cal. 201.

15. We are very reluctant to believe that any officer of the court would designedly endeavor, by omission in the transcript, to mislead the court, and thus procure by fraud a favorable decision. Such a proceeding, if shown to the satisfaction of the court, would unquestionably result in depriving the offender of an opportunity of again misleading it. *Ib.*

16. Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party. *Welton v. Garibaldi*, 6 Cal. 246; *Coulter v. Stark*, 7 Cal. 245.

17. A receiver when fully appointed should retain his own solicitor and counsel, who ought not to be the same as are employed by any of the parties in the suit. *Adams v. Woods*, 8 Cal. 318.

18. An attorney in fact who is not an attorney at law cannot sign his name to a complaint for his principal as plaintiff's attorney; and an action so commenced is

In general.

void, as instituted by an entire stranger to the plaintiff, without authority. *Dixey v. Pollock*, 8 Cal. 572.

19. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

20. The provision of the code authorizing judgment, personal and final, against an absent defendant, for whom the court has appointed an attorney with privilege to defend within six months, is not unconstitutional. *Ware v. Robinson*, 9 Cal. 111.

21. Surprise by an attorney at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 526.

22. The employment of new counsel, after a decision is rendered, is no ground for an extension of the time prescribed by the court for filing a petition for a rehearing. *Ferris v. Coover*, 10 Cal. 633.

23. An attorney is not permitted to disclose the confidential communications of his clients, yet if he acquires information apart from any such communications, he is not precluded from disclosing it. *Hunter v. Watson*, 11 Cal. 377.

24. An affidavit which avers a cause of action against the defendant—that defendant cannot, after due diligence, be found in the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons issued; and that defendant still has a family residing in said county, is insufficient to authorize the court to appoint an attorney to represent such absent defendant. *Jordan v. Giblin*, 12 Cal. 102.

25. The authority of an attorney who appears will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be renewed, on the ground of mistake, unless the mistake be unmixed with any fault or negligence of either the party or his attorney. *Holmes v. Rogers*, 13 Cal. 200.

26. A decree fairly entered by consent of an attorney is as binding upon his clients as a decree entered after resistance. *Ib.*

27. It seems that the appearance of an attorney wholly unauthorized, there being

no fraud or allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Ib.* 201.

28. If the attorney assents to a decree, the assent need not be made in open court, by words spoken by the attorney. It may be made by stipulation out of court. *Ib.*

29. When a decree is made by consent of the attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Ib.* 203.

30. A new trial will not be granted on the affidavit of the attorney of record that he, as well as his client and witnesses, were absent on the trial of the case, because of a verbal agreement by opposing counsel to give notice of day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

31. If the charter of a municipal corporation provides for a city attorney to attend to the business of the city, other counsel may be employed when necessary, especially if the law suit was abroad. *Smith v. City of Sacramento*, 13 Cal. 533.

32. In a criminal case, if the court below impose upon counsel against their consent a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived of the opportunity of a full defense; for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

33. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *Ib.*

34. Where the judge below requires a statement of the evidence in a chancery case and the attorney does not object, but fails to furnish it, and in consequence thereof the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. The court below must take the steps by it deemed necessary or proper in the prem-

In general.—Negligence of an Attorney.

ises. It may rehear the cause on the pleadings and proof, or possibly it may require the attorney to prepare the statement. *Purcell v. McKune*, 14 Cal. 232.

35. On an indictment for murder, the court of sessions is not bound to assign counsel for the prisoner. *People v. Moice*, 15 Cal. 331.

36. There were pending before the board of U. S. land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558 known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before the said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case No. 558, and on file therein; and to use their “best endeavors to procure the confirmation of said claim No. 558.” B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558 he acted for the U. S. law agent in taking said depositions, which were important to the government in defeating claim 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement: held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine v. Stuart*, 15 Cal. 397.

37. An attorney, when acting for his client, is bound to the most scrupulous good faith. Even where the attorney purchases the subject of the suit, the client may set aside the purchase at will, unless the attorney show, by clear and conclusive proof, that no advantage was taken; that everything was explained to the client, and that the price was fair and reasonable, and that the depositions having

become regularly a part of the records of the land commission, and the government being thus entitled to use them, like other public archives, the agreement to withdraw them, and thus to interpose obstacles to the exercise of this right of the government, is contrary to public policy and void, and this whether the depositions were true or false, or whether the government would be benefited or not by their possession. *Ib.* 401.

38. An attorney, after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, cannot go over and render assistance to the adverse side, and then enforce, in a court of equity, a contract based on such assistance. *Ib.*

II. NEGLIGENCE OF AN ATTORNEY.

39. In declaring against an attorney for negligence, it is only necessary to aver generally that he was retained; but if it be alleged that he was retained in consideration of certain reasonable fees and rewards to be paid him, and no future time is stated as agreed upon for the payment of such fee, the declaration must aver payment, and the omission of this is error. *Covillaud v. Yale*, 3 Cal. 110.

40. In order to charge attorneys with negligence in failing to set up a defense, the plaintiff must prove the existence of such facts, and that they are susceptible of proof at the trial by the exercise of proper diligence on the part of his attorneys. *Hastings v. Halleck*, 13 Cal. 209.

41. Skillful or unskillful and negligent conduct of a case in an unimportant subject of inquiry in an action by an attorney for the value of his professional services; anything which shows the services were not of the value claimed—as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, absence of skill—is competent, under the issue of value. *Bridges v. Paige*, 13 Cal. 641.

42. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill or neglect may put the client to great expense to redeem his mistakes. *Ib.* 642.

Compensation of an Attorney.

III. COMPENSATION OF AN ATTORNEY.

43. In an action brought for the distribution of the effects of a corporation, it being for the interest of all parties that the company should be legally dissolved: held, that costs and a counsel fee on each side should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 75.

44. District courts had no right under the code of 1850 to allow counsel fees in admiralty cases. *Selby v. Bark Alice Tarleton*, 1 Cal. 104.

45. An attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 12 Cal. 103.

46. If a retainer be absolute upon its face, but did not specify in what manner or by whom the fees were to be paid, evidence should be admitted to show whether the fee was contingent or not. *Dwinelle v. Henriquez*, 1 Cal. 391.

47. An attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. *Covillaud v. Yale*, 3 Cal. 110.

48. In an action upon an injunction bond to recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of an injunction was properly allowed as part of the damages. *Altshae v. Quan Wan*, 3 Cal. 217; overruling *Heath v. Lent*, 1 Cal. 412.

49. Generally, the recovery of counsel fees as part of the damage is not allowed—as where the loss is consequential; but where the loss is direct—as in the case of an improper commencement and prosecution of a writ, or other process, in a suit—it should be allowed. *Summers v. Farish*, 10 Cal. 353; *Heyman v. Landers*, 12 Cal. 111; *Prader v. Grim*, 13 Cal. 587.

50. Counsel fees, not exceeding five per cent., were stipulated to be paid in the mortgage on foreclosure: held, that it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, but like costs, they were a mere incident to the debt, and might be fixed by the court at its discretion, not exceeding five

per cent. *Carriere v. Minturn*, 5 Cal. 435; *Gronfier v. Minturn*, 5 Cal. 492.

51. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services in another action. *Hart v. Vidal*, 6 Cal. 56.

52. A witness who is not an attorney is incompetent to prove the value of an attorney's services in a cause. *Hart v. Vidal*, 6 Cal. 57.

53. Where an individual doing business under the firm name of "D. W. & Co." incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters formed a partnership with two others under the same firm name, and one of the new members of the firm thus formed subsequently dismissed the suit in the firm name, and when payment for the services was demanded did not deny the liability of the firm, but refused payment and disputed the amount charged: held, that the firm was estopped from denying their liability. *Burrittt v. Dickson*, 8 Cal. 115.

54. But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: held, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. *Ib.* 117.

55. A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report among his disbursements the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. *Adams v. Woods*, 8 Cal. 316.

56. Counsel for the plaintiff in a suit for dissolution cannot claim compensation as associate counsel for the receiver. *Ib.* 10 Cal. 317.

57. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim

 Compensation of an Attorney.—Attorney, District.

priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered; but the plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Patrick v. Montader*, 13 Cal. 444.

58. When an attorney sued for professional services on a quantum valebant, and the answer denied the value of the services: held, that the rule requiring new matter to be set up in the answer does not apply. *Bridges v. Paige*, 13 Cal. 641.

59. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion, the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene if a proper case be made, or prosecute his rights independently, or wait until the recovery and then claim his rights under the contract with relator. *People v. Norton*, 16 Cal. 440.

 ATTORNEY, DISTRICT.

1. The district attorney can bring suit against bail at any time after the adjournment of the term at which the recognizance was declared forfeited. *People v. Carpenter*, 7 Cal. 403.

2. District attorneys, however, should do their duty faithfully, but no more. They should never act as employed coun-

sel, nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. *People v. Butler*, 8 Cal. 440.

3. The fact that a district attorney has, or is entitled to a per centage on a judgment in favor of the State, will not prevent the legislature from the passage of a law releasing the judgment. *People v. Bircham*, 12 Cal. 55.

4. An assistant prosecuting district attorney appointed by the board of supervisors of the city and county of San Francisco, under the act of April 23, 1858, (238) is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court and shall assist the district attorney in the discharge of his various duties. *People v. Magallones*, 15 Cal. 428.

5. One of these duties is the prosecution of charges before the grand jury, and if the assistant may perform the duty, he must be deemed to be clothed with the powers and privileges necessary for that purpose. While acting for the district attorney his acts possess the same validity and must be regarded in the same light as if done by that officer in person. *Ib.* 429.

6. It is no objection to an indictment found in said court of sessions, that such assistant prosecuting district attorney was present during the session of the grand jury while the charge embraced in the indictment was under consideration. *Ib.*

7. The constitution of this State does not fix the term of the office of district attorney, but merely directs (art. 6, sec. 7) that the legislature shall provide for his election by the people, and shall fix by law his duties and compensation. *People v. Brown*, 16 Cal. 442.

8. The act of 1851, (Wood's Dig. 64) providing for the election of a district attorney in each county at the general election of that year, and every two years thereafter, etc., and the act of 1855, (Wood's Dig. 561, secs. 46 and 49) providing that the board of supervisors in each county shall fill vacancies in the office of district attorney, their appointee to hold until the next general election, the person then elected to hold for the balance of the term of the person whose place he is elected to fill, apply to the city and

county of San Francisco, and are not repealed by the ninth, nor by the last section of the consolidation act of 1856. *Ib.* 443.

9. The policy of the act of 1851 was to create uniformity in the official terms of district attorneys by filling those terms at fixed periods. *Ib.*

ATTORNEY GENERAL.

1. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *People v. Talmage*, 6 Cal. 258.

ATTORNEY IN FACT.

See AGENT, POWER OF ATTORNEY.

ATTORNEY, POWER OF.

See AGENT, POWER OF ATTORNEY.

AUCTIONEER.

1. The memorandum required by the statute of frauds to be entered by an auctioneer in his sale book, must be made at the very time of the sale, or the vendee will not be bound by the contract; and the memorandum made in the afternoon or next day after the sale is insufficient. *Craig v. Godeffroy*, 1 Cal. 415.

2. An auctioneer who receives and sells stolen property is liable for the conversion

to the same extent as any other individual, both upon principle and authority. *Rogers v. Huie*, 1 Cal. 433; overruled in *Rogers v. Huie*, 2 Cal. 572.

3. Where a testator in his will appointed two persons as executors, and gave to each the power to sell his property as to them should seem proper, and the same as fully as in law may be required: held, that one of the executors could sell at private sale; and need not sell at auction, as no statutory provision then existed. *Panaud v. Jones*, 1 Cal. 511.

4. An auctioneer who in the regular course of his business receives and sells stolen goods, and pays over the proceeds of sale to the felon, without notice that the goods were stolen, is not liable to the true owner for a conversion. *Rogers v. Huie*, 2 Cal. 571; overruling *Rogers v. Huie*, 1 Cal. 433.

5. Where an auctioneer sells a balance of goods without specifying their quality, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money, or a portion of it, the contract became executed, and the auctioneer will not afterwards be permitted to allege a mistake in quantity. *Burgoyne v. Middleton*, 4 Cal. 66.

6. A sale of land at auction where no note or memorandum of sale is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People v. White*, 6 Cal. 75.

7. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State v. Poulterer*, 16 Cal. 523.

8. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

9. The forty-ninth section of the act makes the auctioneer liable to pay this duty, and the meaning is, that he shall be legally held to pay it. The fact that a bond is required of the auctioneer, conditioned for the performance of his duty, shows that the legislature did not mean to

Auctioneer.

restrict his responsibility to the penal provision of the act—as the bond covers this duty of paying over the money to the State. *State v. Poulterer*, 16 Cal. 523.

10. The criminal process of the fifty-second section is not a remedy provided by the statute for the payment of the duty imposed, but a mere provision for the punishment of those who violate the law. The remedy spoken of by the authorities, as excluding any other remedy, means the process provided by the legislature, whereby the specific duty may be enforced. But under our act, the remedy is not such; for, after the party has been fined and imprisoned, the duty of paying over to the State the money in the hands of the auctioneer remains. *Ib.*

11. The giving a bond in such cases, instead of limiting the remedy to suit on the bond, is merely a cumulative security. *Ib.*

12. Where a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied; and where the law requires a thing to be done, it authorizes the performance of whatever may be necessary for executing its commands. *Ib.* 526.

13. When a statute casts upon a party an obligation to pay money to particular persons, without providing a remedy for its recovery, an action of debt will lie. *Ib.*

14. There is a distinction between this case and cases cited against the result reached here. That distinction is, that in the cases of the creation of a power or duty by statute, the statute giving the power or casting the duty is alone looked to to determine the power given or duty cast, and has provided its own exclusive remedy for the execution of the power or the enforcement of the duty. The statute is complete in itself; giving a power or imposing a duty on its own terms—the remedy to be taken in connection with, and as a part of the right. But this is a matter of legal inference from the statute, and this inference may be repelled by the express language or the general scope of the act. In this case, the State's money is confided to a certain class of officers or agents; bond is required of them to secure the payment; the act declares that they shall be held liable, and subject to pay this money. The meaning is, not merely that they shall be subject to punishment

for not paying, but “liable for the payment”—“the parties *hereby held liable*,” being the expression used. This is equivalent to saying that they shall be subject to the legal course of proceeding for the enforcement of such liabilities. This is by suit in this form. When, after this, a penalty is added as a punishment for this and other violations of this general duty of auctioneers, by no rule of construction can it be held that this penalty was intended to do away with the other, and only effectual remedy first given; effect must be given to the whole statute, and these words quoted are wholly unnecessary, if the only remedy were that given in the penal clause. *Ib.* 531.

15. Under the act here, the auctioneer's liability does not depend upon his statement or exhibit of the sales made by him. The act creates a liability for the percentage; and the provision therein for the statement under oath, is only a means for arriving at, or enforcing a settlement. If the auctioneer fail of his duty in making the statement, he is in no better situation than if he discharged it. *Ib.* 532.

16. Nor does the fact that the defendant was not licensed as an auctioneer, or did not give bond, defeat the action for the duty under the act. Having done the business, and acted openly as an auctioneer, he is estopped to deny the responsibilities of an auctioneer. He cannot plead his own wrong in failing to comply with the law in bar of his responsibilities for violating its provisions. *Ib.*

17. Under the act, it is the duty of the auctioneer each month to make the statement of the amount of his sales for the month preceding, and at that time to pay over to the State what is then due as per his statement. No demand of payment is necessary. The auctioneer, if he fail to make the statement or pay the money, is in default by his own act, and is debtor to the State for the amount so due. *Ib.*

18. Semble: that the actual collection and receipt of money by the auctioneer are not necessary to create his liability for the duty. This liability attaches *prima facie* upon the sale of the goods; and it is for the auctioneer to show legal excuse for not collecting the proceeds of sale. *Ib.*

19. If the auctioneer, under this act, be merely the agent of the State to collect and pay over its dues on sales of goods, it

is doubtful whether his liability to the State for the duty imposed on such sales flows from the statute. By the common law, independent of any statute, such an agent would be responsible to his principal for the money so received. If the auctioneer chooses to put himself in this relation—that is, accepts and assumes this trust—his liability would seem not to flow from the statute, but, like that of any other custodian of funds, would arise from the general law defining the responsibilities of such agents. And the principle that, as the law had already fixed the liability from these facts, the particular remedy given by the statute would be merely cumulative, would seem to apply; but this point is not here decided. *Ib.*

20. This suit, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *Ib.*

AUDITOR.

1. Under the act of 1851, the county auditor can only draw warrants where the claim is audited by himself. There is a defect in the law, which this court cannot remedy on the pretext of public convenience. *Draper v. Noteware*, 7 Cal. 278.

2. An account audited against the city of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. *Knox v. Woods*, 8 Cal. 546.

3. A county possesses no power to allow a county auditor compensation for the issuance and cancelation of warrants drawn on the county treasurer. *People v. El Dorado County*, 15 Cal. 174.

AUTHENTICATION OF RECORD.

See EXEMPLIFICATION OF RECORD.

AUTHORITY.

See AGENCY, POWER, POWER OF ATTORNEY.

AVOIDANCE.

1. Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. *Gaskill v. Moore*, 4 Cal. 235.

2. The nonpresentation of the claim to an administrator for his allowance, is a matter of avoidance in an action on the claim, only to be taken advantage of by plea, and it is still, in its nature and effect, nothing more than a matter of abatement. *Ellissen v. Halleck*, 6 Cal. 363; *Falkner v. Folsom's Ex'rs*, 6 Cal. 412; *McCann v. Sierra County*, 7 Cal. 124; *Hentsch v. Porter*, 10 Cal. 560.

3. The prosecution of the purpose to appropriate water for mining uses is a necessary element of title; and the negative of this, the abandonment of the purpose, is not so much matter of avoidance in title as it is matter showing that no title was ever obtained. *Kimball v. Gearhart*, 12 Cal. 50; *Mc Garrity v. Byington*, 12 Cal. 431.

AWARD.

See ARBITRATION, IV.

AYUNTAMIENTO.

See CORPORATION, MUNICIPAL.

Bail.—Bailment.

BAIL.

1. The respondents were bail in a recognizance conditioned for the appearance of M. to answer an indictment found against him on the nineteenth of April, 1852. M. appeared and the indictment was quashed. Another indictment on the same charge was found by the grand jury then in session, and M. on being called made default: held, in an action upon the recognizance, that judgment will not lie against the bail. *People v. Lafarge*, 3 Cal. 133.

2. Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending. *People v. Smith*, 3 Cal. 272.

3. If the condition be to appear "when-ever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called "in the court of sessions" is not sufficient. *Ib.*

4. An offer of defendant in a civil arrest to surrender himself in discharge of his bail is a good surrender, and discharges them from all liability. *Babb v. Oakley*, 5 Cal. 94.

5. The insufficiency of an affidavit on arrest in civil process cannot be pleaded as a defense by the bail; by putting in bail and neglecting to be discharged, the defendant consents to process and waives all irregularity. *Mattoon v. Eder*, 6 Cal. 59.

6. Final process should issue in a civil action against the defendant before the bail can become finally charged. *Ib.* 60.

7. The district attorney can bring suit against bail at any time after the adjournment of the term at which the recognizance was declared forfeited. *People v. Carpenter*, 7 Cal. 403.

8. Sureties on a bail bond cannot avail themselves in defense to an action thereon of an insufficiency of the justification of the undertaking. *Ib.*

9. A bail bond need not state in what court the defendant shall appear, as the law provides in what court he shall be tried. *Ib.*

10. The sureties on a bail bond of a defendant in civil process are not bound to surrender the defendant within ten days after judgment against him; only within

ten days after the issuing of an execution. *Allen v. Breslauer*, 8 Cal. 554.

11. Where the defendants were sureties in a recognizance for the appearance of one H., who was charged with the crime of receiving two mules alleged to have been stolen, and an indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the some crime mentioned in the recognizance. *People v. Hunter*, 10 Cal. 503.

12. Where an assignment of a note and mortgage has been made to the plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into court, to await the further decree of the court is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

13. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for non-appearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

14. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.* 386.

BAILMENT.

1. An innkeeper, like a common carrier, is the insurer of the goods of his guest, and is bound to keep them safe from burglars and robbers without as well as thieves within his house; but he can be held to this strict liability only for such goods as are brought into his house by travelers in the character of guests. *Mateer v. Brown*, 1 Cal. 229.

2. The jury should decide whether the

Bailment.

article was taken to the inn by the guest in his character of guest, in which event the innkeeper's liability would cover all losses, or whether after he became a guest it was deposited there in the nature of an ordinary bailment. *Ib.* 231.

3. A common carrier is not liable for the loss of the goods entrusted to him for carriage, where it is understood that he is to receive no compensation for the carriage, and where he has exercised ordinary diligence in taking care of them; in such case he is liable only as a bailee without hire. *Fay v. Steamer New World*, 1 Cal. 349.

4. A party depositing securities for payment of a debt, or advancements made thereon, may agree that they shall be sold at the option or pleasure of the creditor. *Hyatt v. Argenti*, 3 Cal. 157.

5. Plaintiffs drew upon the defendant, who held the deposit, directing him to pay them "from the proceeds of the securities in his hands:" this was held to give an authority to the plaintiff to sell the securities deposited to meet the drafts. *Ib.*

6. Personal property may be pledged, mortgaged, hypothecated or placed in trust upon such terms and conditions as the parties may agree upon, and courts of law will be governed by the language of the contract in each particular case. *Ib.* 159.

7. Parties appointed as assignees of an insolvent firm, in a proceeding in insolvency which was illegal and void, are merely the custodians, receivers or bailees of the fund in their hands by virtue of the order of the court, and only hold it subject to the direction of the court. *Adams v. Haskell*, 6 Cal. 115.

8. A pledge is a bailment, which is reciprocally beneficial to both parties, and the bailee must exercise ordinary diligence in the care and custody of the goods pledged; and he is responsible for ordinary negligence. What will amount to ordinary negligence must depend on the circumstances of the transaction and the character of the pledge. *St. Losky v. Davidson*, 6 Cal. 647.

9. The execution and delivery of certificates of deposit by creditors of an insolvent firm to a receiver for money deposited with the creditors, changed their character from being custodians of the funds to that of mere debtors of the insolvents. *Naglee v. Palmer*, 7 Cal. 548.

10. When the property converted has a fixed value, the measure of damages is that value with legal interest from the time of the conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of the conversion, or at any time afterwards. *Nickerson v. Chatterton*, 7 Cal. 572; *Douglass v. Kraft*, 9 Cal. 563; *Phelps v. Owens*, 11 Cal. 24.

11. All conversions of money or property by a bailee are not "ipso facto unlawful or felonious under our statute. The word 'bailee,' under our criminal statute, must be construed in a limited sense, as designating 'bailees' to keep, transport and deliver." *People v. Cohen*, 8 Cal. 43.

12. Indictments under the statute against "bailees" should distinctly set forth the character of the bailment, the mode of conversion, the description of the property and its value. *People v. Cohen*, 8 Cal. 44; *People v. Peterson*, 9 Cal. 315.

13. In an action by the bailor, the bailee will not be allowed to set up title in a third party, except where the bailor's possession was obtained by fraud; and where the real owner of the property appears and asserts his right to the same, the bailee may show that the bailor acquired possession of the goods, either fraudulently, tortiously or feloniously, without having obtained any right thereto. *Hayden v. Davis*, 9 Cal. 574.

14. When a bailee disclaims his relation to the bailor, he cannot claim the right to require a demand for the money, before interest is charged against him. *Dickinson v. Owen*, 11 Cal. 76.

15. A party depositing money for a wager in the hands of a third person may retract the illegal act; the person holding it as the bailee of the depositor, who may resume it any time before it is paid over to the winner. *Hardy v. Hunt*, 11 Cal. 348.

16. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired; it is a mere bailment which bound him, probably as a man, but did not bind him as a sheriff, and if he chose to disregard it entirely, we do not see that he would be bound as an officer. *Whitney v. Butterfield*, 13 Cal. 342.

17. Where a redemptioner, under the

statute, pays to the sheriff an excess of money under protest, as to the excess, the payment is not compulsory, and the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. *McMillan v. Visser*, 14 Cal. 241.

18. Where plaintiff deposits money with defendant to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. *Baker v. Joseph*, 16 Cal. 176.

19. In such case, if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. *Ib.*

20. A man may steal his own property, if by taking it his intent be to charge a bailee with the property, and thus impose a loss upon him. *People v. Stone*, 16 Cal. 371.

BANKRUPTCY.

See INSOLVENCY.

BANKS AND BANKING.

1. Under the insolvent act of 1851,* a banker could not file his petition and claim its benefit, and where his petition shows upon its face that he was a banker, and the debts are due in such capacity, the court has no jurisdiction of the case. *Cohen v. Barrett*, 5 Cal. 210.

2. Under the corporation act of 1850, corporations are by any device restricted from carrying on the business of banking or forming moneyed corporations. They

*The amendment to this insolvent act of March 12th, 1858, permits bankers to file their petitions and distribute their assets pro rata, but does not discharge the indebtedness created as a banker.

are prohibited from issuing bills or notes upon loans, or for circulation as money—that is, they shall not lend their credit. But they may borrow money upon bills, but cannot so loan. *Magee v. Mokelumne Hill C. and M. Co.*, 5 Cal. 259.

3. The defendant, indebted to the plaintiff, a banker, paid an account in the bank to one of the clerks, and on a subsequent day agreed to lend the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff: held, that the amount paid by defendant, in the usual way of business, was a legal payment, and that defendant lost all control over it. *Rhodes v. Hinkley*, 6 Cal. 284.

4. Where a bill of exchange was headed with the name of a banking office, and when paid was to be charged to that office, and was signed by a person as agent: held, that the agent was not personally responsible thereon. *Sayre v. Nichols*, 7 Cal. 542; overruling same case, 5 Cal. 488.

5. Where A, the teller of a bank, draws a check in favor of B, payable at a future day at the bank whereof he is teller, and the check is presented for payment, and A informs the person that it will not be paid, and refuses payment as teller of the bank: held, that protest was not necessary as against A, and no other notice of nonpayment need be given. *Minturn v. Fisher*, 7 Cal. 574.

6. After the issuance of certificates of deposit, there is nothing in the possession of the bankers belonging to the party upon which an attachment could fasten. *McMillan v. Richards*, 9 Cal. 418.

BAR, PLEA IN.

1. Infancy is a good defense to an action on an executory contract, though the defendant did not disaffirm it on coming of age. *Buzzell v. Bennett*, 2 Cal. 102.

2. A judgment for the maker, in a suit by the last endorsee of a note in an agreed case, is a bar to a subsequent suit by a prior indorsee, against the maker. *Bidleman v. Kewen*, 2 Cal. 250.

3. If a defendant fail to plead the statute of limitations at the proper time, he will not be permitted to amend his answer so as to introduce the plea, unless it be in furtherance of justice. *Cooke v. Spears*, 2 Cal. 411.

4. Where the plea of a statute is claimed as a mere legal right, it must be pleaded in the first instance, and has no day of grace thereafter. *Ib.*

5. Where a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Burnett v. Kilbourne*, 3 Cal. 327.

6. In the case of the successive occupancy of several places as residences, the recovery of any one of them by the wife, as a homestead, would bar her recovery of any other as such. *Taylor v. Hargous*, 4 Cal. 273.

7. A sued B for twenty-two head of cattle, and recovered a verdict for twelve head, which was accepted and allowed to stand. C, who held under B, was then sued for the remainder of the cattle: held, that if A had commenced another suit against B, his former recovery would have been a complete bar to the action, and that if B could plead the former recovery in bar, so could C who claimed immediately through B. *Cunningham v. Harris*, 5 Cal. 81.

8. A judgment upon demurrer is not always a bar to a subsequent action. It is only so where it determines the whole merits of the case. *Robinson v. Howard*, 5 Cal. 429.

9. The provisions of the criminal code, which empowers the courts to set aside indictments on motion of the prosecution, is not limited to cases of defects in the instrument itself, and such a dismissal is no bar to a subsequent prosecution for the same offense, when it amounts to a felony. *People v. March*, 6 Cal. 546.

10. The great necessity for a correct description of commercial paper, when sued on, is to enable one recovery to operate as a bar to any subsequent action for the same cause. *Farmer v. Cram*, 7 Cal. 136.

11. The judgment of a court of competent jurisdiction directly upon the point,

is as a plea, a bar and as evidence conclusive between the same parties upon the same matter directly in another court. *Love v. Waltz*, 7 Cal. 252.

12. Where an insolvent was liable on a note made by S. to him, and by him endorsed to R., and by him to M., and describes the same in his schedule, viz: "To R. I am contingently liable for \$1,000 and interest, as endorser for one S. upon a promissory note, made and executed by said S. to said R.:" held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strobe*, 7 Cal. 431.

13. If a judgment would not support an action by the plaintiff against the defendants, it must be equally unavailing when offered in support of a plea of former recovery in an action upon the original demand. *Kane v. Cook*, 8 Cal. 457.

14. A plea of a former suit pending is no bar to an action, where the complaint in the former suit is so defective that a judgment rendered thereon would be a nullity. *Reynolds v. Harris*, 9 Cal. 340.

15. Where it appear upon the face of the complaint that the suit is barred by lapse of time, the defendant may demur. *Sublette v. Tinney*, 7 Cal. 425.

16. The doctrine of recrimination or compensatium criminum, applicable in suits for divorce, and the several offenses which by the statute constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Conant v. Conant*, 10 Cal. 256.

17. An instrument for the sale of partnership property, in presenti, is valid, though one of the parties named in the caption as parties of the first part did not sign the same; especially where such party does not complain and the rights of the other partners are in no degree affected by it; and the agreement is no bar to an action by bill of one of the partners against the others, for an account and dissolution, and sale of the partnership property. *Cayton v. Walker*, 10 Cal. 456.

18. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its illegal detention; defendants paid the damages, but the property was not restored. Plaintiff then brought an action

of trover to recover the value; defendants plead the former recovery as a bar: held, that the judgment in replevin did not constitute a bar to the action of trover—the judgment in replevin not having been satisfied. *Nickerson v. California Stage Co.*, 10 Cal. 521.

19. In an action brought by an agent in his own name for a trespass, in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

20. A judgment against one on a joint contract of several, bars the action against the others, even though the latter were dormant partners unknown to the plaintiff when the original action was brought. *Brady v. Reynolds*, 13 Cal. 33.

21. A judgment against one or more guarantors of a note bars the action against the others. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. *Ib.*

22. A note for five hundred dollars to the order of Alfred McCarty is insufficiently described where the insolvent schedule simply states “Alfred McCarty, borrowed money, April, 1855, \$500;” and a discharge in such case is no bar to a suit on the note. *McCarty v. Christie*, 13 Cal. 81.

23. A suit at law to recover a judgment against an administrator for money embezzled by his intestate, pending which a bill in equity was filed to recover the property bought with the money, and prosecuted to a decree after judgment was taken at law for the amount, evidences no such distinct and deliberate choice to take the general claim on the estate in lieu of the claim on this property, as to bar plaintiff from prosecuting his equitable claim. *Wells v. Robinson*, 13 Cal. 143.

24. The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence not as an affirmation of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of the appeal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on the merits. *Karth v. Light*, 15 Cal. 326.

25. The complaint contained two counts: one upon a special contract for the sale and delivery of the goods; the other for a claim upon goods sold and delivered. Answer denied the contract, and the other allegations of the complaint; but set up a contract between the parties somewhat different, containing a guaranty as to quality, and alleging that the quality of the goods was not in accordance with the contract, and the breach was relied on as a complete defense. Evidence was introduced upon all the issues made by the pleadings. The court instructed the jury that, “if the plaintiffs, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover.” The plaintiffs had verdict and judgment for the price: held, that in a subsequent action by the defendants against plaintiffs, on the breach of the warranty, for the difference in value between the goods delivered and those contracted for, the former suit is no bar; that the matter in dispute, to wit: this breach of warranty, was not adjudged; that the instruction of the court took that question from the jury, and directed them to decide the rights of the parties upon other considerations. *Earl v. Bull*, 15 Cal. 425.

BAYS, RIVERS, ETC.

See WATER COURSES.

BILL AND ANSWER.

See ANSWER, COMPLAINT, PLEADING.

In general.

BILL IN CHANCERY.

See COMPLAINT, EQUITY.

BILL OF EXCEPTIONS.

See EXCEPTIONS.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. In general.
- II. Execution of a Note.
 1. When executed by an Agent.
 2. As Surety.
 3. As Guarantor.
 4. As Trustee.
 5. Proof of Execution.
- III. Notice and Protest.
 1. Notice of Nonpayment.
 2. Protest.
- IV. Proof of Endorsement.
- V. Endorser as a Witness.
- VI. Acceptance of a Bill.
- VII. Alteration of a Bill or Note.
- VIII. Demand of a Note or Bill.
- IX. Actions on a Note.
 1. Defense.
 - a. Want of Consideration.
 - b. Fraudulent Consideration.
- X. Payment.
 1. Extension of time of Payment.
- XI. Interest on a Bill or Note.
- XII. Notes described in Insolvent's schedule.
- XIII. Notes secured by Mortgage.

I. IN GENERAL.

1. The captain of a vessel drew on his owner for six hundred dollars to defray the expenses of the first mate, who was injured on the voyage, and whom it became necessary to leave on shore for his recovery. In an action by the captain against the owner for wages, the owner claimed to offset the draft on the ground that the captain was liable for it, but did

not produce the draft or show payment of it: held, that this offset could not be made. *Wakeman v. Vanderbilt*, 3 Cal. 382.

2. When a partner makes a note in the name of the copartnership, it will render all the partners liable to a bona fide holder, although it has no relation to the copartnership business, and the other partners were wholly ignorant of the transaction and were even intentionally defrauded by the copartner. *Rich v. Davis*, 4 Cal. 22; 6 Cal. 142.

3. An objection that securities sued on are not promissory notes must be taken advantage of by demurrer, and a demurrer having been filed without pointing out this objection, it must be considered waived. *Powell v. Ross*, 4 Cal. 198.

4. A negotiable note taken after maturity is subject to all existing equities between the maker and payee; but not such as subsisted between the maker and any intermediate holder. *Vinton v. Crowe*, 4 Cal. 309.

5. The second of a foreign bill of exchange drawn here, payable at sight, was presented to the drawee, and payment being refused, it was duly protested. Afterwards, and before suit was brought, the first of exchange was paid to the holder, with interest and cost of protest: held, that the drawer was released from the payment of damages for the dishonor of second of exchange. *Page v. Warner*, 4 Cal. 395.

6. A married woman has no power to make a contract, and the execution of a promissory note is not an exception to the rule. *Simpers v. Sloan*, 5 Cal. 458.

7. The holder of negotiable paper endorsed before maturity is supposed to be the bona fide owner of the same, and all intendments are in favor of his right to rebut, which it is necessary to show by competent testimony that he is not the bona fide holder, or that the note was not endorsed until after maturity, or some other fact from which the law will imply fraud. *Palmer v. Goodwin*, 5 Cal. 459.

8. The power to make a note is not one of the express corporate powers of an association, but only an incident to those powers. *Smith v. Eureka Flour Mills*, 6 Cal. 7.

9. In an action for contribution on a promissory note between joint obligors, the statute of limitations does not begin to

In general.

run until after the payment of the debt by the plaintiff. *Sherwood v. Dunbar*, 6 Cal. 54.

10. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after and was paid, with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in said suit knew that the bill was in fact paid at the time when they commenced suit was a question for the jury. *Weaver v. Page*, 6 Cal. 684.

11. The fact that the bill, by the usual conveyance, reached its destination within a month from its date, was sufficient to raise a presumption that defendants had received notice of payment in double that time. *Ib.*

12. The great necessity for a correct description of commercial paper when sued on is to enable one recovery to operate as a bar to any subsequent action for the same cause. *Farmer v. Cram*, 7 Cal. 136.

13. An order drawn upon a party is prima facie an assignment of the debt due from the defendant. *McEwen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Cal. 192; *Pope v. Huth*, 14 Cal. 408.

14. The holder of a negotiable promissory note is prima facie the owner thereof for a valuable consideration. *Frank v. Brady*, 8 Cal. 47.

15. A draft or order by A on B, to pay C or order the balance due A by B, is not a negotiable security, not being for any fixed sum; but if endorsed by B "balance due \$1,293. 75" over his signature, it becomes a promise by B to pay C or his order that sum, and is negotiable. *Garwood v. Simpson*, 8 Cal. 104.

16. Conceding that the words "for value received" were not in the note executed by defendant, still the instrument would have had the same legal effect. *People v. McDermott*, 8 Cal. 291.

17. Giving a promissory note payable at a future time for a preëxisting debt does not discharge it. Its only effect is to suspend the right of recovery until the maturity of the note. *Brewster v. Bours*, 8 Cal. 506.

18. The possession of a promissory

note, whether obtained before or after maturity, is prima facie evidence of ownership. The transfer, with or without value, confers upon the holder the right of action, and a consideration need not be proved unless a defense is interposed which would otherwise preclude a recovery. *McCann v. Lewis*, 9 Cal. 246.

19. The destruction of notes in no respect impairs the liability of the maker or the right of the plaintiff to recover upon them; it only impairs the evidence of the liability of the maker. *Bagley v. Eaton*, 10 Cal. 148.

20. Where a husband and wife executed a joint and several promissory note: held, that the note was only obligatory as the individual contract of the husband. *Luning v. Brady*, 10 Cal. 267.

21. The maker upon the face of a note, with whatever motive or purpose he may sign it, is bound by the contract which he signs, according to the legal effect and meaning of the words, and cannot vary it by parol. *Aud v. Magruder*, 10 Cal. 289.

22. The difference between a maker and an endorser or guarantor is, that the contract of the first by its terms imports an unconditional obligation to pay money; that of the last by its terms imports a conditional obligation. *Ib.* 290.

23. A notice of garnishment previous to the maturity of the note does not operate as a garnishment of the amount in the hands of the garnishee. *Gregory v. Higgins*, 10 Cal. 340.

24. From the very nature of a promissory note it is evident that before its maturity the indebtedness of the maker thereon cannot be the subject of attachment. His obligation is not to the payee named in the note, but to the holder, whoever he may be. *Ib.*

25. The presumption is that promissory notes are given upon a valid consideration, but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Fuller v. Hutchings*, 10 Cal. 526.

26. A court of equity will not exercise jurisdiction to compel the surrender and cancelation of a promissory note past due, as the party has a clear remedy at law, for it would come into the hands of an assignee charged with the same defenses and

In general.—Execution of a Note.

equities as attached to it in the hands of the payee. *Lewis v. Tobias*, 10 Cal. 578; *Smith v. Sparrow*, 13 Cal. 597.

27. The following written order possesses all the requisites of an inland bill of exchange: "Please pay to the bearer of these lines two hundred dollars, and charge the same to my account." The word "please" does not alter the character of the instrument. *Wheatley v. Strobe*, 12 Cal. 97.

28. At common law, a note made payable to the wife would prima facie be the property of the husband, who could endorse it in his own name. *Tryon v. Sutton*, 13 Cal. 493.

29. An order in the following words: "Messrs. F. Huth & Co., please hold to the order of William Pope & Sons, of Boston, five hundred pounds sterling, of insurance effected on cargo per bark Elvira, and oblige," etc., is an equitable assignment of the funds in the hands, or to come into the hands, of the drawees to the payees. *Pope v. Huth*, 14 Cal. 407.

30. To enable a vendor of goods to rescind the sale he must offer to return the notes given for the goods; but this order can be made at, or any time before, the trial. *Coghill v. Boring*, 15 Cal. 218.

31. Complaint avers in substance that defendant made his note, etc., setting out a copy; that plaintiff is holder by transfer from the payee, etc.; and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc. * * * defendant, by virtue of * * * proceedings in insolvency, etc. * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc.: held, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 502.

32. Plaintiff herein having rested his case upon proving his note, and defendant

not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Ib.*

33. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non judice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 382.

II. EXECUTION OF A NOTE.

1. When executed by an Agent.

34. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile house in New York, which had been conducted in the name of his principal, derives no authority from such power to bind his principal by a promissory note given for the purchase of real estate in San Francisco. *Fisher v. Salmon*, 1 Cal. 413.

35. Where A authorizes B to do all acts in his name concerning their mining operations, followed by an authority to sign B's name to any company articles, does not authorize A to sign B's name to a promissory note, even where the money was used in carrying on the joint mining operations. *Washburn v. Alden*, 5 Cal. 464.

36. A party who gives a general power of attorney to another to transact all busi-

Execution of a Note.—As Surety.—As Guarantor.

ness, etc., authorizing the attorney "to make, execute and deliver promissory notes," will be held liable for all such notes executed in his name by his attorney when they have reached the hands of an innocent holder, although they may have been made for the private purposes of an attorney. *Hellman v. Potter*, 6 Cal. 15.

37. Where the authority given by the defendants was to sign his name to a promissory note as surety, and not as principal, and the authority was not exercised in the manner delegated, the plaintiff cannot recover. *Bryan v. Berry*, 6 Cal. 397; *Sayre v. Nichols*, 7 Cal. 538.

38. If in the body of a note it appear that the note is the note of the principal, or made by the signer for, and as agent of the principal, it is the note of the latter, even though the words "agent for," or the like, are not added to the signature. *Haskell v. Cornish*, 13 Cal. 47.

2. As Surety.

39. Where the authority given by the defendants was to sign his name to a promissory note, as surety, and not as principal, and the authority was not exercised in the manner delegated, the plaintiff cannot recover. *Bryan v. Berry*, 6 Cal. 397; *Sayre v. Nichols*, 7 Cal. 538.

40. If a party sign a promissory note, and append to his name the word "security," or "surety," he only means to bind himself as such, and not as principal. *Sayre v. Nichols*, 7 Cal. 538.

41. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

42. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Hartman v. Burlingame*, 9 Cal. 561.

43. The failure of the holder of a note to sue, when requested by a surety, does not operate to discharge the liability of the latter. *Ib.*

44. An outstanding liability, as surety or endorser for another, together with an express promise by such surety or endorser to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount in a promissory note. *Gladwin v. Gladwin*, 13 Cal. 332.

3. As Guarantor.

45. One who puts his name on a promissory note, out of the usual course of regular negotiability, is not an endorser, but a guarantor, no matter what words are used in the covenant. *Riggs v. Waldo*, 2 Cal. 480.

46. A guarantor of a promissory note is entitled to demand and notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Geiger v. Clark*, 13 Cal. 580.

47. A promissory note was endorsed by a third person, before delivery by the payee; such endorsement is prima facie an accommodation to the payee; but proof that his design was to become a guarantor would make him liable to the payee; and his default, with proper averment, dispenses with this proof. *Clark v. Smith*, 2 Cal. 606.

48. It is not material on what part of a note a secondary promisor places his name; if the character of his liability is made to appear, his rights are the same as those of an endorser. *Bryan v. Berry*, 6 Cal. 398.

49. The difference between the maker and an endorser or guarantor is, that the contract of the first by its terms imports an unconditional obligation to pay money; that of the last by its terms imports a conditional obligation. *Aud v. Magruder*, 10 Cal. 290.

50. The mere fact that the holder, having a good note, satisfactorily guaranteed, and drawing a fair rate of interest, rests without suit until the period of guaranty had passed, is not a very pregnant circumstance to prove that there had been a contract made with the maker to wait until that period. *Williams v. Covillaud*, 10 Cal. 428.

51. Where a promissory note was made payable to S., and previously to its deliv-

As Trustee.—Proof of Execution.—Notice and Protest.

ery to the payee was endorsed for the accommodation of the maker by H. and brother and defendant, upon an agreement of the endorers with each other, that each would become surety if the other would: held, that the endorers were guarantors, and jointly, but not severally, liable, in a suit by the payee, or a third person taking the note after maturity. *Brady v. Reynolds*, 13 Cal. 32.

52. A judgment against one or more joint guarantors of a note bars the action against the others. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. *Ib.* 33.

53. A note in this form: "Sixty days from date, for value received, we jointly promise to pay F. Reeves, or bearer, the sum of four hundred dollars, etc. Oct. 11th, 1858. (Signed) E. B. Howe, J. E. Mayo;" was endorsed, "I guarantee the collection of the within note when due. (Signed) A. Hayward," contemporaneously with the signing of the note: held, that the engagement of Hayward is not original, but collateral; that he is a guarantor and not a promisor, and is entitled to legal notice of nonpayment of the note before he can be charged on his contract. *Reeves v. Howe*, 16 Cal. 153.

4. As Trustee.

54. Where a party signs a promissory note, with the addition to his name of the word "trustee," he is personally liable; nor can evidence be admitted to show that, at the time of the execution of the note, there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. *Conner v. Clark*, 12 Cal. 171.

55. A note, stating that "We, the undersigned, trustees of the First African Methodist Episcopal Church, on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is the note of the church, and not of the signers. *Haskell v. Cornish*, 13 Cal. 47.

5. Proof of Execution.

56. Where the complaint alleges the making and endorsing of a promissory note, and the answer denies neither signature, the answer should be stricken out, and the plaintiff be entitled to judgment on the pleadings. *Grogan v. Ruckle*, 1 Cal. 196; *Whitwell v. Thomas*, 9 Cal. 499; *Kinney v. Osborne*, 14 Cal. 113.

57. To force the plaintiff to prove the execution of the note to have been authorized by the corporation, the answer should have denied the genuineness and due execution of it under oath. *Smith v. Eureka Flour Mills*, 6 Cal. 7.

III. NOTICE AND PROTEST.

1. Notice of Nonpayment.

58. A guarantor of a promissory note is entitled to demand and notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Geiger v. Clark*, 13 Cal. 580.

59. A promissory note made before the statute of 1851, (which makes the 4th day of July a nonjudicial day) which fell due on the 1st July, and was payable on the fourth; held, that notice of nonpayment on the third was premature, and ineffectual to charge the endorser. *Toothaker v. Cornwall*, 3 Cal. 146.

60. *If a note is payable in bank, notice of nonpayment may be given to the endorser on the evening of the day on which the note is payable, after the close of banking hours, and if not payable in bank, notice may be given in the evening of the day it is payable, at the close of the usual hours of commercial business.* *Toothaker v. Cornwall*, 4 Cal. 30; overruled in *McFarland v. Pico*, 8 Cal. 631.

61. In places where there are no regular hours of business, the notice may be given after sunset of the day of dishonor. *Toothaker v. Cornwall*, 4 Cal. 30.

62. A notice of the dishonor of a note is sufficient if it appear or can be reasonably inferred from the notice that the note or bill has been duly protested for nonpayment, or has been dishonored. *Stoughton v. Swan*, 4 Cal. 213.

Notice of Nonpayment.—Protest.

63. An express notice of waiver of nonpayment is equivalent to an admission that the note has been presented, or need not be presented. *Matthey v. Galley*, 4 Cal. 63.

64. Where payment by the maker to the endorser is relied on as the excuse for want of demand and notice, it must be a payment directly and specifically for the note, and not as security for all transactions in the aggregate. *Van Norden v. Buckley*, 5 Cal. 284.

65. An endorser of a promissory note, after maturity, is entitled to demand and notice of nonpayment, before he is liable to pay. *Vance v. Collins*, 6 Cal. 439; *Beebe v. Brooks*, 12 Cal. 311.

66. Notice of nonpayment may be dispensed with by express waiver, or by any act which will amount to a waiver. *Minturn v. Fisher*, 7 Cal. 574.

67. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

68. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Hartman v. Burlingame*, 9 Cal. 561.

69. Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and nonpayment is necessary to hold the corporation. The draft, in such cases, is only an order of the corporation upon itself. *Dennis v. Table Mountain W. Co.*, 10 Cal. 370.

70. Where a place of payment is named in a bill or note, it is not a substantial contract, and it is not necessary to allege and prove a demand at the place specified. *Montgomery v. Tutt*, 11 Cal. 327; overruling *Wild v. Van Valkenburgh*, 7 Cal. 167.

71. In an action upon a promissory note, payable "on demand after date," it is not necessary to show actual demand before bringing suit. The institution of suit is a demand. *Ziel v. Dukes*, 12 Cal. 482.

72. A notice to the endorser of a note

of nonpayment is sufficient, if it appear that the endorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, and this though the notice was verbal and the note neither produced nor described. *Thompson v. Williams*, 14 Cal. 162.

73. Where a note due January, 1857, was endorsed by the payee to the present holder November 26th, 1858, and he, November 29th, 1858, demanded payment of the maker, and verbally notified the endorser of such demand, and that he would be held on his endorsement, it is no objection to the notice that it did not state the time of demand. The demand was good if made within a reasonable time, and before the notice; otherwise as to notes endorsed before maturity. In such a case the notice must state the time of demand. *Ib.* 163.

74. If much time intervenes between demand and notice, in transfers after maturity, the question may arise whether the delay has not released the endorser. *Ib.*

75. A notice by the holder that he had demanded payment of that note, implies that payment was demanded of the person liable to pay, to wit: the maker; and the declaration that he intended to look for payment to defendant, the endorser, implies the fact of nonpayment. *Ib.* 164.

76. An endorser of a note payable on demand, no demand being made until thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable. *Jerome v. Stebbins*, 14 Cal. 458.

2. Protest.

77. The second of a foreign bill of exchange drawn here payable at sight was presented to the drawee, and payment being refused, it was duly protested. Afterwards and before suit was brought, the first of exchange was paid to the holder, with interest and cost of protest: it was held, the drawer was released from the payment of damages for the dishonor of the second of exchange. *Page v. Warner*, 4 Cal. 395.

78. By the fifth section of the act concerning notaries, bills are made protesta-

Protest.—Acceptance of a Bill.—Alteration of a Bill or Note.

ble, and by the tenth section the protest of the notary is expressly made evidence of demand, and nonpayment of notes and bills. *Conolly v. Goodwin*, 5 Cal. 221.

79. At common law, promissory notes were not protestable securities; they are made so by our statute, and as a consequence the protest of them must be attended with all the incidents belonging to foreign bills of exchange. *Tevis v. Randall*, 6 Cal. 635.

80. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after, and was paid with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in said suit knew that the bill was in fact paid at the time when they commenced suit was a question for the jury. *Weaver v. Page*, 6 Cal. 684.

81. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie v. Neville*, 14 Cal. 409.

See PROTEST.

IV. PROOF OF ENDORSEMENT.

82. A party is not required to deny an endorsement under oath, and an endorsee cannot give the notes in evidence without proof of their endorsement. *Grogan v. Ruckle*, 1 Cal. 159; *Youngs v. Bell*, 4 Cal. 202.

V. ENDORSER AS A WITNESS.

83. An endorser of a note is incompetent as a witness to establish the lien of a holder of the note upon the property of the maker, being directly interested to have the lien established. *Soule v. Dawes*, 6 Cal. 475.

84. In an action against the maker of a note, or the acceptor of a bill, the endorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 87.

VI. ACCEPTANCE OF A BILL.

85. Where an order is drawn on a firm for an unspecified sum, which is not negotiable, and an endorsement of the exact sum due is made by one of the firm, thus rendering it negotiable, it operates as a release of the firm, and as an individual acceptance of the partner endorsing. *Garwood v. Simpson*, 8 Cal. 106.

86. Where a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened is a question for the jury. *Nagle v. Horner*, 8 Cal. 358.

87. A draft payable in terms out of an appropriation for public work done by the acceptor becomes due on payment for the work by the government. *Ib.*

88. A drew an order on B in favor of C, for two hundred and six dollars and fifty cents. C presented the order to B, and he paid twenty-two dollars and fifty cents thereon, and the amount was receipted on the back of the order, in the handwriting of B, and signed by C: held, that this was not an acceptance. *Bassett v. Haines*, 9 Cal. 261.

89. The written acceptance of the drawee is necessary to charge him as acceptor of a bill, under our statute. A parol acceptance is insufficient. *Wheatley v. Strobe*, 12 Cal. 97.

90. The acceptance of the note of a third party by the creditor is considered as accompanied with the condition that the note shall be paid at maturity. *Griffith v. Grogan*, 12 Cal. 324.

91. A letter of credit, promising unconditionally to accept bills drawn upon its faith, is deemed, under our statute, an actual acceptance in favor of a person who upon its faith receives a bill so drawn for a valuable consideration. *Naglee v. Lyman*, 14 Cal. 454.

VII. ALTERATION OF A BILL OR NOTE.

92. An alteration which does not vary the meaning, the nature, or the subject matter of the note, is immaterial. *Humphreys v. Crane*, 5 Cal. 175.

93. The filling up of a blank is not such an alteration of a note as to vitiate and prevent any recovery. It supplied an

Demand of a Note or Bill.—Actions upon a Note.—Defense.

omission, by fixing an optional rate of interest, not binding on the maker without further proof; but does not avoid the right to recover the principal, and legal interest. *Fisher v. Dennis*, 6 Cal. 579.

94. Where a promissory note was made, bearing interest monthly, but leaving the rate of interest in blank, if the rate of interest is filled in by the holder, he cannot, without some evidence of agreement, recover more than legal interest; though he had passed the note thus filled up to an innocent purchaser, the maker would be liable. *Fisher v. Dennis*, 6 Cal. 579; *Visher v. Webster*, 8 Cal. 112.

95. An answer to a suit on a promissory note, by the assignee, which sets up as one defense—1st, that the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order;" 2d, that the defendant paid the note before assignment; 3d, that the note was assigned to plaintiff after maturity, etc.: held, that if true, they were amply sufficient to defeat the action. *Sherman v. Rolberg*, 11 Cal. 41.

VIII. DEMAND OF A NOTE OR BILL.

96. Where a place of payment is named in a bill or note, it is not a substantial contract, and it is not necessary to allege and prove a demand at the place specified. *Montgomery v. Tutt*, 11 Cal. 327, overruling *Wild v. Van Valkenburgh*, 7 Cal. 167.

97. In an action upon a promissory note, payable "on demand after date," it is not necessary to show actual demand before bringing suit. The institution of suit is a demand. *Zeil v. Dukes*, 12 Cal. 482.

IX. ACTIONS UPON A NOTE.

98. A payor has all of the last day in which his note falls due in which to pay it; and a suit commenced for the recovery of the note on that day is premature. *Wilcombe v. Dodge*, 3 Cal. 260.

99. The complaint was for money loaned, and set out a draft drawn by defendants on a house in Boston, which was drawn with the understanding that plaintiff should pay the same, which he did; but did not aver that after paying the draft he canceled it, and delivered it to

defendants: held, that the action should have been maintained on the outstanding draft. *Lambert v. Slade*, 3 Cal. 331.

100. No right of action can accrue upon a draft to the drawee, until payment. *Wakeman v. Vanderbilt*, 3 Cal. 382.

101. A complaint is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone v. Laurencel*, 4 Cal. 277.

102. The party to whom a note is made payable is prima facie the owner, and his right to maintain the action cannot be questioned on that ground. *Price v. Dunlap*, 5 Cal. 485.

103. A note payable to the plaintiff, although it describes him as the agent of another, does not take away the right of the agent to sue in his own name, at law. *Ord v. McKee*, 5 Cal. 516.

104. Where a creditor commenced an attachment suit against his debtor on four promissory notes, one of which was not due, and obtained judgment by default: held, that it was fraudulent and void as to subsequent attaching creditors, and that the judgment must stand or fall as a whole. *Taaffe v. Josephson*, 7 Cal. 356; overruled in *Patrick v. Montader*, 13 Cal. 442.

105. The failure of a holder of a note to sue when requested by a surety does not operate to discharge the liability of the latter. *Hartman v. Burlingame*, 9 Cal. 561.

106. F. & H. made and delivered to S. a joint and several promissory note for \$4,500; afterwards, and before the maturity of this note, S. gave his note for \$1,000, with large interest, to C., and endorsed and delivered as collateral security the note of F. and H. for \$4,500. C. subsequently assigned S.'s note of \$1,000 to F. and delivered the note of F. and H. as collateral security, or as he held it. After this, S. sold and assigned the note of F. and H. for \$4,500, then in the possession of F., to D., the plaintiff. D. subsequently demanded of F. the \$4,500 note, offering to credit the same, with the amount of the \$1,000 note, and interest. F. declined to deliver the note, and D. brought suit to recover the amount of F. and H., less the \$1,000 note and interest: held, that the suit was properly brought, and that D. is entitled to recover on the note against F. and H., less the amount of the \$1,000 note and interest. *Dupré v. Fall*, 10 Cal. 430.

Defense.

1. Defense.

107. Where the complaint alleges the making and endorsing of a promissory note, and the answer denies neither signature, the answer should be stricken out, and the plaintiff be entitled to judgment. *Grogan v. Ruckle*, 1 Cal. 196.

108. An endorsee, after maturity, takes the same interest that the endorser had, and his claim is subject to the same legal and equitable defense. *Folsom v. Bartlett*, 2 Cal. 164.

109. A negotiable note, taken after maturity, is subject to all subsisting equities between the maker and payee, but not between the maker and any intermediate holder. *Vinton v. Crowe*, 4 Cal. 309.

110. It is not a good plea to allege that the note sued on is the property of another, and not of the plaintiff, without showing some substantial matter of defense against the one asserted to be the owner, and which could not be set up against the plaintiff. *Gushee v. Leavitt*, 5 Cal. 161.

111. It is no defense to a note given by one partner to the other for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note. *Case v. Maxey*, 6 Cal. 277.

112. Where the plaintiff gave his note, payable four months after date, in consideration of which the defendants executed a contract for a deed of land, upon payment of the note: held, that after a tender of the deed, and demand and refusal to pay the note after its maturity, the plaintiff had forfeited his right to insist on a performance of the contract. *Pearis v. Corillaud*, 6 Cal. 621.

113. Where a negotiable promissory note, not yet due, is taken bona fide as collateral security for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne v. Bensley*, 8 Cal. 266; *Robinson v. Smith*, 14 Cal. 98; *Naglee v. Lyman*, 14 Cal. 454.

114. If there is any new consideration for the assignment of a promissory note, then the assignee is a holder for value, and the maker is precluded from resorting to defenses that he might make against the

payee were the suit brought by him. *Payne v. Bensley*, 8 Cal. 266.

115. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

116. L. advanced to H. four hundred and seventy-six dollars, and received from H., for collection, an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H., and took H.'s note for the amount advanced. In a suit for the note, H. set up as a defense laches on the part of L. in not presenting the order, by means of which the debt was lost: held, that if there were any laches, they were waived by the execution of the note. *Leonard v. Hastings*, 9 Cal. 237.

117. Where a complaint, in an action on a promissory note executed by two defendants, averred that the defendants were partners, and that the note was executed by them; and the answer simply denied that the defendants were partners, and did not deny that they executed the note: held, that the averment of partnership was immaterial; and that plaintiff was entitled to judgment on the pleadings. *Whitwell v. Thomas*, 9 Cal. 499.

118. An answer to a suit on a promissory note by the assignee, which sets up as one defense: first, that the note was made payable to order, and was afterwards fraudulently altered by inserting the word "bearer" in lieu of the word "order;" second, that the defendant paid the note before assignment; third, that the note was assigned to plaintiff after maturity, &c.: held, that if true, they are amply sufficient to defeat the action. *Sherman v. Rolberg*, 11 Cal. 41.

119. Where in a mortgage to secure the purchase money of land, for which notes were given falling due at different times, the condition was: "provided, that previous to the dates of said payments, it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession;" the holder of one of the notes, transferred before ma-

 Defense.—Want of Consideration.

turity, may sue on it at maturity, although the title to the land has not been settled, and peaceable possession not given. *Robinson v. Smith*, 14 Cal. 99.

120. The fact that the purchaser of the note saw the mortgage and note was no notice to him of any valid defense to the note. *Ib.* 100.

121. In a suit on a note, the complaint containing the note or a copy, the denial of indebtedness is no denial at all. *Kinney v. Osborne*, 14 Cal. 113.

122. Where, in an action on a lost note, a verified complaint alleges that on a particular day the note in question was made by defendant and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Castro v. Wetmore*, 16 Cal. 380.

123. Where, in an action on a lost note, the complaint verified alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Ib.*

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a. Want of Consideration.

124. Where a note was given on the sale of real estate, and the vendor had neither title, nor color of title, nor possession: held, that the consideration might be inquired into, as between the original parties; and that there being no consideration, the payee could not recover against the maker, and that a guarantor on the note without consideration was not liable. *Fisher v. Salmon*, 1 Cal. 414.

125. Although want of, or illegality of consideration may be inquired into, in an action upon a bill or note between the original parties, by the general mercantile law the maker is estopped from setting up this defense where the securities have passed into the hands of innocent third parties, unless made void by statute. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

126. Where, by an agreement for the sale or purchase of land, the price is pay-

able in instalments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last instalment, and suit is brought on the notes after all the instalments have become due, the tender of a conveyance by the vendor is a condition precedent to the right to sue; and the purchaser may insist on the want of such tender against an endorsee, after maturity. *Folsom v. Bartling*, 2 Cal. 164.

127. In defense to a promissory note, it is not sufficient to plead in general terms want of consideration and that the note was obtained by fraud, without setting out the facts. *Gushee v. Leavitt*, 5 Cal. 160.

128. Where a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: held, that the liability thus assumed is not a conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer v. Tripp*, 8 Cal. 97.

129. Where A gave his promissory note to B, in part payment for a certain tract of land, payable to B thirty days after the confirmation of the Sutter land title; provided the land for which the note was given should be included in the limits of the grant: held, that the confirmation of Sutter's title was a condition precedent to the payment of the note; and to entitle A to a judgment on such note, he must prove such confirmation. *Sanders v. Whitesides*, 10 Cal. 89.

130. The presumption is that promissory notes are given upon a valid consideration; but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Fuller v. Hutchings*, 10 Cal. 526.

131. Where one of the grantees, under the "swamp and overflowed land" act of 1857, enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant, upon payment of the several notes given as the consideration; will complete the canals

Fraudulent Consideration.—Payment.

within the five years allowed; and that by means thereof and the operation of the statute they will have a good and valid title to the premises: held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the State with the vendor and his associates—the agreement itself providing for a surrender of the unpaid notes, and a return of the money paid, in case of future failure of title, and the rights of the grantees of the State being fully known to defendant. *Montgomery v. Kasson*, 16 Cal. 195.

b. Fraudulent Consideration.

132. Where, in an action on a promissory note, the defense set up is that defendant executed the note as the consideration for a deed from the plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein; the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

133. Where a party has given a promissory note, and the payee assigns the note, without recourse after maturity, and suit is brought upon the note by the assignee, and the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: held, that the case was a proper one for equitable relief; and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 102.

134. L. executed and delivered his note to N. without consideration, and for the purpose of defrauding, hindering and delaying creditors. N. had knowledge of the fraud, and sued and attached upon the note L.'s property. After this, W., a creditor of L., also attached and levied upon the same property. Before judgment, N., for a valuable consideration, assigned the note to J., who knew nothing of the fraud: held, that J. was not protected in his purchase; N. having been super-

seded by W.'s attachment could not, by any act or deed of his, put his assignee in any better position than he occupied himself. *Wright v. Levy*, 12 Cal. 263.

135. If any portion of the consideration of a note be fraudulent, the entire note is void, as against creditors. *McKenty v. Gladwin*, 10 Cal. 229.

136. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors. *Scales v. Scott*, 13 Cal. 78.

137. Suit on a note for the purchase of land. Answer sets up that the note was given for the land, fencing and building materials; that plaintiffs falsely represented that there was building material for building a barn; that this material was so insufficient in quantity, that it cost defendant six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: held, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to the fences, they being part of the freehold. *Kinney v. Osborne*, 14 Cal. 113.

138. Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment, by taking the note of third persons, not negotiable in the mercantile sense, in payment; the makers of the note agreed to this under the supposition, induced by him, that he was the owner of the judgment: held, that the makers of the note, upon discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

X. PAYMENT.

139. Where payment by the maker to the endorser is relied on as an excuse for want of demand and notice, it must be a payment directly and specifically for the note, and not as security for all transac-

Payment.—Extension of time for Payment.

tions in the aggregate. *Van Norden v. Buckley*, 5 Cal. 284.

140. Where the maker does not specify that the payment to the endorser was to meet the endorsed note, the endorser had a right to apply it to any indebtedness he held against the maker, and to stand upon his strict legal rights as to demand and notice in regard to the endorsed note. *Ib.*

141. Where a note was delivered to the maker long before it became due, upon his giving the holder an order on the endorsers, which was dishonored, and thereupon it was returned to the holder, it did not operate as a payment. *Smith v. Harper*, 5 Cal. 330.

142. Where the holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check, or it will be a substitution of new security to discharge the endorser. *Ib.*

143. When the plaintiff employs an agent to collect a note due from the defendant, and the defendant employs the same agent to collect other notes due him, and apply the same on plaintiff's note, and the agent becomes insolvent after collecting the money due on defendant's account: held, that unless the appropriation was actually made, the loss occasioned by the failure of the agent must fall on the defendant. *Phillips v. Mayer*, 7 Cal. 83.

144. Where F. sued on a note which had two endorsements, signed by the payee; the first a receipt from F. for the amount due; the second, in the words "without recourse to me:" held, that there was no presumption that the endorsements were made at different times, or that the payment was a voluntary unconditional payment. *Frank v. Brady*, 8 Cal. 49.

145. When the payment of a promissory note is by agreement made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made. *Rogers v. Cody*, 8 Cal. 324.

146. A payor is not permitted to contradict the words, by showing that when he promised to pay absolutely, he meant to bind himself to pay conditionally, or on some contingency, or if another did not, or if demand was made and notice given. *Aud v. Magruder*, 10 Cal. 289.

147. An agent for the collection of the note is confined to the taking of money in payment, and has no power to take goods in payment unless specific authority is given. *Mudgett v. Day*, 12 Cal. 140.

148. A part payment of the demand by one of two debtors is no consideration for a discharge to him of the balance. The payment of the entire amount was the obligation of both; the partial payment was but a partial discharge of the existing obligation, and furnished no claim for the relinquishment of any rights for the residue. *Griffith v. Grogan*, 12 Cal. 324.

149. Unless a note was received by express agreement as payment, it did not extinguish the debt. It only operated to extend the time of payment of the debt to the time the note fell due, and hence the statute of limitations would commence running only from that time. *Ib.*

150. Paying part of a note when all is due is no consideration for an agreement to extend the time of payment. *Liening v. Gould*, 13 Cal. 599.

151. A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution; and where he takes a note, endorses it on the execution, and then returns it satisfied, the action is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 666.

152. Suit on a note. Defendants answered by pleading payment, and averring payment at divers times of money to plaintiff's intestate, which he promised to apply on the note. Plaintiff put the note in evidence and rested. Defendants offered receipts to prove payment. To rebut this, plaintiff offered proof tending to show that these payments applied to an open account against defendants. Defendants then proposed to rebut by showing that there was no such account made or existing. Court refused to permit it: held, that the court erred; that the burden of proof was really on defendants to prove payment under the issue, and that they were entitled to close the proofs; at least, to rebut new matter set up by plaintiff. *Lisman v. Early*, 15 Cal. 200.

Interest on a Bill or Note.—Notes described in Insolvent's schedule.

1. *Extension of time of payment.*

153. An agreement for the extension of the time of payment of a promissory note if without consideration, is void. *McCann v. Lewis*, 9 Cal. 247.

154. A mere extension of time to the maker is not a sufficient plea to discharge the surety or endorser; there must be an extension of time on an agreement with the maker, founded upon a valid consideration, and such as will suspend the right of action against the maker. *Williams v. Covillaud*, 10 Cal. 426.

155. The mere fact that the holder, having a good note satisfactorily guaranteed and drawing a fair rate of interest, rests without suit until the period of guaranty has passed, is not a very pregnant circumstance to prove that there had been a contract made with the maker to wait till that period. *Ib.* 428.

156. The renewal of a note in part could not alter the original relations of the parties as debtors and creditors, except in the increased extension of the time of payment, after the maturity of the renewed note. *Griffith v. Grogan*, 12 Cal. 324.

XI. INTEREST ON A BILL OR NOTE.

157. In a judgment on a note bearing interest, the interest is to be computed and made part of the judgment, and the judgment to bear the agreed interest. *Emeric v. Tams*, 6 Cal. 156; *Mount v. Chapman*, 9 Cal. 297; *McCann v. Lewis*, 9 Cal. 247; *Guy v. Franklin*, 5 Cal. 417.

158. Where a note bore no interest other than legal interest, which was ten per cent. per annum, and conventional interest was ten per cent. per month, this fact alone would raise the presumption that the parties understood that the note should be paid at maturity. *Brown v. Covillaud*, 6 Cal. 572.

159. Where a promissory note was made bearing interest monthly, but leaving the rate of interest in blank, if the rate of interest is filled in by the holder, he cannot, without some evidence of agreement, recover more than legal interest, though he had passed the note then filled up to an innocent purchaser—the maker

would be liable. *Fisher v. Dennis*, 6 Cal. 579; *Visher v. Webster*, 8 Cal. 112.

160. Where a promissory note is payable three months after date, with interest at the rate of — per month, the interest runs from the date of the note. *Dewey v. Bowman*, 8 Cal. 149.

161. Interest which is included in a note is as much a part of the sum for which the note was given as the principal sum itself. *McKenty v. Gladwin*, 10 Cal. 229; *Scales v. Scott*, 13 Cal. 79.

162. Where a note is antedated for the purpose of making it draw interest, for which there is no consideration, it is void as to creditors. *Ib.* 230.

163. Where a note on its face draws two and a half per cent. per month interest, parol evidence is inadmissible to prove that from a certain time the interest had been reduced, by a verbal agreement between the parties, to one and a half per cent. per month. Interest beyond the statutory rate cannot be established by parol. *Adler v. Friedman*, 16 Cal. 140.

XII. NOTES DESCRIBED IN INSOLVENT'S SCHEDULE.*

164. Where an insolvent was liable on a note, and describes the same incorrectly in his schedule: held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strobe*, 7 Cal. 431; *Judson v. Atwill*, 478.

165. The discharge by a decree under the insolvent act from the payment of the note does not release the lien of the mortgage executed to secure its payment. *Luning v. Brady*, 10 Cal. 267.

166. A note for five hundred dollars to the order of Alfred McCarty is insufficiently described in an insolvent's schedule, where he simply states, "Alfred McCarty, borrowed money, April, 1855, five hundred dollars," and a discharge in such case is no bar to a suit on a note. *McCarty v. Christie*, 13 Cal. 81.

*The amendment of April 27th, 1860, to the insolvent law of 1851 discharges the debt, whether imperfectly described or not described at all.

Notes secured by Mortgage.

XIII. NOTES SECURED BY MORTGAGE.

167. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336; *Bennett v. Taylor*, 5 Cal. 502; *Ord v. McKee*, 5 Cal. 516; *Bennett v. Solomon*, 6 Cal. 138; *Phelan v. Olney*, 6 Cal. 483; *Belloc v. Rogers*, 9 Cal. 125; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Hickox v. Lowe*, 10 Cal. 206; *Koch v. Briggs*, 14 Cal. 263.

168. A note executed to O. as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with M., was entitled to one-half of the note: held, that O., having a right to the note, had a right to foreclose the mortgage. *Ord v. McKee*, 5 Cal. 516.

169. Where a new note, on the same terms, between the same parties, for the same sum, and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring v. Hill*, 6 Cal. 18.

170. The endorsement and delivery of one of two notes secured by a mortgage carries with it a pro rata portion of the security. *Phelan v. Olney*, 6 Cal. 483.

171. The purchaser of one of two notes secured by a mortgage, and the assignee of the mortgage itself, takes the assignment with notice of the equity of the holder of the other notes, as he is informed by the deed itself that it was given as security for two notes of equal amount, neither of which was due. *Ib.*

172. The holders of two notes secured by one mortgage stand in the same relation to the mortgaged premises until a discharge of the mortgage and acceptance of a different security. This discharge by one, though void as to the other, is valid as to the maker, and divests any lien which he had by virtue of said mortgage. *Ib.*

173. The discharge by a decree under the insolvent act from the payment of the note, did not release the lien of the mortgage executed to secure its payment. *Luning v. Brady*, 10 Cal. 267.

174. A note executed by the whole of the associates in this joint enterprise to three of them, the plaintiffs below, is

equivalent, we think, to a note and mortgage executed by the defendants to the plaintiffs for an amount less, by the proportion of the number of plaintiffs to the defendants, and may be enforced in equity in like manner as if so executed. *McDowell v. Jacobs*, 10 Cal. 389.

175. In a suit on a promissory note and mortgage, the court may give a general judgment for the amount due on the note, at the same time a decree of foreclosure of the mortgaged premises. *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

176. A corporation may bind itself by a note and mortgage made by its president and secretary and signed by them in their official capacity as such. *Ib.*

177. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

178. Where a husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer v. Riehn*, 13 Cal. 649.

179. Because a mortgage given to secure the payment of several notes falling due at different times provides for payment at times or in modes different from the notes, is no objection to suit on the notes at maturity. The mortgage is not a part of the contract of indebtedness. *Robinson v. Smith*, 14 Cal. 98.

180. Where a mortgage is conditioned to pay a note "according to the tenor and conditions thereof," and the note is recited as a "certain promissory note for the payment of the sum of \$3,500 on the sixth day of June, A. D. 1858, at the said Pine Grove, with interest at the rate of two per cent. per month from date till paid," the statute is complied with as to setting out the sum to be secured, the rate of interest to be paid, and when payable. *Ede v. Johnson*, 15 Cal. 57.

181. At one time, seven shares of stock

Bill of Lading.

in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock, and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

FOR ENDORSEMENT OF BILLS AND NOTES, see ENDORSEMENT.

BILL OF ITEMS.

See ITEMS.

BILL OF LADING.

1. Delivery of part of the goods mentioned in one bill of lading to the consignee does not defeat a lien on the remainder for the whole freight unpaid. *Frothingham v. Jenkins*, 1 Cal. 43.

2. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading until the whole freight is paid; and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. *Ib.*

3. The endorsement of a bill of lading prima facie vests the property in the goods mentioned therein in the endorsee; but a bill of lading is not a negotiable instrument, so far as to enable an endorsee, who has no property either general or special in the goods, and no lien thereon for advances or otherwise, to sue the master of a ship in his own name for the non-delivery of the goods, where it appears on

the face of the complaint that the plaintiff, the endorsee, is a mere naked agent of the shippers. *Lineker v. Ayeshford*, 1 Cal. 79.

4. If a bill of lading be assigned by the consignee bona fide for a valuable consideration, without notice of any adverse interest, the property in the goods mentioned therein becomes vested in the endorsee. *Ib.* 81.

5. The consignee or endorsee of a bill of lading is in general to be deemed the presumptive owner of the goods, if they are shipped on account and risk of the consignee, liable, however, to be explained or rebutted as in any other receipt. *Ib.*

6. An agent cannot ordinarily sue in his own name in respect to the subject matter of his agency, and this rule applies to consignees and endorsees of bills of lading when they are in truth but the agent of the shippers. *Ib.* 82.

7. An agent, whether factor, consignee or endorsee of a bill of lading, having no property in the goods either general or special, and no lien upon them for advances or otherwise, cannot maintain an action for the nondelivery of goods against the ship owner or master who claims to hold the goods for the assignees of the shippers. *Ib.* 83.

8. Where the consignor of a vessel received from a consignee in a bill of lading the freight for his goods shipped in the vessel, and previously endorsed an order to another person to receive the goods: held, he was liable to the consignee of the bill of lading for a conversion of his goods. *Webb v. Winter*, 1 Cal. 418.

9. The consignee named in a bill of lading is to be deemed prima facie the owner of the goods mentioned therein, and upon the payment of freight may maintain an action against any person who assumes a control over them in violation of his rights of property. *Ib.*

10. Where suit is brought on a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo v. Stansbury*, 3 Cal. 467.

11. A party being about to fail can assign a bill of lading of goods to arrive, not yet paid for, to another in trust to devote the proceeds to the payment of the vendor, and such assignment is good against attaching creditors. *Le Cacheux v. Cutter*, 6 Cal. 519.

Bill of Lading.—In general.

12. A bill of lading clear upon its face and without endorsement is not sufficient to put third persons upon inquiry as to the real owner of the property. The holders are presumed to be the real owners. *Glidden v. Lucas*, 7 Cal. 29.

BILL OF SALE.

See SALE.

BOARD OF DELEGATES OF THE
SAN FRANCISCO FIRE DE-
PARTMENT.

See FIRE DEPARTMENT.

BOARD OF EXAMINERS OF THE
STATE DEBT.

See INDEBTEDNESS OF THE STATE.

BOARD OF SUPERVISORS.

SEE SUPERVISORS.

BOARD OF UNITED STATES
LAND COMMISSIONERS.

See LAND COMMISSIONERS.

BOATS.

See ADMIRALTY.

BOOKS OF ACCOUNT.

See ACCOUNT BOOKS.

BONDS.

- I. In general.
- II. Official Bonds.
- III. Bond for a Title.

I. IN GENERAL.

1. In an action upon a bond to be valid in the happening of a certain event, or performance of a certain act, the complaint must aver that the event has happened or the act performed as a condition precedent to recovery. *Mickle v. Sanchez*, 1 Cal. 201; *People v. Smith*, 2 Cal. 272; *Palmer v. Melvin*, 6 Cal. 652; *Mattoon v. Eder*, 6 Cal. 59; *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Cal. 572; *Bensley v. Atwill*, 12 Cal. 240.

2. In an action upon a bond there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 89.

3. Where the condition of a bond is to pay the debt of another, the condition operating merely by way of defeasance; and if a defendant chooses to put his obligation in that form, he elects to be originally liable. A bond should be sued on setting out breaches and damages. Assumpsit on the condition would be bad on demurrer. *Baker v. Cornwall*, 4 Cal. 16.

4. An omission to allege delivery in an action on a bond can be taken advantage of only on demurrer. *Garcia v. Satrustegui*, 4 Cal. 244.

5. The district attorney can bring suit

In general.—Official Bonds.

against the sureties on a bail bond at any time after the adjournment of the term at which the recognizance was declared forfeited, nor can the sureties avail themselves, in defense to an action thereon, of an insufficiency of the justification of the bond. *People v. Carpenter*, 7 Cal. 403.

6. Where plaintiff filed a bill in equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant file a bond to account as receiver, which defendant did, and judgment for \$20,000 was rendered against defendant in that suit, and proper demand being made and refused, suit was brought by plaintiff on this bond, which was made payable to the people of the State of California: held, that the plaintiff could recover thereon. *Baker v. Bartol*, 7 Cal. 553.

7. A plaintiff being the real party in interest has a right to sue upon a bond, though made payable to the people of the State. *Taaffe v. Rosenthal*, 7 Cal. 518; *Baker v. Bartol*, 7 Cal. 554.

8. Under our statute undertakings are on the same footing as bonds. *Canfield v. Bates*, 13 Cal. 608.

9. A bond given to the sheriff voluntarily, on the delivery of property attached, though not a statutory undertaking, is valid as a common law obligation. *Palmer v. Vance*, 13 Cal. 556.

10. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only; it differs from an undertaking. *City of Sacramento v. Dunlap*, 14 Cal. 423.

11. Otherwise as to joint and several bonds. There each signer is bound without the signatures of the others named as obligors, unless at the time of executing the bond he declared he would not be bound without such signatures were obtained. *City of Sacramento v. Dunlap*, 14 Cal. 424.

II. OFFICIAL BONDS.

12. Under the provisions of law requiring certain officers to file their official bonds with the secretary of State within a specified period, with the approval of the governor endorsed thereon and duly

signed by him, and declaring an office to be vacated by the neglect so to do in a specified time, the failure of the governor to endorse his approval on the bond does not vacate an office where an incumbent has within the time fixed by law given a sufficient bond, presented it to the governor for his approval, and deposited it in the office of the secretary of State. *People v. Fitch*, 1 Cal. 534; *People v. Scannell*, 7 Cal. 440.

13. It devolves upon an officer to see that proper bonds are filed, and the State has no right to visit upon a party the laches of her own officer. *People v. Aikenhead*, 5 Cal. 107.

14. When an officer is elected for a new term he should give a new bond, and the sureties on a bond of an officer for one term will not be liable for any act done by him after an election to a second term. *Ib.*

15. A bond not under seal is not the character of security which is required to be given by notaries public under the statute, and no recovery can be had thereon. *Van de Castele v. Cornwall*, 5 Cal. 426.

16. An official bond made to "the people of the State of California" is sufficient, though the statute required it to be made "to the State of California." All that is requisite is that there should be a certain obligee, and either of the above names is descriptive of the same sovereignty and may be indifferently used, as they are in various statutes. *Tevie v. Randall*, 6 Cal. 635.

17. A condition in a notary's bond that he shall well and truly discharge the duties of his office according to law, is the only proper condition to be inserted in his bond. *Ib.*

18. Where the law requires a joint and several bond, and the officer filed a bond which was in form joint, and not joint and several: held, that he and his sureties cannot complain that their obligation is less burthensome than the law required. *Ib.*

19. The absence of the statutory requirements does not invalidate the bond. *Ib.*

20. The consolidation act of San Francisco gave the officers named therein two days after the meeting of the board of supervisors in which to file new bonds. The meeting took place on the ninth of July,

Official Bonds.

and the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 436.

21. The defect in the approval of the bond of an officer, if any existed, could not avail the sureties. The object of approval is to ensure greater security to the public, and it does not lie in the defendants to object that their bond was accepted without proper examination. *People v. Edwards*, 9 Cal. 292.

22. The statute which provides that every such bond shall be obligatory upon the principal and sureties therein for the faithful discharge of all duties which may be required of the officer by any law enacted subsequently, applies only to duties properly appertaining to his office, with the execution of which he may be charged. *Ib.*

23. The principal and each surety on an official bond obligate themselves jointly and severally in the specific sums designated, and although all the parties may be included in the same action, separate judgments are required; none can be entered against the parties for a greater amount than for the payment of which they have respectively bound themselves. *Ib.* 293.

24. The provisions of the statute empowering the board of supervisors to require new bonds of any county or township officer, with additional securities, whenever they deem the same necessary, does not leave the exercise of the power to their arbitrary discretion. By the term "whenever they deem the same necessary," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is a necessity for further security. *People v. Supervisors of Marin County*, 10 Cal. 345.

25. In determining upon the sufficiency of a bond of an officer, and whether the officer by his failure to comply with the requisition of the supervisors to file a new bond has vacated his office, the supervisors exercise powers of a judicial character. *Ib.*

26. An order of the supervisors requiring a new bond of an officer should specify the grounds upon which the order is made. *Ib.*

27. Officers are not to be subjected to the annoyance of giving a new bond upon the mere caprice of the supervisors, and

they must disclose in the order the object of their order. *Ib.* 346.

28. No duty to approve the bond of county officers is imposed upon the supervisors, nor are they even authorized to give such approval. *Ib.*

29. The general bond of the sheriff is made to cover his liabilities as tax collector, though it does not, it seems, cover his liability as collector of taxes of miners' licenses. *People v. Squires*, 14 Cal. 16.

30. An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the nonfeasance or misfeasance of the officer. *Van Pelt v. Littler*, 14 Cal. 196.

31. Where a sheriff or constable seizes the property of one man under an execution against another he is a trespasser, and liable on his official bond. *Ib.* 199.

32. In case of official bonds the sureties undertake in general terms that the principal will perform his official duties, and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Pico v. Webster*, 14 Cal. 204.

33. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of the court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to

Bond for a Title.—In general.

sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss v. White*, 16 Cal. 68.

34. Sureties on the sheriff's official bond in this State stipulate for his official, not his personal dealings, and are entitled to stand on the precise terms of their contract. *Ib.*

III. BOND FOR A TITLE.

35. Where the parties to a bond for title stipulate among themselves for a forfeiture, such forfeiture cannot defeat the plaintiff's rights to the purchase money. *Bagley v. Eaton*, 5 Cal. 500.

36. The breach of a bond for title does not discharge the debt due for the purchase money, and the plaintiff can resort to equity to enforce its performance, or maintain an action at law. *Ib.*

37. At common law a bond for a title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Merritt v. Judd*, 14 Cal. 73.

See SURETIES, UNDERTAKING.

BOUNDARIES.

See METES AND BOUNDS.

BRIBERY.

1. Defendant, a judge of the court of sessions, was charged with receiving money as a bribe not to forfeit a recogniz-

ance. There was no allegation that there was any proceeding commenced upon the recognizance, nor was there any, and the statute against bribery confines the offense to acting "more favorable to one side than another in any suit," etc.: it was held that neither charge was sufficiently set out to warrant a conviction. *People v. Purley*, 1 Cal. 566.

See CRIMES AND CRIMINAL LAW.

BRIDGES AND FERRIES.

- I. In general.
- II. License and granting the same.
- III. Liabilities of the Owner.

I. IN GENERAL.

1. Where the southern line of a creek was the dividing line between the city of Oakland and the remainder of Contra Costa county, both the city and county have jurisdiction to build a bridge over the creek. *Gilman v. Contra Costa County*, 5 Cal. 428.

2. A ferry is a franchise, and is not the subject of levy, sale or delivery under execution. It involves a personal trust granted by the sovereign upon conditions imposed upon the grantee alone, and his liability cannot be removed by substitution. *Monroe v. Thomas*, 5 Cal. 471; *Thomas v. Armstrong*, 7 Cal. 287.

3. The sale of a "bridge" across a certain stream, "together with the toll house, stables and out-houses of every description," and "all the privileges and appurtenances appertaining, or in any wise belonging to said bridge," passes the land upon which the bridge rested and the other buildings were erected. *Sparks v. Hess*, 15 Cal. 195.

4. Where a party purchases a bridge, toll houses, stables and out-houses appurtenant with the right and privilege of his vendor in and to a dug road made on each side of the bridge, neither the purchaser nor those claiming under him, with notice, can object to a decree enforcing the vendor's lien against the premises; that

License and granting the same.

the dug road is public land, and that therefore nothing would pass under the sale upon the decree. *Ib.* 197.

II. LICENSE AND GRANTING THE SAME.

5. No appeal lies from a judgment of a district court on an appeal from an order of the court of sessions* upon an application of a ferry license. *Webb v. Hanson*, 2 Cal. 134.

6. Courts have a discretion in granting a ferry license within two miles of an established ferry, to be exercised for the promotion of public convenience. *Ex parte Hanson*, 2 Cal. 263.

7. The act of March 18th, 1850, grants an appeal to the district court from the court of sessions* in the matter of a license to establish a ferry, but does not provide for an appeal from the judgment of a district court. No appeal can then be had in the latter case. *Webb v. Hanson*, 3 Cal. 68; 105.

8. In an action brought to recover damages by the owners of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, the complaint should allege that the defendant ran his ferry for a fee or reward, or the promise or expectation of it, other than for his own use or the convenience of his family. *Hanson v. Webb*, 3 Cal. 237.

9. A party must fully comply with the laws to entitle him to bring suit for an interference with his ferry privileges, and to entitle him to claim a renewal of his license as a vested right in the privileges of keeping and maintaining his ferry. *Norris v. Lapsley*, 5 Cal. 47.

10. In an action against a ferryman, it is not error to allow the plaintiff to introduce a ferry license after motion of nonsuit; it is a matter within the discretion of the court below. *May v. Hanson*, 5 Cal. 365.

11. At common law no bridge or ferry could be erected so near another, bound by law to be provided with attendance, crafts, etc., as to draw away its profits. *Norris v. Farmers' and Teamsters' Co.*, 6 Cal. 594.

12. In this State no person has a right

to establish a bridge or ferry so as to receive compensation for the same, unless authorized so to do by license issued according to law. *Ib.* 597.

13. A free bridge or ferry in the immediate vicinity of one regularly licensed and receiving toll would be more injurious than the establishment of a regularly licensed bridge or ferry; for the one would only divide the profits; the other would be apt to render the bridge or ferry receiving toll of no value whatsoever. *Ib.*

14. The fact that a free bridge or ferry established within one mile of one already licensed issued certificates for one dollar, by which the holder was entitled to passage for one month, does not constitute the holder a joint stockholder in the bridge or ferry. It is but another mode of payment and a mere evasion of the law, and subjects the owners to punishment for a misdemeanor under the statute. *Ib.* 598.

15. The power to grant a ferry license is not judicial, and its exercise properly belongs to the supervisors, and not to a county judge. *Chard v. Harrison*, 7 Cal. 116.

16. A ferry owner, whose license has expired, does not lose his right to a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises. *Chard v. Stone*, 7 Cal. 117.

17. Such a ferry owner, thus prevented from obtaining a renewal of his license, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the county judge, within a mile of a first established ferry. *Ib.*

18. The act of 1855 makes it a misdemeanor to run a ferry for pay, without a license, and provides that no toll-ferry or bridge shall be established within one mile of one regularly licensed, unless required by public convenience, etc. This does not confer a franchise upon which the owner of a regularly established ferry can maintain a civil action for its infringement. *Ward v. Severance*, 7 Cal. 129.

19. Where the supervisors, in the exercise of their discretion, determined, after hearing testimony, that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award

*The appellate jurisdiction of the district court held to be unconstitutional. See DISTRICT COURT.

License and granting the same.—Liabilities of the Owner.—Broker.—Burglary.

a license to another, supposing that he had succeeded to the rights of the owners of the franchise, the error may be corrected by mandamus, or any other proper proceeding. *Thomas v. Armstrong*, 7 Cal. 287.

20. A kept a ferry across the Sacramento river, under a license which had expired. Having lost his boat, he contracted with B to furnish, rig and run another under the license to A, which he was to renew, until the profits should repay B's advances, with interest. A neglected to renew his license. B, after waiting four months, applied for and obtained a license in his own name, and ran a ferry under the same. A brought suit against B for an accounting and return of the ferry: held, that A had failed to carry out his agreement, and could not recover. *Tartar v. Finch*, 9 Cal. 276.

21. The statute gives the supervisors discretionary power over the location of new bridges and ferries within a mile of those previously established; and if, in the opinion of the board, public convenience requires, such new bridges and ferries may be so located. *Waugh v. Chancey*, 13 Cal. 12.

22. The general doctrine of the United States now is, that the grant of a ferry, bridge, or road franchise does not carry with it a restriction upon the granting power to make a similar grant to other grantees, though the last grant necessarily interferes with the profits and business of the first. *Indian Canon Road Co. v. Robinson*, 13 Cal. 519.

III. LIABILITIES OF THE OWNER.

23. The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities. *May v. Hanson*, 5 Cal. 364.

24. A ferryman undertakes to safely transport passengers or freight from and to certain points, and from the moment that he receives until he has delivered his freight in a proper and safe manner, he will be liable. It applies to the delivery as well as to the receipt of goods. *Ib.*

25. It is the duty of the ferryman to see that the teams are safely driven on board the boat; he may, if he thinks prop-

er, drive himself, or may unharness the team, or unload them, for the purpose of getting them safely on board; but if he permits the party to drive himself, he constitutes him, quoad hoc, his agent, and is responsible for all accidents. *Ib.*

26. As soon as the ferryman signifies his assent or readiness to receive the passenger, he becomes liable for his safe transit and delivery, and is chargeable with any accident occurring, except by act of God or the public enemy. *Ib.*

27. In an action against a ferryman, to recover for injuries sustained in driving off from his boat, it is not incumbent on the plaintiff to prove that he exercised ordinary care to avoid the injury; but the proof of the want of such care on the part of the plaintiff lies on the defendant. He who avers a fact in excuse of his own misfeasance must prove it. *Ib.* 365.

28. Where the defendants hold themselves out as public ferrymen: held, that in an action against them for injuries to plaintiff's cattle by the breaking of their wharf, error in the admission of proof of their ferry license could not injure them, as they were responsible in any case. *Polk v. Coffin*, 9 Cal. 58.

BROKER.

1. A broker whose commission or compensation depends on his principal's recovery is incompetent as a witness, on the ground that he is directly interested in the event of the suit. *Shaw v. Davis*, 5 Cal. 467.

2. Where a broker buys wheat for E. & H. with their funds, and an agreement is made between them that the broker shall dispose of the wheat, and that the profits shall be equally divided, the broker is neither partner nor joint owner of the wheat. *Hanna v. Flint*, 14 Cal. 75.

See AGENCY, FACTOR.

BURGLARY.

1. To charge a party with breaking into and entering a dwelling-house with intent

Calaveras County.—Capital.—Capitol Buildings.

to steal the personal goods of another within the house, without specifying the value of the goods intended to be stolen, is not sufficient. *People v. Murray*, 8 Cal. 520.

2. On trial for burglary, the court instructed the jury that if they found from the evidence that defendant entered a certain warehouse in the night time, and took therefrom sundry goods and chattels, he was guilty as charged: held, that the instruction was wrong, because it ignores the felonious intent of the entry and the character of it. *People v. Jenkins*, 16 Cal. 431.

See CRIMES AND CRIMINAL LAW.

CALAVERAS COUNTY.

1. The act of April 27th, 1855, requiring all persons holding certain warrants upon the treasurer of Calaveras county to present the same for registry before a certain day, or be forever barred from enforcing the payment thereof, is unconstitutional. *Robinson v. Magee*, 9 Cal. 83.

CANALS.

See WATER COURSES.

CAPITAL.

1. Our constitution provided that San José should be the capital of the State until changed by law and a two-third vote of the legislature. The people, at an election, selected Vallejo, which was made the capital by law, after which a majority of the legislature may remove the capital; and Sacramento having been made the

capital in this manner, it is not illegal or unconstitutional. *People v. Bigler*, 5 Cal. 29.

CAPITOL BUILDINGS.

1. The act of March 29th, 1860, providing for the construction of a State capitol in the city of Sacramento, is not unconstitutional, as creating an indebtedness or liability on the part of the State exceeding the limit of \$300,000, prescribed in the eighth article of the constitution. The act authorizes the commissioners therein named to contract only to the extent of \$100,000. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

2. No analogy exists between this case and *Nougues v. Douglass*, (7 Cal. 65) because there the act of 1856 authorized a contract in a sum not exceeding \$300,000, payable in State bonds, and at the time of its passage, the State was indebted to the amount limited by the constitution, without a vote of the people. *Ib.*

3. Nor is the act of 1860 unconstitutional, because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action of law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Ib.* 254.

4. The language of the constitution, as to the right of trial by jury, was used with reference to the right as it exists at common law. The right of trial by jury cannot be claimed in equity cases, unless an

Caveat Emptor.—Certificate of Deposit.

issue of fact be framed for the jury, under the direction of the court. *Ib.*

5. In this case, the district judge did not err in refusing the application to set aside the award of the commissioners, and for a new trial. The proceedings before the commissioners were regular, and "appear to have been done in good faith," within the act. *Ib.* 255.

CARGO.

See ADMIRALTY, BILL OF LADING, FREIGHT.

CARRIERS.

See COMMON CARRIERS.

CAVEAT EMPTOR.

1. Caveat emptor applies in sales of real estate where there is no fraud, warranty, &c. *Salmon v. Hoffman*, 2 Cal. 141.

2. Ordinarily, the maxim of caveat emptor applies to judicial sales, but it has many limitations and exceptions. *Webster v. Haworth*, 8 Cal. 26; *Halleck v. Guy*, 9 Cal. 197.

3. A bill of sale for a mining claim, not under seal and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. The doctrine of caveat emptor applies to all such cases. *Clark v. McElvy*, 11 Cal. 160.

4. The doctrine of caveat emptor applies only to sales made upon valid judg-

ments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment; and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 564.

5. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A is essential; and when present, the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes that risk. To that extent the doctrine of caveat emptor applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specially subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Ib.*

See CONTRACT, SALE.

CERTIFICATE OF DEPOSIT.

1. A certificate of deposit is a negotiable security, and, as far as negotiability is concerned, must be placed on the same footing as promissory notes; and an allegation of loss or destruction thereof must be accompanied with the tender of a bond of indemnity against all future claims against it, before payment can be enforced by law. *Welton v. Adams*, 4 Cal. 30.

2. Where the plaintiff filed his bill, as

Certificate of Deposit.—Certiorari.

receiver of an insolvent firm, to foreclose a mortgage given to plaintiffs in that capacity to secure a certificate of deposit for \$100,000, originally deposited by the receiver, and defendants admitted the debt, but claimed that the amount is to be distributed pro rata among the creditors of the insolvents whom the plaintiff represents; that the claims of the creditors have been filed and reported upon; and that defendants are creditors of the insolvents to the amount of the certificate of deposit: held, that equity will not compel them to pay the money into court, which they would immediately be entitled to receive back; but will order an account and set-off. The execution and delivery of the certificate of deposit by defendants changed their character from being custodians of the funds to that of mere debtors of the insolvents. *Naglee v. Palmer*, 7 Cal. 547.

3. Bankers, by the issuance of certificates of general deposit, become liable not to refund to the depositor the specific money deposited, but to pay its amount to the holder of the certificates on their presentation. *McMillan v. Richards*, 9 Cal. 418.

4. Upon the issuance of a certificate of deposit, there is nothing in the possession of the banker belonging to the depositor upon which an attachment can fasten. *Ib.*

5. A certificate of deposit for \$1,800, payable to the order of V., was endorsed, sold and delivered by V. to L. for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V.; subsequently L. transferred the certificate to plaintiff: held, that plaintiff can recover of V. only the four hundred dollars received by him; the certificate being subject, in the hands of plaintiff, to all the equities between the endorser and endorsee. *Coye v. Palmer*, 16 Cal. 159.

6. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal instalments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument,

dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the instalments, and at the different times in said agreement set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates of instalments, at two, four six and eight months from that date: held, that defendant is not liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff, having taken certificates dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. *Gross v. Parrott*, 16 Cal. 145.

See BANKER, BILLS OF EXCHANGE, ENDORSEMENT, PROTEST.

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## CERTIORARI.

1. The authority to issue writs of certiorari given by the statute to the supreme court, is to be regarded only as auxiliary to the complete jurisdiction of the supreme court over proceedings in inferior tribunals, from which appeals lie direct. *Warner v. Hall*, 1 Cal. 91; *Warner v. Kelly*, 1 Cal. 92.

2. As a general rule at common law, where error has occurred in proceedings which cannot be reached by appeal, the writ of certiorari is a proper remedy to correct such error, unless some other statutory remedy has been given. *People v. Turner*, 1 Cal. 156.

3. An order fining and imprisoning for contempt, which does not specify on its face wherein the contempt consisted, will be reversed on certiorari. *Ex parte Field*, 1 Cal. 187.

4. Writs of certiorari may be issued only to courts from whose judgments an appeal would lie to the court granting the writ. *White v. Lighthall*, 1 Cal. 347.

5. If inferior courts exceed their powers, the supreme court, in every case within its reach, would not fail to interfere by certiorari. *Ex parte Hanson*, 2 Cal. 263.



## Certiorari.

6. A certiorari will not lie to a board of supervisors, on the ground of want of jurisdiction: if taken before the action of the board, they must first decide to take, or decline to take jurisdiction. *Wilson v. Supervisors of Sacramento County*, 3 Cal. 388.

7. When it appears from the complaint that the court below must render judgment simply by an inspection of its own records, it is obviously the most proper mode upon an appeal to bring the latter up by a certiorari, in order that it may receive the construction of the appellate court, which is the only object of the appeal. *Parsons v. Davis*, 3 Cal. 425.

8. District courts cannot entertain jurisdiction of cases in a justice's court by certiorari, where the error complained of might be corrected on appeal to the county court. *Gray v. Schupp*, 4 Cal. 185.

9. A certiorari will lie to review a mandamus issued by a county court to a justice, to compel him to issue final process in an action, when the judgment which was sought to be enforced had been reversed by the supreme court. *Clary v. Hoagland*, 5 Cal. 478.

10. A mandamus to compel a judge to issue a certiorari to review proceedings of the supervisors of a county will not lie. There must be an appeal from the order refusing the certiorari. *People v. Hester*, 6 Cal. 680.

11. *The use of the writ of certiorari is confined by our statute to inferior courts, and bodies exercising judicial functions.* *People v. Hester*, 6 Cal. 680; overruled in *People v. Supervisors El Dorado County*, 8 Cal. 61.

12. It is not necessary to the exercise of the power to review, that the court issuing the writ of certiorari should possess appellate jurisdiction, and the writ may issue from a district court to a county judge. *Chard v. Harrison*, 7 Cal. 116.

13. A writ of certiorari is not the proper remedy, where there has been no excess of jurisdiction. *Coulter v. Stark*, 7 Cal. 245.

14. A justice of the peace has jurisdiction to grant appeals, and to stay proceedings thereupon, and his action cannot be reviewed on certiorari. *Ib.*

15. A writ of certiorari will lie to a district court to review the action of the board of supervisors, otherwise their action

would be beyond control. *People v. Supervisors El Dorado County*, 8 Cal. 61; overruling *People v. Hester*, 6 Cal. 680.

16. District judges have power to issue writs of certiorari, and to hear them on their return at chambers. *People v. Supervisors Marin County*, 10 Cal. 346.

17. Where the application for certiorari shows on its face that the party had an adequate legal remedy by appeal, the writ was denied. *Clary v. Hoagland*, 13 Cal. 175.

18. We think it is well settled that a common law certiorari tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. *Whitney v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 500.

19. While it is well settled at common law, and must be regarded so equally under our statute, that the review under this writ cannot be extended beyond the question of power or jurisdiction, the authorities are not agreed as to what may be considered by the court of review for the purpose of determining this question. *Ib.*

20. The cases are numerous to the effect that the review may be extended to every issue of law and fact involved in the question of jurisdiction, and that not only the record, but the evidence itself, when necessary for the determination of this question, must be returned. *Ib.*

21. The decision of the board of delegates of the fire department, in the case of a contested election for chief engineer, is a judicial decision, and subject to review by the courts on certiorari. *Ib.*

22. Whether the decision of an inferior court, establishing the existence of a fact essential to the exercise of its jurisdiction, can be attacked in a collateral proceeding, is a question which does not arise in the case, and in relation to which we express no opinion. We have held such a decision is subject to review upon certiorari. *Lowe v. Alexander*, 15 Cal. 300.

23. Under the consolidation act of 1858, the Board of Supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action in creating such office and raising such salaries may be reviewed on certio-

## Challenge to the Jury.

rari. *Robinson v. Supervisors Sacramento County*, 16 Cal. 209.

24. As to how far, and when the proceedings of such boards are judicial, and hence reviewable on certiorari, and how far and when legislative, and hence not so to be reviewed, discussed. *Ib.*

See MANDAMUS.

## CHALLENGE TO THE JURY.

1. A prisoner in a criminal prosecution, who has not exhausted his peremptory challenges, has the right to challenge peremptorily one of the jurors after the twelve jurors are accepted, but before they are sworn. *People v. Kohle*, 4 Cal. 199.

2. No regular panel having been drawn and summoned, the court ordered thirty-six jurors to be summoned, which was done, and twenty-seven of them appearing, the court caused their names to be placed in a box, of which twelve were drawn to constitute a trial jury: held, not to be ground for challenge by the defendant to the whole panel. *People v. Stuart*, 4 Cal. 224.

3. Where a juror is challenged for actual bias, the triers are to determine the fact from the testimony, and any testimony which would lead to the conclusion that a bias existed in the juror's mind, is competent testimony; as, that the juror was a member of a secret society and had taken oaths inimical to persons of defendant's birth, rank, or religion. *People v. Reyes*, 5 Cal. 349.

4. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion, when expressed, was without qualification: held, that he was properly challenged by the prisoner and should have been rejected. *People v. Williams*, 6 Cal. 207.

5. In a capital case, where a juror on his examination, on his voir dire, by defendant, stated that he had formed and expressed unqualified opinion, etc., the defendant should have challenged him for cause; but where he did not challenge

him, but passed him to the prosecution for examination, on which the juror stated that his opinion was formed by reading the newspapers, whereupon the prosecution accepted the juror, and the defense desired to question the juror further for cause, which was denied, but a peremptory challenge allowed: held, not to be error. *People v. Stonecifer*, 6 Cal. 409.

6. Where a juror in a capital case was asked if he entertained such conscientious opinions as would preclude him from finding the defendant guilty, when the offense charged was punishable with death, to which he answered that he was opposed to capital punishment on principle: held, that it was error to sustain the challenge for cause by the prosecution on such an answer. *People v. Stewart*, 7 Cal. 144.

7. The improper allowance of a challenge by the prosecution is sufficient to cause a reversal of the judgment on a verdict of guilty. If the challenge had been disallowed, the result might have been different, and the prisoner is entitled to be tried by a panel summoned in a particular way. *Ib.*

8. Where several defendants are tried together they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory as to challenges for cause. *People v. McCalla*, 8 Cal. 303.

9. Defendants in criminal cases, who have not been held to answer before the impanneling of the grand jury, may challenge the panel on arraignment. If they have been held to answer, they must challenge the panel before it is made up and sworn. *People v. Beatty*, 14 Cal. 569.

10. Challenges to the panel of the grand jury, or to individual jurors, must be made at the impanneling of the jury; and on indictment for murder transferred to the district court, the challenge cannot there be made. *People v. Moice*, 15 Cal. 331.

11. A challenge for implied bias, in criminal cases, must specify the particular cause of bias. It is not enough to say "I challenge the juror for implied bias." *People v. Reynolds*, 16 Cal. 130.

12. It is proper practice to examine a juror on his voir dire, generally, as to his qualifications, with the view to obtain information upon which to rest a specific challenge. Immediately after such pre-

Character.—Charter Party.

liminary examination is closed the challenge should be made, distinctly stating the causes. The district attorney can then except to the challenge, or deny the facts it alleges; that is, he can demur to its sufficiency, or join the issue on the truth of its averments. If the latter course be adopted, the juror can be further examined, other witnesses called, and the matter then submitted to the court. *Ib.* 131.

13. The allowance of a peremptory challenge, in criminal cases, after the juror has been accepted and sworn, is not matter of right, but may be permitted for good cause. *Ib.*

See JUROR, JURY, VERDICT.

CHANCERY.

See EQUITY.

CHANGE OF PLACE OF TRIAL.

See VENUE.

CHARACTER.

1. No inference can be drawn by a jury of the intention which induced the commission of the offense, from the previous character of the prisoner. His intention can only be determined by his acts; the law will imply a malicious intention. *People v. Milgate*, 5 Cal. 130; *People v. Roberts*, 6 Cal. 217.

2. Evidence of good character is only admissible in doubtful cases, and when admitted, should be restricted to the trait of character which is in issue, and ought to bear some analogy and reference to the nature of the charge. *People v. Josephs*, 7 Cal. 130.

3. On a trial for murder, weakness of

mind, fear and excitement of the defendant, produced by the violence of the deceased, will not justify the homicide. *People v. Hurley*, 8 Cal. 391.

4. The answer of a witness, that the prisoner was a gambler, not considered as an injury to the prisoner, at a time when gambling was licensed by law. *People v. Butler*, 8 Cal. 440.

5. The character of the deceased cannot be given in evidence, unless at the least, the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense or not. *People v. Murray*, 10 Cal. 310.

CHARGE TO THE JURY.

See INSTRUCTION.

CHARTER PARTY.

1. Where it appears clearly from a charter party that the intention of the owner of the ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for the payment of the hire of the vessel. *Brown v. Howard*, 1 Cal. 424.

2. Where it was agreed in a charter party that a vessel should be chartered for fifteen months at \$2,000 per month, to be employed in the Pacific trade, and that the payments for the hire of the vessel should be made semi-annually in the city of New York: held, that the owner of the vessel had lost his right of lien on the cargo for the nonpayment of the sum stipulated in the charter party. *Ib.*

3. The owner of a ship chartered by and in the name of his agent may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will

be allowed to avail himself of its provisions. *Brooks v. Minturn*, 1 Cal. 482.

4. Where by the terms of the charter party made in England, the charterer agreed to insure the advance freight at the ship's expense, it being deducted from the freight money paid, but failed to do so until long after the risk had commenced, by reason whereof the owner was compelled to insure for his own protection, the owner can recover of the charterer the amount paid by him for insurance. *Lawson v. Worms*, 6 Cal. 371.

5. A guarantee endorsed as a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words, "I hereby guarantee the fulfillment of the within charter on the part of the charterer," is good. *Hazeltine v. Larco*, 7 Cal. 34.

See ADMIRALTY, FREIGHT.

## CHECKS.

1. A check is presumptive evidence of payment of a debt due, and not of money loaned. *Headley v. Reed*, 2 Cal. 324.

2. Checks are on the same footing with bills of exchange, excepting the differences which may arise from the custom of merchants. Sight checks are not entitled to grace; but an order in the nature of a check payable at a future day is an inland bill of exchange, and the drawer is entitled to grace and notice of nonpayment. *Minturn v. Fisher*, 4 Cal. 36.

3. Presentation of a check or bill of exchange before the last day of grace, and the immediate commencement of suit on the day of demand and nonpayment, are premature. *Ib.*

4. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks. *Thorne v. City of San Francisco*, 4 Cal. 150.

5. Where a check had been lost, and paid by a banker upon a forged endorsement, upon a suit for the check after the banker refused to deliver it to the owner: held, in the absence of rebutting evidence, the measure of damages must be the full

value of the amount for which it was drawn. *Survey v. Wells*, 5 Cal. 127.

6. It is sufficient if a check drawn upon one day be presented for payment at the usual banking house the next day, where the payee resides in the immediate vicinity of the place of payment, otherwise he must use due diligence to hold the drawer. *Ritchie v. Bradshaw*, 5 Cal. 229.

7. Where A draws a check in favor of B, dated the first and payable the fifteenth of the same month, on a bank wherein he is paying teller, and the check is presented, and the holder is informed by A that it will not be paid, and at the same time payment is refused by A as teller of the bank, and no other presentment is made: held, that the check need not be protested, nor any notice of nonpayment be given, to hold A thereon. *Minturn v. Fisher*, 7 Cal. 575.

8. A check given for a gaming debt is void in the hands of all persons, except a bona fide holder without notice. *Fuller v. Hutchings*, 10 Cal. 526.

9. A party taking a check after its presentation for payment to the bankers upon whom it is drawn, and after its dishonor, takes it subject to all the defenses to which it was subject in the hands of the original holder. *Ib.*

10. Where the illegal consideration of a check is admitted, it is incumbent on the holder, even if he took it before dishonor, to show that he took it without notice and for value. *Ib.*

11. With a check the presumption is that it is given upon a valid consideration; but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Ib.*

See BANKER, BILL OF EXCHANGE, ENDORSEMENT, PROTEST.

## CHILD.

See INFANT, PARENT AND CHILD.

## CHINA.

1. The commissioner and consuls constitute a judiciary for the government of the citizens of the United States in China, and as such, and when so acting, are governed by the law of nations, the laws of the United States, the common law, and the decrees and regulations of the commissioner, until the latter are modified or annulled by congress. *Forbes v. Scannell*, 13 Cal. 281.

2. Assignments of personal property in China, made there between citizens of the United States resident there, will be tested by the common law. *Ib.* 283.

3. An alien friend may sue an American in the consular courts in China, established under the treaty of 1841. *Ib.* 285.

## CHINESE.

1. The criminal act provides that "no black or mulatto person or Indian shall be allowed to give evidence in favor of or against a white man": held, that the words Indian, negro, black and white are generic terms designating race; that therefore Chinese and all other peoples not white are excluded in the prohibition from being witnesses against whites. *People v. Hall*, 4 Cal. 399; *Speer v. See Yup Co.*, 13 Cal. 73.

2. The act of 1855, imposing a tax of fifty dollars on every person arriving in this State by sea who is incompetent to become a citizen, is unconstitutional and void. *People v. Downer*, 7 Cal. 171.

## CHOSE IN ACTION.

1. An assignee of a chose in action must sue in his own name, but the assignor, under our statute, cannot be a witness in his behalf. *Jones v. Post*, 4 Cal. 15; *Griffin v. Aloop*, 4 Cal. 408; *Allen v. Cit-*

*izens' Steam Nav. Co.*, 6 Cal. 402; *Adams v. Woods*, 8 Cal. 321.

2. The consideration of the assignment of a personal chattel or chose in action may be proven by parol, and a different one established from that expressed in the instrument. *Bennett v. Solomon*, 6 Cal. 138.

3. Debts or credits are considered property in the statute. A judgment is a debt of record, and the parties to it are called judgment creditor and debtor. *Adams v. Hackett*, 7 Cal. 202.

4. A nonnegotiable chose in action, created by the immediate parties to it for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such chose in action. *Wright v. Levy*, 12 Cal. 262.

5. Whether a chose in action—as a note or judgment, and the like—calling for a definite sum without condition, is the subject of levy and sale, without actual possession of the chose by the officer? Query. *Crandall v. Blen*, 13 Cal. 23.

6. The doctrine of continuous possession of personal property after sale or mortgage does not apply to the case of a paper, or the mere evidence of a debt, nor does the chattel mortgage act apply to it. *Hall v. Redding*, 13 Cal. 220.

7. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right to the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the



statute of frauds has no application to a case like this. *Walling v. Miller*, 15 Cal. 40.

### CHURCH PROPERTY.

See MISSIONS.

### CITIZENSHIP.

1. Under the treaty of Queretaro, all Mexicans established in California on the 30th day of May, 1848, and who had not, on or before the 30th day of May, 1849, declared their intentions to continue Mexican citizens, are to be deemed American citizens. *People v. Naglee*, 1 Cal. 244.

2. Laws regulating the admission of foreigners and aliens, and placing them under peculiar disabilities on account of some suppressed inconvenience which may result to the State, are political laws. *People v. Folsom*, 5 Cal. 378.

3. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People v. Riley*, 15 Cal. 49.

4. And a mere residence or sojourn in the county as a soldier does not make him a citizen or prove him to be such. The rule as fixed by the constitution is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship, leaving the political status of the soldier where it was before. *Ib.*

See ALIEN, ELECTION JUROR, NATURALIZATION.

### CIVIL LAW.

1. The civil law, except so far as it has been expressly adopted by the legislative power, is without authority, either in Spain or Mexico. *Panaud v. Jones*, 1 Cal. 500.

2. All contracts made in this State pri-

or to the act of April 22d, 1850, must have their effect and construction by the rules of the civil law. *Fowler v. Smith*, 2 Cal. 569.

### CLERK.

1. The clerk of a confidential counselor, solicitor or attorney of the party cannot be compelled to disclose the communications made to him, or letters or entries made by him in that capacity. *Landsberger v. Gorham*, 5 Cal. 451.

2. Where there was but one clerk in the office of a newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk. *Gray v. Palmer*, 9 Cal. 637.

### CLERK OF THE COURT.

1. The certificate of the clerk of the district court could not be received to contradict the plain import of the judgment. *Belt v. Davis*, 1 Cal. 140.

2. The supreme court will not consider the testimony as returned in a statement unless it appears settled by the parties, or by a certificate of the clerk that he took down the testimony in writing at the trial, and at the request of one of the parties. *Bunting v. Beideman*, 1 Cal. 182.

3. The special act of the legislature, approved April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at \$3,000, was intended in lieu of all fees for services rendered the county. *Mitchell v. Stoner*, 9 Cal. 203.

4. A mandamus will not lie against the clerk of the district court to compel him to issue execution on a money judgment rendered in the court of which he is clerk. *Goodwin v. Glazer*, 10 Cal. 338.

5. Where a clerk of the district court improperly refuses to issue execution on a judgment rendered in the court of which he is clerk, on the ground that the judgment has been attached at the suit of another party, a bill in equity cannot be sustained to release the attachment and

## Clerk of the Court.—Cognovit.

compel the clerk to issue the execution, as the injured party has his remedy at law by an action on the official bond of the clerk. *Goodwin v. Glazer*, 10 Cal. 333; *Miller v. Sanderson*, 10 Cal. 490.

6. An objection to an acknowledgment by a county clerk that he had no seal of office is too narrow a construction of the law. His power was never intended to be made to depend upon the fact of his having procured a seal, or the care with which he preserved it. *Ingoldsby v. Juan*, 12 Cal. 580.

7. The clerk of a court, though a constitutional officer, is subject to its orders in the control of the records. The court cannot without great abuse of its powers take from the clerk in any way the perquisites of his office for copies of opinions and papers on file. *Houston v. Williams*, 13 Cal. 28.

8. A clerk's certificate that a statement is the same which was used on motion for new trial, is entitled to no weight, as the clerk is not authorized by law to verify a statement in that form. *Fee v. Starr*, 13 Cal. 171.

9. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

10. Where a submission to arbitration is made an order of court under the code, the clerk of the court may enter judgment on the award in due time without any further order of the court. *Carsley v. Lindsay*, 14 Cal. 395; overruling *Heslep v. City of San Francisco*, 4 Cal. 4.

11. When the judge cannot be found, the proposed statement or bill in a criminal case may be delivered to the clerk of court for him, the clerk's office being the proper place for the deposit of the papers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt, and hand it to the judge at the earliest convenient opportunity. *People v. Lee*, 14 Cal. 512.

12. Under the act of 1857 regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons

and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmondson v. Mason*, 16 Cal. 388.

13. The clerk is entitled to charge, under that act, fees for certified copies of summons and injunction, if the copies, though prepared by plaintiff, were certified by the clerk at plaintiff's request. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk. *Ib.*

14. Under the code as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited waived his right to costs, whether they were clerk's and sheriff's fees or other costs, and in the absence of such memorandum the clerk had no power to include costs in the judgment. *Chapin v. Broder*, 16 Cal. 419.

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CLIENT.

See ATTORNEY.

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CODEFENDANT.

See DEFENDANT.

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COGNOVIT.

1. A cognovit is good as an admission in pais after answer filed until set aside by the court for good cause shown. *Hirshfield v. Franklin*, 6 Cal. 609.

2. If judgment was entered on the cognovit and by its authority, then the amount acknowledged would have been the sum of the judgment. But where upon declaration and answer denying the facts alleged, the acknowledgment is used as evidence, interest may be given by way of damages. *Ib.*

COLLATERAL SECURITY.

See BAILMENT, MORTGAGE OF CHATTELS, PLEDGE.

COLLEGE.

1. In an application for an order to incorporate a college under the act of 1850, it is necessary that subscriptions of real estate—if such subscriptions must not be cash under the statute—should define the boundaries or situation of the lands proposed to be given; and where an endowment of a proposed college consisted of real estate, the situation thereof must be ascertained and determined from the subscription papers, their value must be represented and their title established, or the application will be denied. *Ex parte The California College*, 1 Cal. 130.

2. On an application for an incorporation of a college, a cash subscription of \$27,500, with the subscription list annexed to the petition, and accompanied by affidavits showing that the subscribers are severally worth the respective sums set opposite the names, is a sufficient compliance with the act of April 20, 1850, to authorize the supreme court to grant a charter. *Ex parte The Wesleyan College*,* 1 Cal. 447.

COLLISION.

1. An action to recover damages for collision cannot be sustained where the in-

* The above law is repealed by the corporation act.

jury complained of has resulted from the negligence of both parties. *Kelly v. Cunningham*, 1 Cal. 366.

2. A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. *Innis v. Steamer Senator*, 1 Cal. 459.

3. In a case of collision, the plaintiff must be faultless. *Griswold v. Sharpe*, 2 Cal. 24.

4. In an action to recover damages for collision, there being no indebtedness arising upon contract, an attachment cannot issue. *Ib.*

5. In an action for collision, after the witness testifies concerning the position of the vessels and the character of the night, he was asked whether a vessel on such a night and in such a place could be seen at a considerable distance from a vessel approaching the shore; and if so, how far: held, that the question should have been allowed. *Innis v. Steamer Senator*, 4 Cal. 5.

COMMERCE.

1. The power to regulate commerce is general and exclusive, and no part of it can be exercised by a State. But when this power has not been exercised by congress, but lies dormant, and a State in the meantime exercises such power over a given subject, the question whether the action of the State be void in such a case is left in doubt. *Mitchell v. Steelman*, 8 Cal. 371.

2. The power of congress to regulate commerce with foreign nations and among the States is an exclusive power. *People v. Downer*, 7 Cal. 171.

The general authority given to congress to regulate commerce with foreign nations could probably find no more useful or appropriate means of exercise than in treaties and laws withdrawing our citizens domiciled in unchristian nations from the

jurisdiction of such governments, and confiding their rights of property and person to judicial officers of their own country, administered under responsibilities to a common government, laws, with the general spirit and principles of which those citizens are familiar. *Forbes v. Scannell*, 13 Cal. 282.

COMMISSION.

See AGENCY, BROKER, DEPOSITION.

COMMISSION, UNITED STATES LAND.

See LAND COMMISSION OF THE UNITED STATES.

COMMISSION, STATE LAND.

See LAND COMMISSION OF THE STATE.

COMMISSIONER OF THE UNITED STATES.

1. An appeal lies from a consular court in China to the United States commissioner. *Forbes v. Scannell*, 13 Cal. 286.

COMMISSIONER OF THE FEDERAL COURTS.

1. Justices of the peace alone have the

power to try and commit deserted seamen under the acts of congress, and commissioners under the United States court can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

COMMISSIONERS OF THE FUNDED DEBT OF SAN FRANCISCO CITY.

1. A sale of land in the city of San Francisco, by a portion of the board of commissioners of the funded debt, does not pass a legal title upon which ejectment can be maintained. *Leonard v. Darlington*, 6 Cal. 125.

2. The act of the legislature confers the power on five commissioners, and though a majority may control, yet it is necessary that all should meet and consult, or have notice of the meeting, that they may attend if they desire. *Ib.*

3. A general resolution, passed by the whole board a year before the sale in question, that they would sell all the city property to pay her debts, will not give validity to the particular sale made in pursuance of a resolution to sell the particular lot, adopted by only three of the board shortly before the sale. *Ib.* 126.

4. The act of 1851, creating the board of fund commissioners of San Francisco, was a law authorizing a contract between the city and her creditors, who surrendered the old indebtedness and took a new security bearing a different rate of interest. This transaction was in the nature of a new contract, and the law authorizing it entered into and became a part thereof and cannot be altered or amended so as to impair or destroy the rights of parties under the contract. *People v. Woods*, 7 Cal. 584.

5. The provisions of the consolidation act of 1856, requiring that the sinking fund created by the act of 1851 should be first exhausted by the redemption of certificates of stock, before the treasurer should make payment annually of the sum of fifty thousand dollars, set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional. *Ib.*

Commissioners of the Funded Debt of San Francisco City.—Of the Sinking Fund.

6. The act of May 1st, 1851, authorizing "the funding of the floating debt of the city of San Francisco," is substantially a trust deed, whereby she agrees, on a valuable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations, in the mode and according to the terms of her agreement. *People v. Bond*, 10 Cal. 567; *People v. Tillinghast*, 10 Cal. 584; *People v. Supervisors of San Francisco County*, 12 Cal. 301.

7. The commissioners of the funded debt of the city of San Francisco are not private agents; they are public officers, clothed with important trusts, for the due administration of which they have executed bonds with security. *San Francisco County v. Commissioners of the Funded Debt of the City of San Francisco*, 10 Cal. 586.

8. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners, created by the act of April 20th, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued should be made parties to the action. *Hutchinson v. Burr*, 12 Cal. 103.

9. The board of supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit of the board are alike immaterial. *People v. Supervisors of San Francisco County*, 12 Cal. 301.

10. The act of 1858, amendatory of the act of May 1st, 1851, authorizing the funding of the floating debt of the city of San Francisco, and to provide for the payment of the same, is constitutional. *Blanding v. Burr*, 13 Cal. 349; *Thornton v. Hooper*, 14 Cal. 11.

11. If, under the act, a large surplus accumulates, it may be applied to the purchase of bonds, even if no provision exists in the act for payment before the bonds are due. *Ib.*

12. The commissioners of the funded debt of the city of San Francisco have power, under the act of 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund,

created by ordinance of said city, to receive the three per cent. scrip of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts. *People v. Commissioners of the Funded Debt of the City of San Francisco*, 14 Cal. 541.

13. A purchaser of such beach and water lot property, at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 126.

14. In this case, as the record does not show that the judgment ever became such lien, the decision giving title to the purchaser must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

COMMISSIONERS OF THE SINKING FUND OF SAN FRANCISCO CITY.

1. The act of the city of San Francisco creating the board of sinking fund commissioners, and the deed executed to them of all the property in the city, is void for want of power in the city, and because said deed is within the statute of frauds. *Smith v. Morse*, 2 Cal. 538; *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

2. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

3. *Smith v. Morse*, 2 Cal. 524, commented on, and attention called to the fact that plaintiff's judgment, in that case, had

become a lien on the property sold before the passage of the funding act of May 1st, 1851, and that hence the act was declared unconstitutional, so far as it impaired such previous lien. . *Wheeler v. Miller*, 16 Cal. 125.

COMMISSIONERS OF THE STATE CAPITOL.

1. The act of 1860, authorizing the construction of a State capitol at Sacramento, is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action of law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

2. In this case, the district judge did not err in refusing the application to set aside the award of the commissioners, and for a new trial. The proceedings before the commissioners were regular, and "appear to have been done in good faith," within the act. *Ib.*

COMMISSIONER OF STREETS.

1. The street commissioner of the city of San Francisco is empowered to use

the necessary force to prevent an injury to the public streets of the city; and no action can be sustained against him, or those who act under his orders, for using such force. *Clark v. McCarthy*, 1 Cal. 454.

2. To entitle a party to recover, as street commissioner of San Francisco, he must show not only that he had discharged his duties; but first, that he had been lawfully elected; second, had qualified himself to hold the office, by taking the oath, and filing the bond at the same time, and in the manner required by law. *Payne v. City of San Francisco*, 3 Cal. 125.

3. A joint resolution of the city councils, approved by the mayor, recognizing a party as street commissioner, will not enable him to recover for services rendered in that capacity upon a quantum meruit. *Ib.* 128.

See STREETS AND HIGHWAYS.

COMMITMENT.

1. If an order of commitment be sufficient in substance, it will be held good on habeas corpus, although it contain more than is necessary to be stated therein. The unnecessary matter will be regarded as surplusage. *People v. Smith*, 1 Cal. 11.

2. Justices of the peace alone have power to try and commit deserted seamen, under the acts of congress; and commissioners, under the United States courts, can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

3. On finding a commitment illegal, if it appear that the party is guilty of an offense, the court will not discharge him without allowing time for his arrest by proper authority. *Ib.* 145.

4. A commitment for contempt, "in refusing to answer certain questions propounded to the witness by the grand jury," is not a compliance with the statute, which requires that when the contempt consists in the omission to do an act which was in the power of the person to perform, the act shall be specified in the commitment. It does not appear, from such commitment,

whether the questions were legal or not. *Ex parte Rowe*, 7 Cal. 183.

See CRIMES AND CRIMINAL LAW.

COMMON CARRIERS.

1. In an action against a common carrier, the rule of damages is the value of the goods at the port of delivery, and not the invoice price, or the value at the port of shipment. *Ringgold v. Haven*, 1 Cal. 118; *Hart v. Spalding*, 1 Cal. 214.

2. A common carrier is not responsible for the loss of goods entrusted to him for carriage, where it is understood that he is to receive no compensation for his carriage, and where he has exercised ordinary diligence in taking care of them; in such a case, he is only liable as a bailee without hire. *Fay v. Steamer New World*, 1 Cal. 349.

3. A merchant was in the habit of having his gold dust carried gratuitously on the steamer; while the owners refused to carry it for hire, or to become liable as common carriers in case of loss: held, where a quantity of gold dust, belonging to the plaintiff, was stolen from the steamer, without any negligence on the part of the master or officers, that the plaintiff could not recover its value. *Ib.*

4. Whether a common carrier of goods and passengers merely, can be made liable in an action for refusing to carry gold dust. Query? *Ib.* 350.

5. In an action against a common carrier, for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. *Yonge v. Pacific M. S. S. Co.*, 1 Cal. 354.

6. When an action is brought for damages against a common carrier, for the nonperformance of the contract to carry the plaintiff's servant, the plaintiff must show that he is entitled to claim his services. *Ib.*

7. Evidence showing that the plaintiff was a good book-keeper, was proper to be submitted to the jury, to enable them to form an estimate of the damages which the plaintiff had probably sustained; and they should consider the probabilities of

his procuring a situation, and retaining it. *Ib.*

8. In an action brought by a passenger against the owners of a steamer for not furnishing him with the conveniences during the voyages which the contract of conveyance required, the court will not interfere with the verdict of a jury, where the question upon which they have passed is one solely of liquidated damages, unless beyond doubt the verdict be unjust and oppressive. *George v. Law*, 1 Cal. 364.

9. Delivery by a common carrier to a wrong person by mistake or by gross imposition will not discharge his responsibility to the owner for the value of the goods. The authority of an agent to deliver goods to a common carrier is not an authority to take them back or to countermand the shipment. *Adams v. Blankenstein*, 2 Cal. 418.

10. If a common carrier deliver goods to any but the owner, he does so at his peril; and his defense must clearly show that the person to whom he delivered the goods was duly authorized as the agent of the owner to receive them. *Ib.*

11. The law regards ferrymen as common carriers, and has imposed upon them the same duties and liabilities; and he is liable for the safe transit and delivery of passengers, and is chargeable with any accident occurring, except by the act of God or the public enemy. *May v. Hanson*, 5 Cal. 364.

12. In an action for damages brought by a passenger against a stage company for injuries to plaintiff caused by carelessness of the driver in overturning the coach: held, that the fact that the driver was informed before the accident that a passenger was to be left at plaintiff's destination, and that after the accident, the agent of defendant informed the driver that plaintiff was to stop at the destination designated, was sufficient to establish prima facie the allegation in the complaint, of a contract to safely carry, etc. *Thorne v. California Stage Co.*, 6 Cal. 233.

13. The towing of a vessel out to sea by a steamer is the transportation of property, without resorting to any other than the necessary construction arising from the generic and common meaning assigned to the word "transport." *White v. Steam Tug Mary Ann*, 6 Cal. 470.

14. It is sufficient as a common carrier

Common Carriers.

that the steam-tug held herself out to the world for engagement in a business for hire, which required prudence, skill and the use of adequate means to perform the contracts which she should undertake. *Ib.* 471.

15. Where it appears that the coach at the time of the accident was driven by the servant or agent of the owner, the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. *Wardrobe v. California Stage Co.*, 7 Cal. 120.

16. Damages which are professedly laid for the benefit of the public cannot be recovered in an action brought by a passenger of a stage coach against the owners thereof for injuries sustained by reason of the upsetting of the coach. *Ib.*

17. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there, and consequent illness and other injuries, though based on a contract, sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner v. Steamer Uncle Sam*, 9 Cal. 729; *Ord v. Steamer Uncle Sam*, 13 Cal. 372.

18. Where in an action to recover damages occasioned to the plaintiff from his detention by the defendants as common carriers, a witness was permitted to give his estimate of the value of the plaintiff's services per day, which he placed as high as one hundred dollars, and stated as ground for his opinion that the plaintiff was a speculator, possessed of large property, money invested in stocks, rents and other sources of income, and frequently made from one to five hundred dollars per day: held, that the testimony was inadmissible. *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

19. A stage company engaged in carrying passengers to and from a place is liable to pay to that place a license under the provisions of a law taxing any business carried on in that place. *City of Sacramento v. California Stage Co.*, 12 Cal. 138.

20. A contract for the transportation of passengers from San Francisco to New York is an entirety, whether the entire

voyage is to be performed in one vessel or not. *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

21. Telegraph companies in contemplation of law are common carriers, and are subject to the rules of law governing the same. *Parks v. Alta Telegraph Co.*, 13 Cal. 424.

22. Where A contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due him from a third party by attachment, and this service is so negligently performed that other creditors of the common debtor obtain the first attachment and exhaust the assets of the debtor, which would not have been the case had the telegraph company performed its contract within a reasonable time, the company is liable, not only for the cost of the dispatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. *Ib.*

23. In suits against common carriers, damages for pain of mind are recoverable. *Fairchild v. California Stage Co.*, 13 Cal. 601.

24. Proprietors of stage coaches are not insurers or warrantors of the safety of passengers to the same extent with common carriers of goods. *Ib.* 602.

25. Common carriers are liable for the slightest neglect, and are held to extraordinary diligence and care. In case of injury, the presumption, prima facie, is, that it occurred by the negligence of the coachman. The onus probandi is on the proprietors to show no negligence, and that the injury was occasioned by inevitable casualty, or by some cause which human care and forethought could not prevent. *Ib.*

26. Where a telegraph company fails to transmit a message, upon compliance by the person contracting with it with the conditions required by sec. 154 of the act of 1850, p. 370, an action for the penalty given by the act lies in favor of such person. *Thurn v. Alta Telegraph Co.*, 15 Cal. 474.

27. The sum to be recovered is a penalty for a breach of the duty to transmit the message, and the act is a penal law to be strictly construed. *Ib.* 475.

28. Under the above section, the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He

Common Carriers.—Common Law.

may, probably, do this by his agent or servant; but when the contract is made by a party as agent of another, in order to give the right of action to the principal, the fact of agency must be shown. *Ib.* 475.

29. Proof as follows: "I am superintendent of the California State Telegraph Company, and operator in their office at San Francisco. July 2d, plaintiff came to our office and delivered a message to be transmitted to Jackson, and paid for transmitting it there. The message was: 'Alta Express Co., Jackson: If you have package for me, forward immediately.' Signed 'C. Thurn.' In the margin of the message sent, were the words: 'F. July 2d.' Few words passed when the message was delivered; no express agreement that the California State Telegraph Co. should forward the message to Sacramento, and employ the Alta California Telegraph Co. to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendant's line from Sacramento." C. Thurn, the plaintiff, sues the Alta Telegraph Co. for the penalty, under the one hundred and fifty-fourth section of the act of 1850, p. 370: held, that under these facts, he is not the person making or offering to make the contract, within the meaning of the act, and cannot recover; that the only contract proven is a contract by the State Telegraph Co. to send the message or to have it sent; and a contract, on its part, to contract on its own account with the Alta Telegraph Co. to send the message. *Ib.* 475.

30. If the message, in this case, had not been transmitted, plaintiff might have held the State Telegraph Co. responsible. *Ib.* 476.

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### COMMON LAW.

1. Money lost at play cannot be recovered in an action; such recovery was unknown to the common law. *Bryant v. Mead*, 1 Cal. 441.

2. The common law is presumed to be in force in other States, unless the contrary

is shown. *Thompson v. Monrow*, 2 Cal. 100.

3. The statute requiring the complaint to contain a statement of the facts constituting a cause of action in ordinary and concise language, is only declaratory of the common law. *Godwin v. Stebbins*, 2 Cal. 105.

4. Where a right exists at common law, and a new remedy is given by statute, the latter is cumulative, and either remedy may be pursued; but where the right and remedy are given by statute, that remedy can alone be pursued. *People v. Craycroft*, 2 Cal. 244; *State v. Poulterer*, 16 Cal. 526.

5. There is no common law of the United States as contradistinguished from the individual States; and the courts of the United States, instead of administering the common law, conform to the law of the States. *People v. Folsom*, 5 Cal. 379.

6. At common law all wagers were recoverable except such as were prohibited by law, or were against public policy, or calculated to affect the interest, character or feelings of third parties. *Johnson v. Fall*, 6 Cal. 361.

7. The common law having been adopted as the rule of decision in this State, it is our duty to enforce it, leaving all question of its policy as applied to a particular class of contracts for the consideration of the legislature. *Ib.*

8. A court is bound to take judicial notice of the general laws in force in this State at the cession of California, which remained unrepealed until the act of the 13th of April, 1850, establishing the common law. *Wells v. Stout*, 9 Cal. 494.

9. At common law a party was not permitted to plead a want of consideration as a defense to an action upon a sealed instrument—the presumption of the existence of a consideration being absolute and conclusive. *McCarty v. Beach*, 10 Cal. 463.

10. The rule of common law which requires owners of cattle to keep them confined within their own close, does not prevail in this State. The common law was adopted only so far as it was not repugnant to the constitution and statutes of the State. *Waters v. Moss*, 12 Cal. 538.

11. Common law is that general body of law which, by those general principles and those general usages which are to be



found, not in the legislative acts of any particular State, but that generally recognized and long established law which forms the substratum of the laws of every State. *Forbes v. Scannell*, 13 Cal. 285.

12. By the common law there were only two classes of conveyances which were held to operate upon the after acquired title—those by feoffment, by fine or by common recovery, and those by indenture of lease. *Clark v. Baker*, 14 Cal. 626.

13. In the absence of proof to the contrary, the common law is presumed to exist in those States of the Union which were originally colonies of England, or were carved out of such colonies. *Norris v. Harris*, 15 Cal. 252.

14. The same presumption prevails as to the existence of the common law in those States which have been established in territory acquired since the revolution, where such territory was not, at the time of its acquisition, occupied by an organized and civilized community; but where the population, upon the establishment of government, was formed by emigration from the original States. *Ib.*

15. No such presumption can prevail as to the States of Florida, Louisiana and Texas. In those States, at the time of their accession to the country, organized governments existed, the laws of which remained in force until they were abrogated by proper authority, and new laws were promulgated. *Ib.* 253.

16. The common law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute. *Van Maren v. Johnson*, 15 Cal. 311.

## COMMON PROPERTY.

1. By the Mexican law the wife during the continuance of the marriage has a revocable and feigned dominion in and possession of one-half the property acquired by her and her husband, but the husband is the real and veritable owner and has the irrevocable dominion in all the gananciales, and may sell and dispose of them at pleasure. *Panaud v. Jones*, 1 Cal. 515.

2. After the death of the wife, the husband may dispose of the gananciales without being obliged to reserve for the children of the marriage either the property in or proceeds of the same. *Ib.*

3. A father during his life time and after the death of the wife may, although there have been children of the marriage, dispose of the gananciales for any honest purpose, where there is no intention to defraud the children, and may by last will and testament direct the sale to them for the payment of his debts. *Ib.* 516.

4. A having married and there being children of the marriage and his wife having died, and there being common property acquired during the marriage: held, that the children upon the death of the wife did not acquire a vested estate in the common property, and that the father had absolute dominion over and power to sell such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts, not only such as were contracted during the continuance of the marriage, but also such as were contracted by the husband after the dissolution of the marriage by the death of his wife. *Ib.* 517.

5. By the statute the rents and profits of the separate property of the wife are declared to be common property. *Snyder v. Webb*, 3 Cal. 87.

6. If a husband should purchase or invest the rents and profits of the estate of the wife, he will be held to account for her benefit in the same manner and to the same extent as if he had undertaken a specific trust. *Ib.* 88.

7. Upon a divorce, the statute directs that the common property shall be equally divided between the parties, and that the court granting the decree shall make the order for the division thereof: held, that a partition of the common property is one of the direct results of a decree for divorce and is part and parcel of the decree to be rendered, and one of the proper subjects of the action. *Kashaw v. Kashaw*, 3 Cal. 322.

8. As soon as a place acquires the character of homestead it is immaterial how the title to the property originated, whether it was the separate property of the husband or wife or the common property of both. *Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Cal. 71.



## Common Property.

9. By the Mexican laws, all property acquired during marriage was common property, and the wife could neither be bound as security for her husband nor liable as a joint contractor, except where it was shown that the contract was advantageous to the wife. *Hames v. Castro*, 5 Cal. 111.

10. Under the rule of the Mexican law, where the wife is the survivor of the husband, she is liable for one-half the community debts; but to fix this liability it must be shown that a fruitless effort has been made to obtain payment through an administration of the community assets, or that there is no common property and that the community is insolvent. *Ib.*

11. The act of April 17th, 1850, giving to the husband the entire control of the common property, does not invest him with power to dispose of the same by devise whereby the rights of the wife may be defeated. *Beard v. Knox*, 5 Cal. 256.

12. The husband and wife during coverture are jointly seized of the property, with one-half interest remaining to the wife, subject only to the husband's disposal during their joint lives. *Beard v. Knox*, 5 Cal. 256; *Scott v. Ward*, 13 Cal. 469.

13. A wife is entitled to her own share of the common property, and entitled to any legacy out of the share of the husband. *Beard v. Knox*, 5 Cal. 257.

14. Property in this State acquired by the husband after marriage but before the passage of the act of April 17th, 1850, is common property under the Mexican law, as that so acquired subsequently is by the statute, and cannot be disposed of by will. *Estate of Buchanan*, 8 Cal. 509; *Smith v. Smith*, 12 Cal. 225; *Scott v. Ward*, 13 Cal. 469.

15. The homestead being held in a sort of joint tenancy, passes on the death of the husband to the wife by right of survivorship, and forms no part of the common property. *Estate of Buchanan*, 8 Cal. 509.

16. The earnings of both husband and wife go into a common fund and become common property, the control and disposition of which belongs to the husband, and when applied by him or with his assent for her support, and are sufficient for that purpose, there is no basis for a divorce on the ground of willful neglect. *Washburn v. Washburn*, 9 Cal. 476.

17. To entitle a surviving husband or wife to the whole common property, it must be affirmatively shown that there are no descendants of the deceased. *Cummings v. Chevrier*, 10 Cal. 520.

18. In an action for the division of the common property of the husband and wife after a decree of divorce, the plaintiff, to bring herself within the provisions of the act of April 17th, 1850, defining the rights of husband and wife and establishing the common property, must affirmatively state such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 166.

19. A mere general averment that property was common property is no averment of any issuable fact, but a conclusion of law, and is defective in a complaint. *Ib.* 169.

20. In an action for a division of the common property after a divorce, where it appeared that the property in question had been in the possession of the husband before marriage, without title, and that he purchased the property and obtained deeds thereof after marriage, the purchase money being paid with the common funds: held, that it was common property. *Johnson v. Johnson*, 11 Cal. 205.

21. Upon the death of a husband, the whole of the common property is assets of the deceased, to be administered upon by his personal representatives. *Estate of Tompkins*, 12 Cal. 124.

22. All property acquired by either spouse during the existence of the community is presumed to belong to it, and this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burthen of proof lies upon the party claiming the property as separate. *Smith v. Smith*, 12 Cal. 224; *Meyer v. Kinzer*, 12 Cal. 253; *Scott v. Ward*, 13 Cal. 470; *Tryon v. Sutton*, 13 Cal. 493; *Pixley v. Huggins*, 15 Cal. 131; *Mott v. Smith*, 16 Cal. 557.

23. Where a brick building was erected on such lots during the existence of the community, the presumption that it was but the form in which the common property was invested is too cogent to be overcome by loose and unsatisfactory testimony. *Smith v. Smith*, 12 Cal. 224.

24. The law investing in the husband the absolute power of disposition of the

## Common Property.—Compensation in general.

common property, as of his separate estate, designed to facilitate its bona fide alienation, and to prevent clogs upon its transfer by claims of the wife. *Ib.*

25. The law will not support a voluntary disposition of the common property, or any portion of it, with a view of defeating any claims of the wife. *Ib.* 225.

26. Where a husband deliberately places a brick building upon the property of his children by a former marriage, after a second marriage, he cannot have any claim upon it or its proceeds. In case its character as common property is declared only for the protection of the interest of the wife. *Ib.* 226.

27. Property acquired by the husband and wife during the marriage and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either of them by lucrative title are solely constituted the separate property of the party making the acquisition. *Scott v. Ward*, 12 Cal. 471; *Noé v. Card*, 14 Cal. 596.

28. The title of the common property is in the husband, and he can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. *Van Maren v. Johnson*, 15 Cal. 311.

29. The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage, and judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately. *Ib.* 313.

### COMPENSATION.

- I. In general.
- II. As Damages.
- III. For Private property condemned to Public use.
- IV. As a Reward.
- V. To Public Officers.
  1. To Administrators.
  2. To an Arbitrator.
  3. To Attorneys at Law.

4. To County Clerk.
5. To County Physician.
6. To Sheriff.
7. To County Treasurer.
8. To County Auditor.
9. To Clerk of the Board of Supervisors.

### IN GENERAL.

1. The plaintiff introduced two witnesses to prove the value of his services in going twice to Europe to negotiate the purchase of an estate, etc.; but it was not shown that he undertook these voyages at the request of defendant, or in what capacity he went: held, that the court erred in admitting the testimony, as the question was hypothetical, and assumed a state of facts not in proof. *Dopman v. Hoberlin*, 5 Cal. 414.

2. A mandamus can only compel a board of supervisors to act upon a claim against the county, but cannot direct their action; and the rejection of the account is an action upon it, which is all that a mandamus could require where the compensation claimed in the account is not fixed by law. *Price v. Sacramento County*, 6 Cal. 256.

3. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *People v. Talmage*, 6 Cal. 258.

4. It would be impossible to estimate, with any approach to accuracy, the damage done in entering upon a mining claim and removing the auriferous earth, and hence the greater necessity of preventing by injunction what cannot be adequately compensated. *Merced Mining Co. v. Fremont*, 6 Cal. 322.

5. Where a party employed received a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary, and to this presumption he must show an express agreement for this extra pay, otherwise he cannot recover. *Cany v. Folsom*, 9 Cal. 201.

6. The term "compensation" in section 21, art. 4, of the constitution of this State,

As Damages.—For Private property condemned to Public use.

means the income of the office, not the profit over and above the necessary expenses of the office. *Searcy v. Grow*, 15 Cal. 122. See WAGES.

## II. AS DAMAGES.

7. Where there has been a special contract to erect a building at a specified price and according to an agreed plan, and the contract is afterwards deviated from by consent, the plaintiff cannot recover upon the express contract, for the reason that the work has not been performed according to the terms of the express contract; though at the trial the measure of compensation must be graduated by the terms of the contract, so far as the work can be traced under it. *De Boom v. Priestly*, 1 Cal. 207.

8. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 181.

9. If there should be an error in the computation of interest, the supreme court would not be disposed to correct the decree on account of it, but should permit it to stand, leaving the excess over the proper amount to go as compensation to the respondent on account of the appeal. *Whitney v. Buckman*, 13 Cal. 539.

10. In the absence of mitigating circumstances in a trespass, the rule is compensation merely, and this refers solely to the injury done to the property, and not to collateral or consequential damages resulting to the owner; and this matter of relief is matter of law. *Dorsey v. Manlove*, 14 Cal. 555.

11. But where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. *Ib.* 556.

12. The rule of compensation, merely as distinguished from the rule of exemplary damages, applies even though the writ under which the officer committed the trespass were void, there being no circumstances of aggravation. *Ib.*

## III. FOR PRIVATE PROPERTY CONDEMNED TO PUBLIC USE.

13. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may perhaps give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds v. West*, 1 Cal. 329.

14. The destruction of a building to stop the spread of a conflagration it seems cannot be deemed the taking of private property for public use within the meaning of that clause in the constitution which prohibits such taking without just compensation. *Dunbar v. City of San Francisco*, 1 Cal. 356; *Surocco v. Geary*, 3 Cal. 72.

15. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be claimed for that part of the wharf, which is below the line of low water. *Gunter v. Geary*, 1 Cal. 469.

16. If by the construction of a railroad through the enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75.

17. Where private property is appropriated to public use by the supervisors of a county, without making provision for paying for the same, such act is illegal and may be enjoined. *McCann v. Sierra County*, 7 Cal. 124.

18. Parties in possession of land are entitled to compensation before it can be taken for public uses. *Gunter v. Geary*, 1 Cal. 65; *City of San Francisco v. Scott*, 4 Cal. 116; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75; *McCann v. Sierra County*, 7 Cal. 124; *Colton v. Rossi*, 9 Cal. 599; *McCauley v. Weller*, 12 Cal. 528, 531; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 313; *Johnson v. Alameda County*, 14 Cal. 107; *People v. Brooks*,

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As a Reward.—To Public Officers.—To Administrators.

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16 Cal. 47; *Gillan v. Hutchinson*, 16 Cal. 156.

19. A citizen is entitled to hold his property free from any interference, except through the taxing power, from the government or his fellow subject to this one qualification: that when it is necessary for the purposes of the public, it may be taken from him; provided, the government so taking or authorizing others to take it, shall make the owner just compensation, which must be paid or secured to him before he is deprived of his possession. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 313.

20. No title or any right of possession comes from the mere condemnation of private property for public use. Just compensation, actually made or secured according to law, is a condition precedent; and such compensation must be made within a short period, or the privilege of taking the property under the condemnation will be deemed abandoned. *Ib.* 316.

21. The act of March 29th, 1860, providing for the construction of the State capital at Sacramento, is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

22. The language of the constitution as to the right of trial by jury was used with reference to the right as it exists at common law. The right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. *Ib.*

#### IV. AS A REWARD.

23. A municipality appropriated, by resolution, \$10,000 to their mayor, for meritorious services in quelling a riot, exclusive of his salary which was paid. The mayor died from wounds received in the riot before he finally accepted the appropriation: held, that the same could not be recovered by his executor at law. *Heslep v. City of Sacramento*, 2 Cal. 480.

24. An agreement by one who has lost property by fire or theft to pay a certain sum to any one who will secure the arrest and conviction of the criminal is not a nude pact, but may be enforced by a person performing the service. *Ryer v. Stockwell*, 14 Cal. 136.

25. In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. *Ib.* 137.

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#### V. TO PUBLIC OFFICERS.

26. The legislature having vested certain duties in a public officer, for which services compensation is allowed, may take those duties and the fees from the office before the expiration of the term and confer them upon another officer. *People v. Squires*, 14 Cal. 15.

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##### 1. To Administrators.

27. The compensation allowed by law to executors upon the whole value of the estate, both real and personal, only applies where the administration is complete, and the estate is finally settled. *Ord v. Little*, 3 Cal. 289.

28. Where the administrator resigns, leaving the administration incomplete, there is no fixed rule of compensation. The probate court should apportion it in



## To an Arbitrator.—To Attorneys at Law.

reference to the compensation fixed by law for the whole, according to sound discretion. *Ib.*

29. An administrator being compelled by law to hold, protect and guard funds coming into his hands which he has reason to believe to be assets of the estate, until the right to the funds can be determined, is entitled to his commissions thereon. *Wells v. Robinson*, 13 Cal. 143.

### 2. To an Arbitrator.

30. Where parties who submit a matter to arbitration agree as to who shall pay the arbitrator, if the latter be no party to the agreement he will not be bound by it, but may look to all the parties for compensation for his services. *Young v. Starkey*, 1 Cal. 427.

31. Where an arbitrator refuses to deliver an award made by him until his fees are paid, and a promise to pay him is made, and he delivers the award, it takes the case out of the statute of fraud, and the undertaking to pay for the services a reasonable compensation is supported by a sufficient consideration. *Ib.*

### 3. To Attorneys at Law.

32. In an action brought for the distribution of the effects of a corporation, it being for the interest of all parties that the company should be legally dissolved: held, that costs and a counsel fee on each side should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 75.

33. District courts had no right under the code of 1850 to allow counsel fees in admiralty cases. *Selby v. Bark Alice Tarlton*, 1 Cal. 104.

34. An attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 12 Cal. 103.

35. If a retainer be absolute upon its face, but did not specify in what manner or by whom the fees were to be paid, evidence should be admitted to show whether

the fee was contingent or not. *Dwinelle v. Henriquez*, 1 Cal. 391.

36. An attorney is always entitled to his retaining fee in advance, unless he stipulates to the contrary. *Covillaud v. Yale*, 3 Cal. 110.

37. In an action upon an injunction bond to recover damages for the wrongful issuing of the writ, it was held that the amount paid to counsel as a fee to procure the dissolution of an injunction was properly allowed as part of the damages. *Ah Thaie v. Quan Wan*, 3 Cal. 217; overruling *Heath v. Lent*, 1 Cal. 412.

38. Generally, the recovery of counsel fees as part of the damage is not allowed—as where the loss is consequential; but where the loss is direct—as in the case of an improper commencement and prosecution of a writ, or other process in a suit—it should be allowed. *Summers v. Farish*, 10 Cal. 353; *Heynan v. Landers*, 12 Cal. 111; *Prader v. Grim*, 13 Cal. 587.

39. Counsel fees, not exceeding five per cent., were stipulated to be paid in the mortgage on foreclosure: held, that it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, but like costs, they were a mere incident to the debt, and might be fixed by the court at its discretion, not exceeding five per cent. *Carriere v. Minturn*, 5 Cal. 435; *Gronfier v. Minturn*, 5 Cal. 492.

40. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services in another action. *Hart v. Vidal*, 6 Cal. 56.

41. A witness who is not an attorney is incompetent to prove the value of an attorney's services in a cause. *Hart v. Vidal*, 6 Cal. 57.

42. Where an individual doing business under the firm name of "D. W. & Co." incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters formed a partnership with two others under the same firm name, and one of the new members of the firm thus formed subsequently dismissed the suit in the firm name, and when payment for the services was demanded did not deny the liability of the firm, but refused payment and disputed the amount charged: held, that the firm was estopped from denying their liability. *Burritt v. Dickson*, 8 Cal. 115.



To Attorneys at Law.—To County Clerk.—To County Physician.—To Sheriff.

43. But where it was shown that the plaintiff's partner had drawn up the partnership articles of defendants: held, that plaintiff was bound to know the terms on which the defendants' firm was formed, and that defendants had a right to presume such knowledge, and are not estopped by the acts above recited from denying their liability. *Ib.* 117.

44. A receiver having the right to stipulate with the counsel employed by him, that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report among his disbursements the claim of the counsel, leaving the amount to be fixed by the court; and if the counsel, or any other person employed by the receiver, feels aggrieved by the order of the court thereon, he can appeal therefrom. *Adams v. Woods*, 8 Cal. 316.

45. Counsel for the plaintiff in a suit for dissolution cannot claim compensation as associate counsel for the receiver. *Ib.* 10 Cal. 317.

46. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered; but the plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund before distribution. *Patrick v. Montader*, 13 Cal. 444.

47. When an attorney sued for professional services on a quantum valebant, and the answer denied the value of the services: held, that the rule requiring new matter to be set up in the answer does not apply. *Bridges v. Paige*, 13 Cal. 641.

48. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion, the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and

it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene if a proper case be made, or prosecute his rights independently, or wait until the recovery and then claim his rights under the contract with relator. *People v. Norton*, 16 Cal. 440.

#### 4. To County Clerk.

49. The statute of April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at \$3000 per annum, was intended in lieu of all fees for services rendered. *Mitchell v. Stoner*, 9 Cal. 203.

#### 5. To County Physician.

50. In a suit by a physician against a county, on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless it distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

#### 6. To Sheriff.

51. A sheriff cannot maintain an action against a county for compensation for "taking care of the court house, and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. *Stockton v. Shasta County*, 1 Cal. 114.

#### 7. To County Treasurer.

52. Under the Sacramento consolida-

To County Auditor.—Clerk of the Board of Supervisors.—Complaint in general.

tion act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only \$3000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for money paid by them into the State treasury. This percentage belongs to the city and county of Sacramento. *Sacramento County v. Bird*, 15 Cal. 295.

#### 8. To County Auditor.

53. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and cancelation of warrants drawn on the county treasurer. *People v. Supervisors of El Dorado County*, 11 Cal. 174.

#### 9. Clerk of the Board of Supervisors.

54. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento has no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and its action in creating such office and raising such salaries, may be reviewed on certiorari. *Robinson v. Supervisors Sacramento County*, 16 Cal. 211.

### COMPLAINT.

- I. In general.
- II. What the Complaint should contain.
  1. Cause of Action.
  2. Statement of a Condition precedent.
- III. Admission of Fact set up in Complaint.
- IV. Amendment to the Complaint.
- V. Supplemental Complaint.
- VI. Joinder of Causes of Action in a Complaint.
- VII. Dismissal of a Complaint.
- VIII. Surplusage in a Complaint.
- IX. Verification to a Complaint.
- X. Prayer to a Complaint.

#### I. IN GENERAL.

1. The complaint contained averments against defendants as common carriers, and the action was for damage done to merchandise in their transportation: held, that it was indispensable for the plaintiff to prove that defendants were common carriers, and that the goods were delivered to and received by them as such for the purpose of being transported for hire. *Ringgold v. Haven*, 1 Cal. 116.

2. Where in an action against administrator the complaint is founded on an instrument alleged to have been executed by the intestate, it is not necessary under the statute that the administrator should deny the signature of the intestate under oath. It must be proven. *Heath v. Lent*, 1 Cal. 411.

3. The objection to a defect of parties in the complaint should be taken advantage of by demurrer, or it must be deemed to have been waived and could not have been raised at the trial. *Sampson v. Shaeffer*, 3 Cal. 202; *Warner v. Wilson*, 4 Cal. 313; *Beard v. Knox*, 5 Cal. 257; *Oliver v. Walsh*, 6 Cal. 456; *Tissot v. Throckmorton*, 6 Cal. 473; *McKune v. McGarvey*, 6 Cal. 498; *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334; *Alvarez v. Brannan*, 7 Cal. 510; *Dunn v. Tozer*, 10 Cal. 170; *Mott v. Smith*, 16 Cal. 557.

4. An allegation that the goods were purchased of A, the agent, then and there acting for defendant, is sufficiently certain to prevent any misapprehension of its meaning, and is the same as if the allegation was of the purchase from defendant. *Cochran v. Goodman*, 3 Cal. 245.

5. Where the complaint in *hæc verba* sets forth the bill of the article purchased, it is sufficient to inform the defendant with what he is charged, for he is presumed to know what was intended by his own account. *Id.*

6. Objections to the form of a complaint cannot be raised for the first time in the supreme court. *Sutter v. Cox*, 6 Cal. 415.

7. An allegation in a complaint that the parties kept a saloon for the purpose of gaming and selling liquors and cigars, does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gaming house, as the word might apply to lawful games, as bil-

## In general.—What the Complaint should contain.

liards, etc. *Whipley v. Flower*, 6 Cal. 632.

8. If the defendant is described in the caption of the complaint as administrator, it is immaterial so long as the facts stated in the body of the complaint show that he is not sought to be charged as administrator. *People v. Houghtaling*, 7 Cal. 350.

9. Where an attachment was issued on a complaint which was a printed form, with the blanks filled up by the clerk at the request of plaintiff, but no name signed to it until next day, and after other attachments on the same property, when it was signed by the clerk with the name of plaintiff's attorney: held, that the action of the clerk, though not correct, was only an irregularity, and the complaint was not void. *Dixey v. Pollock*, 8 Cal. 572.

10. The allegations of the complaint must be construed most strongly against the pleader. *Dickinson v. Maguire*, 9 Cal. 50.

11. It is necessary in the service of papers to follow the provisions of the statute, and the return should show that the defendant was served with a certified copy of the complaint. *McMillan v. Reynolds*, 11 Cal. 379.

12. An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 169; *Bostic v. Love*, 16 Cal. 72.

13. A bill quia timet and to enforce the specific execution of an agreement lies only where there is no adequate remedy at law. But where the damages resulting from the breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction unless there are some peculiar equitable circumstances. *White v. Fratt*, 13 Cal. 525.

14. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry & Table Mt. W. Co.*, 14 Cal. 36.

15. Where a paper purporting to be an admission by an agent is attached to the complaint as an exhibit, and then the answer denies the agency, the paper is not evidence until the agency is proven. *Id.* 37.

16. Where the return of a sheriff states

that he served the defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else. *Curtis v. Herrick*, 14 Cal. 119.

17. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, defendant may show anything disproving the contract as averred; as that another party who in fact sold the cattle, sold them as his own, and not as agent of the plaintiff; or that defendant was not to pay until the cattle were fattened and slaughtered. *Hawkins v. Borland*, 14 Cal. 414.

18. If, as contended in this case, a judgment by default be void, because of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

## II. WHAT THE COMPLAINT SHOULD CONTAIN.

### 1. Cause of Action.

19. Where a plaintiff alleged in his complaint that he was *satisfied* that defendant procured certain property through fraud, but there were no other allegations in the complaint showing fraud: held, that the issue tendered was immaterial—it not presenting a point upon which the case could be decided upon its merits. *Snow v. Halstead*, 1 Cal. 361.

20. A plaintiff must recover, if at all, according to the averments in his complaint, and a court is not warranted in rendering a judgment in favor of the plaintiff when there is no averment in the complaint upon which the judgment can be based. *Sterling v. Hanson*, 1 Cal. 480; *Benedict v. Bray*, 2 Cal. 256.

21. The plaintiff must recover on the allegations in his complaint, if at all, and if the complaint fails to aver that property was partnership property, the judgment

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of the court should not find that fact. *Sterling v. Hanson*, 1 Cal. 480.

22. The code of practice requiring the complaint to contain a statement of the facts constituting a cause of action, in ordinary and concise language, is only declaratory of the common law. *Godwin v. Stebbins*, 2 Cal. 105.

23. A plaintiff can only recover for such causes of action as are stated in his complaint. *Benedict v. Bray*, 2 Cal. 256.

24. In an action of detinue it is usual to aver a bailment or finding; but the manner in which the defendant became possessed of the property has always been held to be mere matter of inducement. *Otero v. Bullard*, 3 Cal. 189.

25. The allegation that the use and occupation of the lot in question was at the request of the defendant, and by the permission of plaintiff, was the allegation of a contract, which the plaintiff is bound to establish to enable him to succeed. *Sampson v. Shaeffer*, 3 Cal. 201.

26. The allegation of ignorance in making the necessary averments in a complaint, or of insufficient conduct in the prosecution of a former suit, does not constitute grounds for relief in chancery. *Barnett v. Richey*, 3 Cal. 327.

27. The complaint was for money loaned, and set out a draft drawn by defendant which plaintiff was to pay and did pay, but did not aver that after paying the draft he canceled and delivered it up to the defendant: held, that this defect was fatal to the form of action and should have been upon the outstanding draft. *Lambert v. Slade*, 3 Cal. 331.

28. Where the complaint alleged, in September, 1849, the plaintiff settled on a tract of land, "the same being public land of the United States;" that subsequently H., a foreigner, built a house and occupied a portion of the tract; and now, that H.'s executor is offering the same for sale, and plaintiff prays an injunction and damages for the occupation: held, that the complaint sets forth no principle on which to base a claim. *O'Conner v. Corbitt*, 3 Cal. 372.

29. The allegation of possession at the time of the ouster complained of is a sufficient allegation of title to sustain the declaration. *Hutchinson v. Perley*, 4 Cal. 34.

30. The statute does not require an allegation in the complaint of possession;

an averment that the premises "are unlawfully withheld from the plaintiff" is somewhat general, yet not insufficient in a justice's court—except upon demurrer. *Cronise v. Carghill*, 4 Cal. 122.

31. In forcible entry and detainer, a description of the land sufficiently definite to enable the administration of substantial justice is all that is required in actions before a justice of the peace. *Hernandez v. Simon*, 4 Cal. 183.

32. A complaint is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone v. Laurencel*, 4 Cal. 277.

33. Where a complaint alleges that the plaintiffs were in possession and lawfully entitled to possession at the time of eviction, it was held that the complaint must be treated as a declaration in ejectment. *Ramirez v. Murray*, 4 Cal. 293.

34. In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient. *Shafer v. Bear River & Auburn W. & M. Co.*, 4 Cal. 295.

35. A declaration is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or what manner the indebtedness accrued—whether on account of the defendant or that of another. *Mer-shon v. Randall*, 4 Cal. 326.

36. To enable the plaintiff to recover in an action of ejectment founded on prior possession, he must allege in his complaint and prove an actual ouster by defendants, or those under whom he holds. *Payne v. Treadwell*, 5 Cal. 311; *Watson v. Zimmerman*, 6 Cal. 47.

37. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objections to it should be taken by demurrer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

38. To maintain a creditor's bill in chancery, in order to reach equitable assets, which are alleged to have been fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set forth, which will reasonably sustain the theory of the bill. *Kinder v. Macy*, 7 Cal. 207.

39. A complaint alleging that the de-



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fendant sold to plaintiffs a certain share of fruit growing in an orchard, and after a sale executed a guaranty that the share of plaintiffs should be at their disposal; and further alleging a demand for the same, and the refusal of the defendant to deliver; is demurrable, as it should contain an averment of the assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 212.

40. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, and are entitled to the natural flow of the waters of the stream, which had been diverted to their injury by defendants, sets forth a sufficient cause of action. *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.

41. A complaint alleging that the defendant collected and received certain money as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud and for judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

42. No averment of notice to the defendant is requisite in the complaint where the matters assigned as breaches lie as much in the knowledge of the one party as of the other. *People v. Edwards*, 9 Cal. 292.

43. The supreme court does not deem it necessary to decide whether in all cases where a judgment is based upon a complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as a nullity. *Reynolds v. Harris*, 9 Cal. 341.

44. A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against the plaintiff, I. Kendall, under which he sold the property, and averring damages in the sum of \$2,000, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action, as the sheriff's deed conveys nothing if the property was a homestead. *Kendall v. Clark*, 10 Cal. 18.

45. If a complaint should only allege that the defendant was indebted to the

plaintiff in a named sum, which the defendant refused to pay, it would be insufficient. It must allege the facts which constitute the indebtedness. *Piercy v. Sabin*, 10 Cal. 28.

46. A complaint which alleges that the plaintiffs were on a certain day the owners and proprietors of a certain valuable water ditch for the purpose of conveying water, and at which time and place the defendants were also the owners of a certain other water ditch for the purpose aforesaid, and that afterwards, on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, and the water therein so negligently and carelessly attended to that said ditch broke away, and the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiffs' ditch, and depriving them of the use and profit of the water flowing therein, to said plaintiffs' damage of \$3,000, and thereof they bring suit, is sufficient. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 195.

47. The averment in the complaint that the plaintiff is the owner of the note and mortgage in suit, is a sufficient answer to a demurrer on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins v. Forbes*, 10 Cal. 300.

48. A demurrer to a complaint on the ground "that the complaint does not state facts sufficient to constitute a cause of action," and which then specifies that the complaint shows no joint cause of action in the plaintiff, and that it prays for a judgment in favor of three plaintiffs for an injury done to one, is a good demurrer for misjoinder of parties. *Summers v. Farish*, 10 Cal. 350.

49. In an action for damages for breaking defendants' dam and flooding the plaintiff's mining claim, where the complaint is one count, and charges that "the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the said defendants, broke away," etc.: held, that the com-



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plaint is sufficient. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 416.

50. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 181.

51. A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules of equity. *Hunt v. Waterman*, 12 Cal. 305.

52. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson v. Highland*, 13 Cal. 75.

53. A complaint is sufficient which states that defendant was indebted for a certain sum of money, ascertained to be due upon a statement of account, and which defendant promised to pay. *Dewitt v. Porter*, 13 Cal. 172.

54. A legatee who has been represented by counsel at the allowance of accounts against an estate, and seeks, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence, must show in his complaint how and why the facts could not have been discovered at the time. *Williams v. Price*, 13 Cal. 213.

55. In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill, is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

56. Where a bill in equity shows on its face that plaintiff is not entitled, the defect may be taken advantage of in the supreme court, even though no demurrer be filed. *White v. Fratt*, 13 Cal. 525.

57. An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship. *Castro v. Armesti*, 14 Cal. 39.

58. Bill filed by a judgment creditor of J., upon order of court permitting it, against the defendants as executors. Bill avers that the will of deceased "directed by written or oral instructions" the executors to sell certain cattle and retain the

proceeds for the use and benefit of J., after first discharging his then debts; that it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: held, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader, and that there is no law giving effect to an oral instruction of a testator—as a will or part of a will; and that the creditor of J. can have no more rights than J. himself. *Sparks v. De la Guerra*, 14 Cal. 111.

59. Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can over a general demurrer. *Abbe v. Marr*, 14 Cal. 211.

60. Where the facts averred by plaintiff as constituting his cause of action show turpitude on his part, he states himself out of court. *Ib.*

61. The endorser of a note payable on demand, no demand being made within thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable, and in such case the facts to excuse the delay are an essential part of the complaint, and if not averred therein it is insufficient. *Jerome v. Stebbins*, 14 Cal. 458.

62. Every fact which, if controverted, plaintiff must prove to maintain his action, must be stated in the complaint. *Ib.*

63. Upon the face of the complaint a good cause of action appears, and it would be going beyond precedent or reason to hold the action of the court void in giving effect to such a complaint when no objection was urged by the only party who could take exception to it. *Smith v. Billett*, 15 Cal. 26.

64. A complaint in ejectment, with general averments in the usual form, is sufficient without a specific averment of the facts. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion, without benefit. *Garrison v. Sampson*, 15 Cal. 95.

65. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground

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in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, was insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States; contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 104.

66. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Id.*

67. A complaint in ejectment, averring that plaintiff was in the actual possession of the premises by inclosure and cultivation; that defendants, on a certain day, entered upon the same and ousted the plaintiff, and that defendant is still in possession, is sufficient. *Boles v. Weifenback*, 15 Cal. 144; *Boles v. Cohen*, 15 Cal. 151.

68. In an action to recover damages for the diversion of the water of a stream from plaintiffs' mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiffs claimed to be entitled, is an immaterial averment: and a recovery of damages would not establish plaintiffs' right to the exact quantity of water claimed, so as to be res judicata in a subsequent suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 149.

69. Complaint in ejectment may be for two separate and distinct pieces of land; but the two causes of action must be sep-

arately stated, affect all the parties to the action, and not require different places of trial. *Boles v. Cohen*, 15 Cal. 152.

70. Complaint in ejectment need not state the exact time of the alleged ouster, especially when no claim is made for damages, and no recovery had for them—the allegation in this case as to time of ouster being, “on or about December 12th, 1857.” *Collier v. Corbett*, 15 Cal. 185.

71. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged; and he must allege nothing affirmatively which he is not required to prove. Negative allegations, however, are frequently necessary, though they are not to be proved. *Green v. Palmer*, 15 Cal. 415.

72. A subsequent purchaser of land mortgaged is a proper if not a necessary party to a foreclosure suit, and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon v. Higuera*, 15 Cal. 495.

73. Mrs. L., when a femme sole, contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid, by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit against her was brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her—the judgment of the supreme court, being conclusive so long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding impeaching it for fraud: held, further, that the complaint need not set out any separate property of the defendant, because the wife was liable in personam before coverture, and under our statute continues so after marriage. *Bostic v. Love*, 16 Cal. 72.

74. In an action of forcible entry and detainer, the complaint described the premises as “about ten rods square, situated

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within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres.) "The said ten rods square being situated from twenty to fifty feet, more or less, southeasterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof among other things showed this ten rods to be called the northeasterly instead of the northwesterly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the northeasterly instead of the northwesterly corner was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

75. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title. *Eagan v. Delaney*, 16 Cal. 87.

76. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business and their property be destroyed: held, that these allegations are insufficient to

authorize an injunction, there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 206.

77. Only such facts need be alleged in a complaint in ejectment as are required to be proved, except to negative a possible performance of the obligation, which is the basis of the action, or to negative an inference from an act which is in itself indifferent. *Payne v. Treadwell*, 16 Cal. 243.

78. In ejectment, the only facts necessary to be alleged are, that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that the defendant was in their possession at the commencement of the action, and withholds the possession from plaintiff. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. *Ib.*

79. There is no necessity, in a complaint in ejectment, of negating the possible rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense. *Ib.*

80. In quo warranto for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office, without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *People v. Abbott*, 16 Cal. 364.

81. Where, in an action on a lost note, the complaint verified alleges the loss, stating particularly the circumstances thereof, an answer denying that the note was lost as alleged does not put in issue the fact of loss, which is the gist of the averment, but only the circumstances of the loss, which are collateral and immaterial. *Castro v. Wetmore*, 16 Cal. 380.

82. Where, in an action on a lost note, a verified complaint alleges that on a par-

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ticular day the note in question was made by defendant, and delivered to plaintiff, an answer denying the making and delivery of the note on the day mentioned is insufficient. Such denial does not reach the substantial matter of the averment, and only raises an immaterial issue as to time. *Ib.*

83. A complaint in ejectment describing the premises as "lot No. 1, in block No. 23, as per plot of the town of Red Bluff, as laid out by the Red Bluff land corporation, in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated, by the terms, "in said county," referring to the designation, "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 433.

84. A complaint in ejectment should not set out the mesne conveyances through which plaintiffs deraign title. These are matters of evidence, not pleading, and should be stricken from the complaint on motion. *Coryell v. Cain*, 16 Cal. 571.

85. In ejectment the complaint should only aver that on some day designated plaintiffs were possessed of the land, describing it; that while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster. *Ib.*

86. The fact that a complaint in ejectment, in addition to describing the premises by metes and bounds, also designates them as one-half of a certain preëmption claim taken up by one Morris—from whom plaintiffs traced title—in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential to plaintiffs' recovery as against a defendant in possession, that they allege in their complaint, and on the trial prove such facts as will bring them within the provisions of the preëmption laws of the United States, or the possessory act of this State. The designation of the property as part of a preëmption claim does

not preclude the claimants from relying upon any other source of title than the United States or the State. *Ib.* 572.

87. In suits for damages for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant is in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title—in other words: the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants, and the complaint need not show title; but this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. *Halleck v. Mixer*, 16 Cal. 579.

## 2. Statement of a Condition precedent.

88. A ship master cannot require payment of freight unless ready to deliver the goods, and consignees cannot require a delivery of goods unless ready to pay the freight, and neither party can maintain an action to compel the other party to perform his part, unless ready to perform the correlative act. *Frothingham v. Jenkins*, 1 Cal. 44.

89. In an action on a contract to be valid on the happening of a certain event or the performance of an act, the complaint must aver and there must be proof that the event has happened or the act performed as a condition precedent to recovery. *Mickle v. Sanchez*, 1 Cal. 201; *People v. Smith*, 2 Cal. 272; *Mattoon v. Eder*, 6 Cal. 59; *Palmer v. Melvin*, 6 Cal. 652; *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Cal. 572; *Bensley v. Atwill*, 12 Cal. 240.

90. The conditions of a bond were such that if on a sale of the balance of the



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goods in the hands of the plaintiff, and the subsequent winding up of the accounts of M. with them, the nett proceeds should be sufficient to cancel the indebtedness of M. to plaintiffs, the obligation to be void: held, in an action on said bond, that the complaint must aver the conditions precedent, the sale of goods, the subsequent winding up of the accounts of M., and the insufficiency of the net proceeds to cancel the indebtedness. *Mickle v. Sanchez*, 1 Cal. 201.

91. Where promises are dependent, neither party can maintain an action against the other without showing performance or an effort on his part to perform his conditions. *Osborne v. Elliott*, 1 Cal. 338.

92. A agreed to convey to B a certain vessel, and B gave his promissory note for the consideration money: held, that A being the holder of the note, could not sue thereon without showing that he had conveyed the vessel to B, or had tendered a conveyance. *Ib.*

93. Where the defendants stipulated to sell to the plaintiffs certain merchandise shipped from Batavia to San Francisco, agreeing that the contract should be considered as binding until the arrival of the ship: held, that the fulfillment of it on either side depended on the contingency of the ship's arrival, and that an action could not be maintained by the vendee of the goods, it appearing that the ship had never arrived at her port of destination. *Middleton v. Ballingall*, 1 Cal. 446.

94. Where by an agreement for the sale or purchase of land the price is payable in instalments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last instalment, and suit is brought on the notes after all the instalments have become due, the tender of a conveyance by the vendor is a condition precedent to the right to sue; and the purchaser may insist on the want of such tender against an endorsee after maturity. *Folsom v. Bartlett*, 2 Cal. 164.

95. Where a declaration states a condition precedent, and fails to aver a performance, the defect must be urged on a demurrer, and it is too late after a verdict. *Happe v. Stout*, 2 Cal. 461.

96. A lessee admits the authority of his lessor by taking a lease, and no averment of the lessor's right to lease is necessary

as against him. *Morse v. Roberts*, 2 Cal. 516.

97. In an action brought to recover damages by the owner of a licensed ferry against a party alleged to have run a ferry within the limits prohibited by law, the complaint should allege that the defendant run his ferry for a fee or reward, or the promise or expectation of it, or other than for his own use. *Hanson v. Webb*, 3 Cal. 237.

98. Where a bail bond is given to appear and answer an indictment, the complaint thereon must aver that the indictment was found or is pending. *People v. Smith*, 3 Cal. 272.

99. If the condition be "to appear whenever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called "in the court of sessions" is not sufficient. *Ib.*

100. It is proper to declare in what the common property consists, its nature and value; and in the absence of such an allegation, the presumption would be that there is none at all. *Kashaw v. Kashaw*, 3 Cal. 321.

101. The contract sued on required lumber to be delivered from time to time at such wharf or place as the defendants should designate. The plaintiffs were ready to deliver, but the defendants refused to designate the place of delivery, or to accept the lumber: held, that this refusal was a breach of the condition precedent on the part of the defendants; and that plaintiffs were entitled to sue for a breach of the contract. *Warner v. Wilson*, 4 Cal. 314.

102. A party must fully comply with the laws to entitle him to bring suit for an interference with his ferry privileges, and to entitle him to claim a renewal of his license as a vested right. *Norris v. Lapsley*, 5 Cal. 47.

103. On an action charging conspiracy to obtain a favorable compromise of suits about to be commenced, it is not sufficient merely to show that there were no grounds to warrant these suits. It ought, in addition, to be proved that the intentions of the parties were unfairly directed to the obtaining of such an end, by understanding and agreement between them, which may be shown either by their words or acts. *Leavitt v. Gushee*, 5 Cal. 153.



## Statement of a Condition precedent.

104. Where a contract stipulated for the delivery of a vessel, but designated no particular place for such delivery: held, that a notice of a readiness to deliver must be treated, under the contract, as an actual delivery. *Albretson v. Hooker*, 5 Cal. 178.

105. A promise to stay proceedings under a judgment is a condition precedent to a guaranty given thereupon, and a performance thereof should be alleged and proven to recover on the guaranty. *Smith v. Compton*, 6 Cal. 26.

106. A complaint for money had and received, which does not allege a demand, is bad and demurrable. *Reina v. Cross*, 6 Cal. 31.

107. An allegation on the part of the plaintiff that he has performed all the conditions precedent of the contract, is sufficiently explicit to recover upon. *California Steam N. Co. v. Wright*, 6 Cal. 263.

108. Where a deed contains a covenant that if the grantees shall pay a certain sum of money before a certain day, then this instrument is to take effect as a full and complete conveyance in fee of all and singular the lands: held, that the payment of the purchase money was a condition precedent to the vesting of the legal estate. *Mesick v. Sunderland*, 6 Cal. 314.

109. A complaint should aver that an account was presented to the administrator for allowance, and rejected, to enable the plaintiff to recover. *Ellissen v. Hallock*, 6 Cal. 393.

110. In an action on a release bond in attachment, the complaint should set forth as a condition precedent the release of the property attached upon the delivery of the bond. *Palmer v. Melvin*, 6 Cal. 652.

111. In pleading a judgment of a probate court, it being a limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. *Smith v. Andrews*, 6 Cal. 654.

112. A complaint should not aver that a claim for damages for property taken was presented to the board of supervisors and rejected, to enable the plaintiff to recover. *McCann v. Sierra County*, 7 Cal. 124.

113. In an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint and proven at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

114. Where the payment of a promissory note is by agreement of parties made conditional upon the payment of a certain debt, such payment is a condition precedent to the plaintiff's right to recover on the note, and must be averred in the complaint to have been made. *Rogers v. Cody*, 8 Cal. 324.

115. When by the terms of a contract, expressed or implied, a request or demand constitutes a condition precedent to the bringing of the action, then it must be averred. *Tissot v. Darling*, 9 Cal. 285.

116. An averment in the complaint, in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is unnecessary. The nonpayment of the judgment can be shown without issuing an execution. *Ib.*

117. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property attached was released upon the delivery of the undertaking. *Williamson v. Blattan*, 9 Cal. 501.

118. The plaintiff must show in his complaint that he comes within the exception of the provision of the code which requires an action to be tried in a particular county. *Uhlfelder v. Levy*, 9 Cal. 615.

119. An appointment to an office is complete when the commission is duly issued, but the person appointed is required to give bond and take the oath of office before he can possess the office; these acts constitute a condition precedent to the holding the office. *People v. Whitman*, 10 Cal. 43.

120. Where payment for land was to be made thirty days after a confirmation of the title by the United States—provided that land should be included in the limits of the grant: held, that the confirmation of the title was a condition precedent to recovery of the payment, and should be proven. *Sanders v. Whitesides*, 10 Cal. 90.

121. It is a general principle of the common law that whoever seeks redress for the violation of a contract, resting upon mutual and dependent covenants, to obtain success must himself have performed the obligations on his part. *Conant v. Conant*, 10 Cal. 254.

122. By the common law, a party to a contract was compelled to show a literal performance of the stipulation of it before

## Statement of a Condition precedent.

he could claim damages for a nonperformance against the other. *Green v. Covillard*, 10 Cal. 325.

123. In an action for the division of the common property of husband and wife, after a decree of divorce, the plaintiff must bring herself within the provisions of the statute, and must state affirmatively such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 166.

124. In an action at common law for an account for rent by a tenant in common against his cotenant, the complaint is fatally defective which does not aver that the defendant occupied the premises upon any agreement as receiver or bailiff. *Pico v. Columbet*, 12 Cal. 419.

125. Where the court orders a new trial upon the payment of costs, and such payment is made by the order a condition precedent, and the defendant does not except to the order at the time and appeals, the only thing from which he can appeal is the annexing of this condition to the granting of the motion. *Rice v. Gashirie*, 13 Cal. 54.

126. No title nor any right of possession comes from the mere condemnation of private property for public use. Just compensation actually made or secured according to law, is a condition precedent. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 316.

127. Pending a suit by two joint owners of land to recover possession, one conveys his half to the other, taking back a mortgage for the purchase money conditioned to become due when the mortgagor recovers possession by the suit or compromise, or when he parts with his title: held, that the mortgage does not become due by a sale of half the land to counsel employed to recover the possession, together with sales of most of the other half to various parties. *Steinbeck v. Leese*, 13 Cal. 367.

128. To sustain an action on an account it must be shown there was a demand in favor of plaintiff acceded to by defendant. *Terry v. Sickles*, 13 Cal. 429.

129. Execution against the judgment debtor is not a condition precedent to suit on a bond to release property attached. *Palmer v. Vance*, 13 Cal. 557.

130. In quo warranto to determine the right to an office, an allegation that defendant is in possession of the office with-

out lawful authority is a sufficient allegation of intrusion and usurpation, and if the complaint be defective in this particular, the defect must be reached by special demurrer. *People v. Woodbury*, 14 Cal. 45.

131. In an action of damages for violation of a contract to grind wheat and deliver the flour on demand upon payment of the price agreed on for grinding, tender of the price is necessary to maintain the action. *Vance v. Dingley*, 14 Cal. 53.

132. In suit in equity to set aside a judgment by default on a return by the sheriff of personal service, on the ground that defendant, in fact, was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof he was to be released from the debt for which the action was brought: held, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was, or has been at any time ready or willing to perform the same. *Gregory v. Ford*, 14 Cal. 138; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 202.

133. On appeal from a justice's court in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

134. A complaint by husband and wife, to recover the homestead conveyed away by deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been previously abandoned. *Harper v. Forbes*, 15 Cal. 203.

135. A complaint in replevin, alleging that the testator was seized and possessed of certain premises at the time of his death, on the nineteenth of July, 1855, and that the plaintiffs were appointed the executors of his last will and testament, without averring in direct terms, either previously or subsequently, the fact of the testator's death, or that he left a last will and testament, is defective as a pleading. *Halleck v. Mixer*, 16 Cal. 577.

136. A complaint in replevin alleging that F. was seized and possessed of certain

## Admission of Fact set up in the Complaint.

premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in the possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises without authority and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them to their damage of \$1,100—the alleged value of the wood—sufficiently shows plaintiffs' ownership. *Ib.* 578.

137. The complaint here averring that the plaintiffs were duly appointed executors of the last will and testament of the deceased, and have ever since been such executors, and as such have ever since been in possession of the premises, is not demurrable on the specific ground that it does not show that plaintiffs are the executors of F., or have any authority to maintain the action, though it is subject to other objections. The complaint should state the death of Folsom; his leaving a last will and testament; the appointment therein of the plaintiffs as executors; the probate of the will; the issuance of letters testamentary thereon to the plaintiffs, and their qualification and entry upon the discharge of their duties as executors. *Ib.* 579.

### III. ADMISSION OF FACT SET UP IN THE COMPLAINT.

138. Where the complaint alleges the making and endorsing of a promissory note and the answer denies neither signature, the answer should be stricken out and the plaintiff be entitled to judgment. *Grogan v. Ruckle*, 1 Cal. 196; *Whitwell v. Thomas*, 9 Cal. 199; *Kinney v. Osborne*, 14 Cal. 113.

139. Courts will protect the rights of the actual possessor, and if the complaint avers possession by the plaintiff and is not denied by the answer it will be assumed by the court as a conceded fact. *Folsom v. Root*, 1 Cal. 376.

140. A fact set forth in the complaint

admitted by the defendant's answer needs no proof. *Brooks v. Minturn*, 1 Cal. 483.

141. A demurrer admits the facts as alleged in a complaint to be true. *Selkirk v. Sacramento County*, 3 Cal. 326; *Tuolumne Water Co. v. Chapman*, 8 Cal. 397.

142. Under our practice and that of the common law, a specific denial of one or more allegations is held to be an admission of all others in the complaint well pleaded. *De Ro v. Cordes*, 4 Cal. 120.

143. A default admits the facts as alleged in a complaint to be true. *Tuolumne W. Co. v. Chapman*, 8 Cal. 397; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Hentsch v. Porter*, 10 Cal. 558; *McGregor v. Shaw*, 11 Cal. 48; *Curtis v. Herrick*, 14 Cal. 119; *Smith v. Billett*, 15 Cal. 26.

144. A defective allegation of a fact in a complaint may be cured by default or verdict, but not the entire absence of any allegation whatever. *Hentsch v. Porter*, 10 Cal. 588.

145. Where the complaint called the defendant not only to answer the character of the possession, but the fact of possession by it, a failure to deny this averment is an admission of it. *Burke v. Table Mountain Water Co.*, 12 Cal. 407.

146. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry and Table Mountain Water Co.*, 14 Cal. 36.

147. Where the complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact not in issue by the pleadings, but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 116.

148. Where a complaint avers title in an administrator, a default admits it. *Curtis v. Herrick*, 14 Cal. 119.

149. It matters not what the pleadings are; the complaint covering the amount, the defendant was fixed by his admission, or even by evidence to which he did not except, to the damages shown by such admissions or evidence. *Van Pelt v. Littler*, 14 Cal. 201.

## Amendment to the Complaint.

150. Where the bond in the complaint answers to the description of the bond offered in evidence, and the complaint avers that the mortgage was given to secure *this bond*—the denials in the answer being literal and conjunctive—the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. *Blankman v. Vallejo*, 15 Cal. 644.

## IV. AMENDMENT TO THE COMPLAINT.

151. When it appears by the plaintiff's testimony that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a plaintiff on such terms as may be just. *Acquittal v. Crowell*, 1 Cal. 192.

152. The misjoinder of parties can be corrected by amendment under the statute. *Heath v. Lent*, 1 Cal. 412.

153. Where on appeal the complaint is so radically defective as not to authorize a judgment, a new trial may be granted, with leave to amend upon just terms. *Sterling v. Hanson*, 1 Cal. 479.

154. The discovery of fraud after suit brought would entitle the party to amend so as to include the newly discovered facts. *Truebody v. Jacobson*, 2 Cal. 285; *Davis v. Robinson*, 10 Cal. 412.

155. Where the proof does not sustain the allegations of the bill, and where by the proof the complainant would be entitled to relief in a court of equity if his pleadings had been properly framed, an amendment should be allowed or directed, to conform the pleadings to the facts which ought to be in issue, in order to enable the court to decree fully on the merits, and whenever this is not done it is error. *Connally v. Peck*, 3 Cal. 82.

156. It is not error for the court to allow a complaint to be amended. *Mills v. Dunlap*, 3 Cal. 97.

157. A joint claim by two persons cannot be pleaded as a counter claim by one defendant; but he may amend, and allege that the whole interest therein has been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

158. A case may be remitted to a referee with leave to plaintiff to amend his declaration, and to the defendant to answer over, when it is necessary to enable a correct report to be made. *Montifiori v. Engels*, 4 Cal. 434.

159. The plaintiff sued in assumpsit to recover rent. After a trial and verdict, which was set aside by the court, he amended his complaint to make it in form an action of trespass for mesne profits: held, this was erroneous and should not be permitted, for if the new complaint is to be treated as an amendment to the old one, and to continue the original action, then two causes of action, incompatible in their nature, are joined. *Ramirez v. Murray*, 5 Cal. 224.

160. It would be proper for the court to order the complaint to be amended in an action where the defendant is arrested, so that the question of fraud should be submitted to the jury, and a judgment entered in conformity with the facts found. *Matoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

161. A party may amend by striking out a claim for damages, without regard to the purpose which may influence him, and it is error to refuse this right. *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 414.

162. The prayer of an amended or supplemental complaint may change the character of the original bill, and pray for a different relief, if in accordance with the additional facts. *Baker v. Bartol*, 6 Cal. 486.

163. Every supplemental complaint is enlarged or altered by every additional and pertinent fact, and the plaintiff has a right to attach in an amended complaint the assignment for fraud discovered since filing his original complaint. *Ib.*

164. After a motion for a nonsuit, the court may, upon terms, allow an amendment of the complaint, if it would not operate as a surprise upon the defendant; but if this is not done, the plaintiff cannot recover. *Farmer v. Cram*, 7 Cal. 136.

165. When a final judgment on demurrer to the complaint, sustaining the demurrer, was reversed, the plaintiff had the right to amend, on application to the court below. *Phelan v. San Francisco County*, 6 Cal. 16.

166. It is always in the power of the



## Amendment to the Complaint.

court to allow an amendment to the complaint, so it does not affect the substantial rights of the parties. *Polk v. Coffin*, 9 Cal. 58.

167. If defendants were surprised by the amendment, and found it necessary to adopt a different line of defense in consequence of it, they would have been entitled to a continuance, in order to prepare for their defense. *Ib.*

168. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or by permission of the court be allowed to file a separate answer, the plaintiff having the liberty to amend the complaint, if any matters are set up in the answer which he might wish to anticipate by further allegation. *Moss v. Warner*, 10 Cal. 297.

169. It is error to render a final judgment on demurrer to plaintiff's complaint. Where the complaint is defective, the court should sustain the demurrer, with leave to the plaintiff to amend his complaint; and if the plaintiff then declines, judgment final should be given. *Gallagher v. Delaney*, 10 Cal. 410.

170. An affidavit which avers that affiant, on the day named, "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof attached to a copy of the amended complaint filed in this action," is insufficient; the copy of the amended complaint should be certified. *McMillan v. Reynolds*, 11 Cal. 378.

171. A justice of the peace has the right to allow a complaint to be amended, in all respects, so that the case may be determined on its merits; and this, whether the defect be in the statement of jurisdiction or any other fact. *Linhart v. Buiff*, 11 Cal. 280.

172. A mere order, permitting an amendment of the complaint, was of no effect unless and until complied with. *Kimball v. Gearhart*, 12 Cal. 46.

173. A court may order judgment creditors, as subsequent incumbrancers, to be made parties to an action by an amendment of the complaint, as a better course, or by petition on intervention. *Horn v. Volcano Water Co.*, 13 Cal. 70.

174. A refusal by a county court, on appeal from justice, to permit an amendment to the complaint, is matter of discretion, and there being no affidavit of materiality, nor any showing of importance of the amendment, this court will not interfere. *Canfield v. Bates*, 13 Cal. 608.

175. The amendment of the complaint putting the substantial matters contained therein into two counts not being answered by defendants, and no default taken therefor, the plaintiff cannot go to trial without objecting to the answer to the original complaint, and after verdict against him object to the want of an answer to the amended complaint. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

176. Where a demurrer is sustained, and the plaintiff amends by making two counts, instead of one, he cannot, after trial, complain of error in sustaining the demurrer. *Ib.*

177. If after a demurrer to the complaint sustained defendant does not offer to amend, final judgment against him will not be disturbed. *Smith v. Yreka Water Co.*, 14 Cal. 202.

178. Complaint filed against M. & D. and H. & L. sureties; complaint amended, and H. & L. only named defendants, and on this complaint the issue was framed, and the cause tried: held, that this operated as a discontinuance as to M. & D. *Browner v. Davis*, 15 Cal. 11.

179. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Smith v. Billett*, 15 Cal. 26.

180. Upon the remittitur of a cause to the court below, if the plaintiffs desire to amend their complaint so as to present their legal rights for the determination of a jury, they should be permitted to do so. *McDonald v. Bear River W. & M. Co.*, 15 Cal. 149.

181. The supreme court will not reverse the judgment of the court below to afford plaintiff an opportunity to amend his complaint, when he did not offer to amend below, there being no error in the record. *Gibbons v. Scott*, 15 Cal. 286.

182. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and in consequence the character of



## Amendment to the Complaint.—Supplemental Complaint.

the judgment which is sought, cannot be incorporated with the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Van Maren v. Johnson*, 15 Cal. 311.

183. When suit is brought against a female, who subsequently marries, her husband must be made a codefendant. But this should be done, and an averment of the marriage be made by a supplemental complaint, and not by an amendment to the original. *Ib.*

184. The objection to a complaint in forcible entry and detainer, that it does not aver "actual" possession—the word "possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended, but it cannot be urged in the supreme court for the first time. *Minturn v. Burr*, 16 Cal. 110.

## V. SUPPLEMENTAL COMPLAINT.

185. Every supplemental complaint is enlarged or altered by every additional and pertinent fact, and the plaintiff has a right to attach in an amended complaint the assignment for fraud discovered since filing his original complaint. *Baker v. Bartol*, 6 Cal. 486.

186. Where suit is brought against a female, who subsequently marries, her husband must be made codefendant. But this should be done, and an averment of the marriage be made by a supplemental complaint, and not by an amendment to the original. *Van Maren v. Johnson*, 15 Cal. 311.

187. If the husband be made a party at the trial, upon suggestion of the marriage, in open court with the consent of all parties, by an order of court, and the complaint is then and there amended by simply inserting the names of the husband and wife in place of the female defendant alone, and they then file an answer, it cannot be for the first time objected in the supreme court that a supplemental complaint should have been filed. *Ib.*

188. Nor is it any objection in such a case that, after the amendment of the complaint, the suit was against defendants

jointly, while the evidence failed to show any cause of action against the husband. The action being for services rendered to the defendant, wife, previous to her marriage, the liability of the common property of the defendants, and the necessity of making the husband a party, arise from the subsequent marriage; and as the orders and proceedings of the court, however informal and irregular, show the true facts of the case, the judgment will be a bar to any future action against the defendants for the same cause. *Ib.*

189. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Ib.*

190. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently D. and M. convey to the defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided one-third—one-half of E.'s interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose—making D. alone the party—get judgment for the amount due, and a decree directing a sale of all the interest D. had at date of mortgage. At the sale, plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree, and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property—a partition being impossible without prejudice—and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the time of his mortgage to them; and that the sheriff stated such interest was offered for sale: held,

## Joinder of Causes of Action in the Complaint.

that upon proper application in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing in E. and others interested, as parties. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 566.

## VL. JOINDER OF CAUSES OF ACTION IN THE COMPLAINT.

191. If several causes of action are improperly united in the same action, the objection must be taken by demurrer or it will be deemed to be waived, and the action will be sustained. *Macondray v. Simmons*, 1 Cal. 395; *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Clark v. Boyreau*, 14 Cal. 638.

192. A contract contained a covenant for stipulated damages, and by the same contract the parties were constituted partners: it was held, that in action on said contract the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

193. In a complaint for trespass, the plaintiff in one count claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages: it was held, that these causes of action were properly joined. *Tendesen v. Marshall*, 3 Cal. 440.

194. A claim for damages for a personal tort cannot properly be united in an action with a demand cognizable in equity. *Mayo v. Madden*, 4 Cal. 28.\*

195. A claim for possession of real property, with damages for its detention, cannot be joined with a claim for consequential damages arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. The Sacramento Turnpike Co.*, 5 Cal. 225.

196. It is not misjoinder of causes of action to demand in the same action that defendant account for and refund a proportion of the outfit and advances made

by plaintiff, as agreed in the same contract. *Garr v. Redman*, 6 Cal. 576.

197. A party may declare in tort, under our pleadings, and at the same time ask for the equitable interposition of the court to protect the subject matter in litigation until the case is heard. *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237.

198. A complaint which joins an action of "trespass quare clausum fregit," ejectment and prayer for relief in chancery will be held bad on demurrer. To sustain such complaint would be subversive of all the rules of pleading. *Bigelow v. Gove*, 7 Cal. 135.

199. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 9 Cal. 642.

200. An action at law which prays for a judgment against the party who executed the note sued upon may be joined with an equitable demand to foreclose a mortgage given by that party and his wife to secure the payment of the note. *Rollins v. Forbes*, 10 Cal. 300; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Rowland v. Lieby*, 14 Cal. 157.

201. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam, and the consequent washing away of the pay-dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears Union Water Co.*, 12 Cal. 557.

202. The union in one count of a complaint of an allegation that defendants have wrongfully built dams and flumes across Mormon Creek, so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that "defendants have constructed gates, etc., in their said dams and flumes, which they hoist for the purpose of cleaning out said dams and flumes of slum, stone and gravel," the accumulation of which renders the water useless to plaintiff, does not make the complaint demurrable on the ground that it unites several distinct causes of action in one count.

\* In the opinion of *Gates v. Kieff*, 7 Cal. 126, the court stated that the case of *Mayo v. Madden*, 4 Cal. 28, was not analogous.

## Dismissal of a Complaint.—Surplusage in a Complaint.

*Gale v. Tuolumne Water Co.*, 14 Cal. 27.

203. Common counts cannot all be united in one count, as one cause of action, without any specification of the sums due upon each several cause. *Buckingham v. Waters*, 14 Cal. 147.

204. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste pending the action; but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma Water and Mining Co. v. Clarkin*, 14 Cal. 548.

205. Though the prayer, or one of the prayers, may indicate a distinct cause of action against one defendant, yet it is immaterial if the allegations of the complaint, taking them all together, make no homogeneous case as against all the defendants. *De Leon v. Higuera*, 15 Cal. 495.

206. Complaint avers in substance that defendant made his note, etc., setting out a copy; that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "Plaintiff further shows that after said note was executed, etc. \* \* \* defendant, by virtue of \* \* \* proceedings in insolvency, etc. \* \* \* claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about \* \* \* defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc.: held, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as matter of inducement. *Smith v. Richmond*, 15 Cal. 502.

207. An objection that one of two counts in a complaint is an equitable cause of action, and should not be tried by jury, must be taken at the time, and cannot be urged on appeal if not so taken. *Baker v. Joseph*, 16 Cal. 177.

## VII. DISMISSAL OF A COMPLAINT.

208. Where a complaint disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett v. Kilbourne*, 8 Cal. 327.

209. Plaintiff demurred to defendant's answer, and defendant moved to dismiss the complaint, which motion was argued with the demurrer. The court dismissed the complaint on defendant's motion: held, that the action of the court may be considered as sustaining a demurrer to the declaration, because either the motion to dismiss may have been treated as a demurrer, or the plaintiff's demurrer to the answer may have been first visited upon the bill. *Den v. Den*, 6 Cal. 82.

210. Where a notice of motion to dismiss a complaint on specified grounds is given, to obtain a review of the order made on the motion, the record must disclose the papers read, or the evidence offered in their support. *Freeborn v. Glazer*, 10 Cal. 338.

## VII. SURPLUSAGE IN A COMPLAINT.

211. Where the complaint, in an action to recover possession of a mining claim in a justice's court, contains an allegation of injury done and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten v. Jilson*, 6 Cal. 19.

212. Superfluous matter in a complaint, when inserted by itself, should be struck out or disregarded as surplusage. *Boles v. Cohen*, 16 Cal. 152.

213. In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual averments, went on to detail the manner of the seizure, with the incidents occurring on the street at the time, and everything done by defendants, plaintiff and the "crowd," relating to or constituting the evidence of the wrongful conversion: held, that this narration should have been stricken out, on motion, as irrel-

## Verification of a Complaint.—Compromise.

evant and redundant matter. *Green v. Palmer*, 15 Cal. 414.

214. An unessential, or, what is the same thing, an immaterial allegation, is one which can be stricken from the pleading without leaving it insufficient, and need not be proved or disproved. Whether an allegation be material, may be determined by the question, "Can it be made the subject of a material issue?" In other words, "If it be denied, will the failure to prove it decide the case in whole or in part?" If it will not, then the fact alleged is not material. *Ib.* 416.

215. An allegation in a complaint on ejectment that the possession of defendant is "wrongful or unlawful," is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. *Payne v. Treadwell*, 16 Cal. 244.

216. The averment in a complaint for replevin of timber cut, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to defendant's removal and detention of the same, may be stricken out as surplusage. *Halleck v. Mixer*, 16 Cal. 578.

## IX. VERIFICATION TO A COMPLAINT.

217. The objection to the want of verification of a complaint, where verification is required by statute, must be taken either before answer or with the answer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

218. There are but two forms in which a defendant can controvert the allegations of a verified complaint: first, positively, when the facts are within his personal knowledge; and second, upon information and belief when they are not. *Curtis v. Richards*, 9 Cal. 37; *Humphreys v. McCall*, 9 Cal. 62.

219. Where the complaint is verified, an answer denying "generally and specifically each and every material allegation in the complaint, the same as if such allegations were herein recapitulated;" and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any facts stated in the complaint. *Hensley v. Tartar*, 14 Cal. 509.

## X. PRAYER TO A COMPLAINT.

220. Although the prayer of a complaint be inartificially framed, under the general prayer for relief the court may disregard the mistakes and treat them as surplusage, and grant such relief as will conform to the bill. *Truebody v. Jacobson*, 2 Cal. 283.

221. The complaint, in an action of forcible entry and detainer, need not pray for treble damages to warrant the court in trebling them. *Hart v. Moon*, 6 Cal. 162.

222. Objections to the prayer of a complaint cannot be taken by demurrer. *Rollins v. Forbes*, 10 Cal. 300.

223. The averments, and not the form of the prayer of a complaint, must determine the character of the pleading; and the designation of a complaint as a bill in equity does not make it such. *Pico v. Columbet*, 12 Cal. 419.

## COMPROMISE.

1. In an action, charging conspiracy to obtain a favorable compromise of suits about to be commenced, it is not sufficient merely to show that there were no grounds to warrant the suits. It ought in addition to be proven that the intentions of the parties were unfairly directed to the obtaining of such an end, by understanding and agreement between them, which may be shown either by their words or acts. *Leavitt v. Gushee*, 5 Cal. 153.

See COGNOVIT.

## COMPUTATION OF TIME.

See TIME.



## Condemnation of Private Property.

## CONCILIATION.

1. Since the occupation of California by the Americans, and before the adoption of the code, the proceeding of conciliation has been deemed a useless formality by the greater portion of the members of the bar, by the courts, and by the people. *Von Schmidt v. Huntington*, 1 Cal. 64.



## CONDEMNATION OF PRIVATE PROPERTY.

1. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purpose of a public street, though it may perhaps give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds v. West*, 1 Cal. 329.

2. The destruction of a building to stop the spread of a conflagration it seems cannot be deemed the taking of private property for public use within the meaning of that clause in the constitution which prohibits such taking without just compensation. *Dunbar v. City of San Francisco*, 1 Cal. 356; *Surocco v. Geary*, 3 Cal. 72.

3. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be claimed for that part of the wharf which is below the line of low water. *Gunter v. Geary*, 1 Cal. 469.

4. If by the construction of a railroad through the enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75.

5. Where private property is appropriated to public use by the supervisors

of a county, without making provision for paying for the same, such act is illegal and may be enjoined. *McCann v. Sierra County*, 7 Cal. 124.

6. Parties in possession of land are entitled to compensation before it can be taken for public uses. *Gunter v. Geary*, 1 Cal. 65; *City of San Francisco v. Scott*, 4 Cal. 116; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75; *McCann v. Sierra County*, 7 Cal. 124; *Colton v. Rossi*, 9 Cal. 599; *McCauley v. Weller*, 12 Cal. 528, 531; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 313; *Johnson v. Alameda County*, 14 Cal. 107; *People v. Brooks*, 16 Cal. 47; *Gillan v. Hutchinson*, 16 Cal. 156.

7. A citizen is entitled to hold his property free from any interference, except through the taxing power, from the government or his fellow subject to this one qualification: that when it is necessary for the purposes of the public, it may be taken from him; provided, the government so taking or authorizing others to take it shall make the owner just compensation, which must be paid or secured to him before he is deprived of his possession. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 313.

8. No title or any right of possession comes from the mere condemnation of private property for public use. Just compensation, actually made or secured according to law, is a condition precedent; and such compensation must be made within a short period, or the privilege of taking the property under the condemnation will be deemed abandoned. *Ib.* 316.

9. The act of March 29th, 1860, providing for the construction of the State capital at Sacramento, is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only



requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

10. The language of the constitution as to the right of trial by jury was used with reference to the right as it exists at common law. The right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. *Ib.*

## CONDITIONS.

- I. Precedent.
- II. Subsequent.

### I. PRECEDENT.

1. The third section of the act "to provide for the construction of canals and for draining and reclaiming certain swamp and overflowed lands in Tulare valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee until performance of the condition annexed—that is, until the reclamation of the lands. *Montgomery v. Kasson*, 16 Cal. 193.

2. This grant is a contract between the State and the grantees, by which the State grants certain lands upon condition of work to be performed; the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely upon the performance of the acts specified as the consideration moving the State. *Ib.* 194.

For CONDITION PRECEDENT, in the Complaint, see COMPLAINT, II, 2, p. 229.

### II. SUBSEQUENT.

3. The sovereign power may, in dis-

posing of the natural domain, annex such conditions to a grant as it sees fit; and in such case a restriction against alienation inserted in a grant and authorized by law will not be held void on the ground that it is against the policy of law. *Sunol v. Hepburn*, 1 Cal. 283.

4. Where a contract of pledge is absolute upon its face, the party asserting a condition or limitation must show it. *Hyatt v. Argenti*, 3 Cal. 164.

5. Where the contract is entire, a breach of part is a breach of the whole, and discharges the party complaining of it from the performance of any of the conditions on his part, and gives him a complete right of action. *Haskell v. McHenry*, 4 Cal. 411.

6. Questions as to the performance of a certain condition in a grant can only be made by the grantor, and not by a mere naked trespasser. *Buckelew v. Estell*, 5 Cal. 108.

7. If the legislature had no authority to annex conditions to removal of the capital by which the State could be benefited, then so much of the act as refers to and fixes conditions is unconstitutional, and may be stricken out, leaving the removal of the capital to stand. *People v. Bigler*, 5 Cal. 27.

8. In an action of ejectment under a Mexican grant, the supreme court is bound to regard the decisions of the United States supreme court establishing the rule that a conditional grant from Mexico conveys a good title without performance of the conditions sufficient to maintain ejectment, and admissible to qualify the plaintiffs' actual possession. *Gunn v. Bates*, 6 Cal. 271.

9. The power to impose conditions after the contract is once complete and perfect is exercising the power to impair its obligation, which the constitution of the United States and of this State have prohibited. *Robinson v. Magee*, 9 Cal. 84.

10. The condition that the party of the second part shall deliver up the property upon a failure to comply with its terms to the party of the first part, to be sold by them to pay the debts of the firm outstanding, then to pay the balance over to the party of the second part, is only a trust retained upon the property sold, which may be enforced like any other trust. *Cayton v. Walker*, 10 Cal. 455.

11. Where an agreement operates by

## Conditions.—Confession.

its terms a present and effectual change of ownership in the subject matter, the title is supposed in law to remain divested until it be affirmatively shown that the conditions of defeasance have happened. *Myers v. South Feather Water Co.*, 10 Cal. 583.

12. We apprehend that when parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have ownership and interest in the premises. *Tewksbury v. Provizzo*, 12 Cal. 25.

13. Whether the conditions of a deed are complied with or not is a matter between the grantor and grantee with which third persons have nothing to do. *Smith v. Brannan*, 13 Cal. 115.

14. Where no conditions are imposed upon creditors in an assignment, an acceptance is presumed upon the general principle that a party is presumed to assent to acts done for his benefit. *Forbes v. Scanell*, 13 Cal. 287.

15. Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature in its wisdom may impose. They may take effect only upon the happening of events which are future and uncertain; and among others the voluntary act of the parties upon whom they are designed to operate. *Blanding v. Burr*, 13 Cal. 357.

16. Where a Mexican grant contained clauses designated in the instrument as conditions against alienation, mortgage or mortmain, and directing the grantee to obtain juridical possession thereof: held, that these clauses were not properly conditions, and that there was nothing in any of the provisions which were onerous or burthensome to the grantee, or which could be regarded as a valuable consideration moving the government to make the grant. *Scott v. Ward*, 13 Cal. 471.

17. Conditions are sometimes attached to donations which would be regarded as changing the character of the transaction from one of gift to one of purchase. *Ib.* 472.

18. Donations may be absolute or accompanied with conditions the performance of which may be essential to the en-

joyment of the property donated. It would seem that under the Spanish and Mexican law, a more comprehensive meaning was attached to the term donation than that usually given to it in our jurisprudence. *Noe v. Card*, 14 Cal. 598.

19. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant. *Holladay v. Frisbie*, 15 Cal. 634.

## CONFESSIOIN.

1. Where the admission or confession of a party was resorted to as evidence, it was held error to exclude any portion of it made at the same time with that portion of it which was admitted. *People v. Navis*, 3 Cal. 106.

2. Where admissions made by defendant are proven on the trial, the objection that it is not first shown that such admissions were made freely and not under the influence of fear or other improper inducements, should be made to the introduction of the testimony. *People v. Rodriguez*, 10 Cal. 60.

3. The provision of the statute concerning divorces, that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party," does not prohibit the introduction of confessions in evidence, but simply prevents granting a decree on them alone. *Baker v. Baker*, 13 Cal. 93.

4. The object of the rule requiring proof in corroboration of defendant's confessions, is to guard against collusion; and where the entire testimony, confessions and circumstances repel all suspicion of collusion and leave no doubt of the truth of the confessions, the court should act upon them. *Ib.* 94.

5. In a criminal case, proof of statements made by defendant must be by the

witness himself, and not by a written memorandum made by him at the time, which he says is correct. *People v. Elyea*, 14 Cal. 145.

6. On an indictment for murder, it appeared that the prisoner on the day of the killing called at a mill, several hundred yards from where deceased was killed, and borrowed a chisel—having been previously in the habit of borrowing tools at the mill. His shirt was bloody, and two spots of skin were knocked off his nose. Defendant's counsel asked the witness, "Did he (prisoner) state how he came by those hurts? If so, state all the conversation then and there between you two in respect to those hurts, and his errand there." Objected to and ruled out: held, that there was no error in the ruling, the declarations not appearing to have any connection with the offense charged; that declarations of a prisoner, to be admissible as part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character: held, further, that even if in this case such declarations were improperly excluded, the prisoner was not prejudiced, because he was convicted of manslaughter only, showing that the jury negatived the idea of malice and premeditation. *People v. Wyman*, 15 Cal. 74.

7. It is not error in the court, in a criminal case, to charge the jury to give such weight to the defendant's confession as they deem it entitled to, "judging from the circumstances under which it was given, and the motives which would naturally actuate the party in giving it;" and that they might, in their discretion, believe or disbelieve parts of such confession. *Ib.*

8. Confessions of a defendant indicted for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him, that if defendant would disclose his confederates he would use his influence to get defendant acquitted, are not admissible in evidence against him. *People v. Smith*, 15 Cal. 410.

9. Query. Whether there is any foundation for the distinction between confessions induced by persons who have no authority or control over the prisoner, and those by persons having such authority as constables, prosecutors and the like. *Ib.*

See ADMISSIONS, CRIMES AND CRIMINAL LAW.

## CONFESSION OF JUDGMENT.

1. An application by a judgment creditor to set aside his confession of judgment, should show that the claim was not just and that the judgment ought not to have been confessed. *Arrington v. Sherry*, 5 Cal. 514.

2. A junior judgment creditor has no right to join with the defendant in an application to set aside such confessed judgment. He must resort to a court of chancery if he is dissatisfied. *Ib.*

3. A confession of judgment to a bona fide creditor and the issuance of execution and making levy under the same by the judgment debtor without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditor. *Ryan v. Daly*, 6 Cal. 239.

4. In a confession of judgment the omission to comply fully with the statute to set forth explicitly the facts and circumstances upon which the debt was incurred does not ipso facto make the judgment void; it merely throws the burden of proof on the judgment creditor, if his judgment is contested by other creditors, of proving that his judgment was fair and not fraudulent. *Richards v. McMillan*, 6 Cal. 422; *Cordier v. Schloss*, 12 Cal. 146.

5. Judgment by confession for over two hundred dollars in a justice's court is void for want of jurisdiction. *Feillett v. Engler*, 8 Cal. 77.

6. Where a judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot at the instance of one not a party to the judgment be invoked to set aside or show the judgment was a nullity. *Cloud v. El Dorado County*, 12 Cal. 133.

7. In a suit to set aside judgment confessed by a party to defraud his creditors, it is not necessary that plaintiff should be either a judgment or execution creditor. A lien acquired by attachment suffices. *Scales v. Scott*, 13 Cal. 78.

8. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after date of the note, which drew interest on the whole amount from date, a portion of the inter-

## Confiscation.—Conflict of Law.

est is fraudulent, and the entire note is void against creditors. *Ib.*

### CONFISCATION.

1. It seems that in the year 1833, or 1834, the property of the missions in California was confiscated by the Mexican government, with the exception of limited portions reserved for religious purposes, and that in carrying into effect this confiscation, the officers of the Mexican government took possession of the lands and property of the Mission Dolores, except a small portion reserved. *Santillan v. Moses*, 1 Cal. 93.

### CONFLAGRATION.

See FIRE.

### CONFLICT OF LAW.

1. The law of Louisiana requires a co-partnership contract to be in writing; the law of California does not: held, that a verbal contract of copartnership made in Louisiana to be executed in California was valid. *Young v. Pearson*, 1 Cal. 450.

2. The political laws, as the laws of slavery of the ceded or conquered country, give way to the laws of the acquiring country. *Ex parte Perkins*, 2 Cal. 439.

3. On May 1, 1851, the legislature "passed" two acts, one to regulate criminal cases, the other to regulate fees in office, both fixing the fees of the clerk in criminal cases, and essentially different: held, that the latter act must govern, as the subject of fees was the sole object of that act, and a mere incident of the crimi-

nal act. *Dobbins v. Supervisors Yuba County*, 5 Cal. 415.

4. The act of May 3d, 1852, providing for the disposal of the 500,000 acres of land granted by Congress to this State, is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims v. Palmer*, 6 Cal. 13.

5. From our constitution, if a statute or section of a statute is reenacted, it is totally inconsistent with the idea that the old statute or section still remains in force, or has vitality for any purpose whatever. *Billings v. Harvey*, 6 Cal. 383.

6. Where an act is passed between the time of the commission of the act and the death of the victim, defining the offense and providing for its punishment, and providing that upon trials for crimes committed previous to its enactment the party should be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed. *People v. Gill*, 6 Cal. 638; 7 Cal. 357.

7. The law does not favor repeals by implication; where there is an apparent conflict between two acts, it is the duty of the court, if possible, to reconcile them; but if this cannot be done, then the last act must govern. *Scofield v. White*, 7 Cal. 401; *Pierpont v. Crouch*, 10 Cal. 316.

8. The power of congress to regulate commerce is exclusive when exercised. The act of congress of July 29th, 1850, authorizing mortgages upon sea-going vessels to be recorded, and making the record notice to third parties, being in conflict with our statute of frauds, the latter must yield. *Mitchell v. Steelman*, 8 Cal. 370.

9. Different principles of the law must be harmoniously applied to the circumstances of the particular case. *Adams v. Woods*, 9 Cal. 29.

10. Rights of property acquired by contract, valid in the place where made, will be protected here. *Forbes v. Scannell*, 13 Cal. 276.

11. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853 relative to pledges of stock by delivery of the certificates. The act of 1853 has no

## Conquest.—Consideration in general.

effect on the act of 1857. *Ede v. Johnson*, 15 Cal. 58.

12. Statutes should be construed according to what appears to be the intention of the legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the later statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. *City and County of Sacramento v. Bird*, 15 Cal. 295.

13. The fifty-fourth section of the act of April 16th, 1850, concerning crimes and punishments, (Wood's Dig. 335) is not repealed by the act of April 19th, 1856, (statutes 1856, 131) amendatory of, and supplementary to the act of 1850. Section two of the act of 1856 does not conflict with section fifty-four of the act of 1850. These sections refer to a different class of offenses. Under the latter, the abduction must be accompanied with a removal into another county, State or territory, or a design to remove the party beyond the limits of the State. Under the former, the abduction need not be accompanied with any such removal or design—the intent to detain and conceal being the gist of the offense. *People v. Chu Quong*, 15 Cal. 333.

## CONFLICTING EVIDENCE.

See EVIDENCE.

## CONQUEST.

1. As a general rule, the laws of a conquered or ceded territory remain in force until changed by the new sovereign. But a strict application to this rule would, in many cases, be unjust; and the Mexican laws on the subject of usury and implied warranty in the sale of land may be deemed to have been abrogated by the

customs and usages of American emigrants before any formal act of legislation abolishing those laws. *Fowler v. Smith*, 2 Cal. 47.

2. Political laws, as the laws of slavery of the ceded or conquered country, give way to the laws of the acquiring country. *Ex parte Perkins*, 2 Cal. 439.

3. It is a well established principle of international law, that the military occupation of a conquered territory does not in general effect any change in the laws of that territory. The political connection between its inhabitants and their former sovereign or State is interrupted or suspended so long as the occupation continues, and is entirely severed on the completion or confirmation of the conquest, whether by treaty of cession or otherwise. *Hart v. Burnett*, 15 Cal. 559.

4. The right of the conqueror to govern the enemy's territory which he may occupy is not derived from the constitution or political institutions of his own State, but flows directly from the laws of war, as established by the usage of the world and confirmed by the writings of publicists and the decisions of courts; in fine, from the law of nations. *Ib.*

5. Although the conqueror may suspend the laws, and entirely displace the former local and civil authorities, or limit or change their powers, this is not usually done; and consequently, that such changes are not to be presumed, but must be proven. *Ib.*; *Payne v. Treadwell*, 16 Cal. 228.

## CONSIDERATION.

- I. In general.
- II. Want of Consideration.
- III. Fraudulent Consideration.
- IV. Parol Evidence to explain Consideration.

## I. IN GENERAL.

1. A contract not to run boats on a certain line of travel, and on failure to comply with such contract to pay \$15,000, is



## In general.

not void as being against public policy and in restraint of trade, where a consideration is paid therefor. *California Steam Nav. Co. v. Wright*, 6 Cal. 262.

2. In these cases, the doctrine seems to be that there must be not only a consideration for the contract, but there must be some good reason for entering into it; and it must impose no restraint upon one party which is not beneficial to the other. *Ib.*

3. A guaranty endorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words, "I hereby guarantee the fulfillment of the within charter on the part of the charterer," is good. *Hazeltine v. Larco*, 7 Cal. 33.

4. If the guaranty were executed subsequently, it would fail, for there is either no consideration for the promise in fact, or the new consideration is not expressed in the instrument referred to. *Ib.* 34.

5. Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the subsequent promise. *Feeny v. Daly*, 8 Cal. 85.

6. Where a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: held, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for a full consideration. *Palmer v. Tripp*, 8 Cal. 97.

7. A conveyance of land on the part of the husband to a trustee, securing the payment of an annuity to the wife in consideration of an indemnity by the trustee against all debts of the wife for maintenance or other account, is valid and supported by a sufficient consideration. *Wells v. Stout*, 9 Cal. 494.

8. Where the object of a deed is to provide for the maintenance of the wife whilst living separately from the husband, and reconciliation and cohabitation takes place, her maintenance being obligatory upon him, the consideration of the deed fails. *Ib.* 498.

9. Time is not in some instances of the essence of contract, it may be true;

but the idea that in California, in early days, either the period of the conveyance of land, or the payment of the consideration, was immaterial or not an important element of the contract, seems to us plainly opposed to common sense. *Green v. Covillaud*, 9 Cal. 330.

10. The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this State has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer. *McCarty v. Beach*, 10 Cal. 463.

11. To constitute a consideration to a bond or other instrument in writing it is necessary that some advantage to the promisor, or injury to the promisee should occur. A part and executed consideration is not sufficient. *Comstock v. Breed*, 12 Cal. 288.

12. An agreement of cancelation of the lease of a ditch and the surrender of the possession to the lessor, is sufficient evidence of the surrender of such possession, although it does not appear that there was a consideration expressed in the instrument. *Burke v. Table Mountain W. Co.*, 12 Cal. 408.

13. The nonpayment of the consideration expressed in the release does not affect the instrument as a valid release. The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. *Paige v. O'Neal*, 12 Cal. 496.

14. Conveyances of real and personal property made to hinder, delay and defraud creditors are subject to the same defect, liable to be avoided at the suit of the creditors, but valid as between the parties, and vest a title which cannot be transferred perfect to a bona fide purchaser for a valuable consideration. *Ib.* 497.

15. A nominal consideration stated and the operative words of a transfer grant, bargain, sell and convey, do not change the character or object of the deed. *Barber v. Koneman*, 13 Cal. 11.

16. R. assigned a mortgage against a company to F., to secure him against his

## In general.

liability as endorser, delivering the mortgage at the same time to F., who retained it a few minutes and returned it to R. to receive the interest from the company as the agent for him, F. The note is unpaid. R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstances of fraud or suspicion, did not impair the rights of the assignee; that the liability of F. as surety was a sufficient consideration for the assignment, and that such assignment is not a mortgage of a mortgage. *Hall v. Redding*, 13 Cal. 219.

17. An outstanding liability as surety or endorser for another, together with an express promise by such surety or endorser to the principal that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount on demand. *Gladwin v. Gladwin*, 13 Cal. 335.

18. Where a Mexican grant contained clauses designated in the instrument as conditions against alienation, mortgage and mortmain, and directing the grantee to obtain juridical possession thereof: held, that these clauses were not properly conditions, and that there was nothing in any of the provisions which was onerous or burthensome to the grantee, or which could be regarded as a valuable consideration, moving the government to make the grant. *Scott v. Ward*, 13 Cal. 471.

19. The consideration which induced the grant or donation cannot change its character, unless there is a positive provision of law which makes the exception—as in that given from the fuero real, where the thing granted is in remuneration of services rendered at the expense of the community. *Ib.* 475.

20. The stay of proceedings accorded by the statute to the execution of the undertaking on appeal, is a sufficient consideration. *Dore v. Covey*, 13 Cal. 508.

21. An undertaking on injunction, reciting that it is made in pursuance of the order of court requiring a bond in the suit in which the restraining order was already in force, sufficiently expresses a consideration. The order for the bond and the undertaking must be taken together. *Praeder v. Purkitt*, 13 Cal. 591.

22. An agreement by one who has lost property by fire or theft to pay a certain sum to any one who will secure the arrest and conviction of the criminal is not a nude pact, but may be enforced by a person performing the service. *Ryer v. Stockwell*, 14 Cal. 135.

23. In such cases, the offer of a reward or compensation by a public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise, and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. *Ib.* 137.

24. When the consideration of a conveyance was a debt, either preëxisting or created at the time, which was not extinguished, but still subsisted between the parties, it was held to be a mortgage. *People v. Irwin*, 14 Cal. 435.

25. Any suspension or forbearance of a legal right constitutes a sufficient consideration for a note or bill, without regard to the possible result in the given case of any attempt to enforce such right. *Naglee v. Lyman*, 14 Cal. 455.

26. Where the mortgage is given to secure the payment of a promissory note, which per se imports a valuable and sufficient consideration, it is of course prima facie evidence of a just indebtedness. *Ede v. Johnson*, 15 Cal. 57.

27. Where the consideration passing between the endorsee and his endorser is not equal to the amount of the paper, the endorsee, in an action against the endorser, can only recover the consideration which he has actually paid. *Vallejo v. Green*, 16 Cal. 160.

28. The third section of the act "to provide for the construction of canals and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee until performance of the conditions annexed—that is, until the reclamation of the lands. It is a contract by which rights may be acquired absolutely upon performance of the acts specified as the consideration moving the State. *Montgomery v. Kasson*, 16 Cal. 193.

29. Where a power of attorney only

## Want of a Consideration.

authorizes a sale, that is a transfer for a valuable or moneyed consideration, but it does not authorize a conveyance from motives of love and affection. *Mott v. Smith*, 16 Cal. 557.

## II. WANT OF CONSIDERATION.

30. Where a note was given on the sale of real estate, and the vendor had neither title, nor color of title, nor possession: held, that the consideration might be inquired into, as between the original parties; and that there being no consideration, the payee could not recover against the maker, and that a guarantor on the note without consideration was not liable. *Fisher v. Salmon*, 1 Cal. 414.

31. Although want of, or illegality of consideration may be inquired into, in an action upon a bill or note between the original parties, by the general mercantile law the maker is estopped from setting up this defense where the securities have passed into the hands of innocent third parties, unless made void by statute. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

32. Where, by an agreement for the sale or purchase of land, the price is payable in instalments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last instalment, and suit is brought on the notes after all the instalments have become due, the tender of a conveyance by the vendor is a condition precedent to the right to sue; and the purchaser may insist on the want of such tender against an endorsee, after maturity. *Folsom v. Bartling*, 2 Cal. 164.

33. In an action upon a promise to pay money, if the complaint contains no averment of consideration or of indebtedness, except by way of recital, it is insufficient. *Shafer v. Bear River W. and M. Co.*, 4 Cal. 296.

34. In defense to a promissory note, it is not sufficient to plead in general terms want of consideration and that the note was obtained by fraud, without setting out the facts. *Gushee v. Leavitt*, 5 Cal. 160.

35. The statute of frauds requires the written agreement to answer for the debt of another to express the consideration

upon which it is made; but where the agreement is executed at the same time as the lease, and forms the consideration for the execution, it is not a promise to answer for the debt of another, but must be considered as an original undertaking, and as a promise made upon the strength of which another was enabled at the time to obtain possession of property, and enjoy its use. Such a transaction is not embraced within the statute of frauds; as the credit given by the written guarantee of the third party is the consideration upon which the transaction is closed. *Evoy v. Tewksbury*, 5 Cal. 286.

36. A guarantee not under seal, nor expressing consideration, made contemporaneously with the contract guaranteed, is a part of that contract; and the expression of the consideration in the contract takes the guarantee out of the statute of frauds. *Jones v. Post*, 6 Cal. 104.

37. A written contract to pay more than ten per cent. per annum as interest on an indebtedness incurred prior to the contract, is void for want of consideration as to the excess of interest up to the date of the contract. *Adams v. Hastings*, 6 Cal. 130.

38. The indebtedness being only for the principal and legal interest, is not sufficient to support a contract to pay a greater amount than was due. It is a voluntary undertaking and cannot be enforced. *Ib.*

39. But a contract to pay in future a greater than legal interest on an existing indebtedness is binding—the forbearance of the creditor being a sufficient consideration. *Ib.*

40. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of a fraud by its vendor, in the purchase thereof at a constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

41. There is no conclusion of fraud springing from the want of consideration in a deed which will enable a stranger to attack it, though it is a circumstance, among others, from which fraud may be inferred. *Gillan v. Metcalf*, 7 Cal. 139.

42. Where a party, in consideration of a conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement,

## Want of Consideration.—Fraudulent Consideration.

at the same time acknowledging his liability: held, that the liability thus assumed is not a conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer v. Tripp*, 8 Cal. 97.

43. Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz v. Hazlett*, 8 Cal. 126.

44. A party who contracts with another for certain work, and states to third persons who furnish labor and materials that he will see they are paid therefor, has no consideration for that promise, and is within the statute of frauds. *Clay v. Walton*, 9 Cal. 333; *Ellison v. Jackson W. Co.* 12 Cal. 553.

45. Where A gave his promissory note to B, in part payment for a certain tract of land, payable to B thirty days after the confirmation of the Sutter land title; provided the land for which the note was given should be included in the limits of the grant: held, that the confirmation of Sutter's title was a condition precedent to the payment of the note; and to entitle A to a judgment on such note, he must prove such confirmation. *Sanders v. Whitesides*, 10 Cal. 89.

46. An arrangement between a party and tenant is void where the tenant, being a married woman, had no capacity to contract; and any agreement on the part of the plaintiff to accept her as purchaser and release the party, was void for want of consideration. *Shaver v. Bear River and Auburn W. and M. Co.*, 10 Cal. 401.

47. The presumption is that promissory notes are given upon a valid consideration; but this presumption being rebutted, the necessity is thrown upon the holder of proving that he received it in good faith, without notice of the illegality of the consideration. *Fuller v. Hutchings*, 10 Cal. 526.

48. Paying part of a note when all is due is no consideration for an agreement to extend the time of payment. *Liening v. Gould*, 13 Cal. 599.

49. Where one of the grantees, under the "swamp and overflowed land" act of 1857, enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant, upon payment of the several notes given as the consideration; will complete the canals within the five years allowed; and that by means thereof and the operation of the statute, they will have a good and valid title to the premises: held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the State with the vendor and his associates—the agreement itself providing for a surrender of the unpaid notes, and a return of the money paid, in case of future failure of title, and the rights of the grantees of the State being fully known to defendant. *Montgomery v. Kasson*, 16 Cal. 195.

50. Where a son conveys real estate to his father, the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement, the agreement is void; the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property, it being shown that the transaction was not a gift. *Russ v. Mebius*, 16 Cal. 355.

51. If in such case the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Id.*

### III. FRAUDULENT CONSIDERATION.

52. When a part of a consideration of a contract is illegal, or when an entire judgment is composed of several elements, one of which is fraudulent, the whole is void. *Taaffe v. Josephson*, 7 Cal. 355; *Swartz v. Hazlett*, 8 Cal. 129; *Valentine v. Stewart*, 15 Cal. 404.

53. A party cannot retain the consideration of a contract on the ground of fraud,



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 Fraudulent Consideration.—Parol Evidence to explain Consideration.
 

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and resist the payment of a penalty of an infraction of his contract on the same ground. *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 592.

54. Where, in an action on a promissory note, the defense set up is that defendant executed the note as the consideration for a deed from the plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein; the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

55. Where a party has given a promissory note, and the payee assigns the note, without recourse after maturity, and suit is brought upon the note by the assignee, and the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction, and that the note be canceled: held, that the case was a proper one for equitable relief; and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 102.

56. L. executed and delivered his note to N. without consideration, and for the purpose of defrauding, hindering and delaying creditors. N. had knowledge of the fraud, and sued and attached upon the note L.'s property. After this, W., a creditor of L., also attached and levied upon the same property. Before judgment, N., for a valuable consideration, assigned the note to J., who knew nothing of the fraud: held, that J. was not protected in his purchase; N. having been superseded by W.'s attachment could not, by any act or deed of his, put his assignee in any better position than he occupied himself. *Wright v. Levy*, 12 Cal. 263.

57. If any portion of the consideration of a note be fraudulent, the entire note is void, as against creditors. *McKenty v. Gladwin*, 10 Cal. 229.

58. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors. *Scales v. Scott*, 13 Cal. 78.

59. Suit on a note for the purchase of land. Answer sets up that the note was given for the land, fencing and building materials; that plaintiffs falsely represented that there was building material for building a barn; that this material was so insufficient in quantity, that it cost defendant six hundred dollars to buy more, etc. There were some averments as to the rotten condition of fences, which plaintiff represented to be good: held, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to the fences, they being part of the freehold. *Kinney v. Osborne*, 14 Cal. 113.

60. Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment, by taking the note of third persons, not negotiable in the mercantile sense, in payment; the makers of the note agreed to this under the supposition, induced by him, that he was the owner of the judgment: held, that the makers of the note, upon discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

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 IV. PAROL EVIDENCE TO EXPLAIN CONSIDERATION.

61. Although want of, or illegality of consideration may be inquired into in an action upon a bill or note between the original parties, by the general mercantile law, the maker is estopped from setting up this defense where the securities have passed into the hands of innocent third parties, unless made void by statute. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

62. The consideration of the assignment of a personal chattel or chose in action may be proven by parol, and a different one established from that expressed in the instrument. *Bennett v. Solomon*, 6 Cal. 138.

63. Under our system, a mortgage is a mere incident to the debt secured by it, and as the debt secured by it and as the consideration for endorsing a note can be



Consignment.—Consolidation.

gone into at any time, there can be no reason for adopting a more stringent rule as to the assignment of the mortgage securing it. *Ib.*

64. As to instruments under seal generally, the American rule seems to be, that the consideration clause in a deed can be explained by parol proof, at least where the consideration proven is of the same species as that mentioned in the instrument. *Ib.*

65. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor in the same manner as a promissory note by the maker. *Comstock v. Breed*, 12 Cal. 288.

66. In a bill of sale of goods sold and delivered, a recital that the consideration was paid is only prima facie evidence of that fact, which may be rebutted or explained by parol. *Cravens v. Dewey*, 13 Cal. 43.

CONSIGNMENT.

1. The consignee named in a bill of lading is to be deemed prima facie the owner of the goods mentioned therein, and, upon payment of freight, may maintain an action against any person who assumes a control over them in violation of his right of property. *Webb v. Winter*, 1 Cal. 418.

2. In an action for money had and received by the consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered. *Johnson v. Totten*, 3 Cal. 347.

3. A plaintiff has a right to waive a tort as against factors, and to bring his action to compel them to account, and for the net proceeds arising from the sales. *Lubert v. Chauviteau*, 3 Cal. 462.

4. Where there is nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in a particular case. *Glidden v. Lucas*, 7 Cal. 30.

5. The liability of a consignee to his principal for the proceeds of sales made accrues, in the absence of original instruc-

tions to remit proceeds on sale, on demand, or instructions to remit, and not upon receipt of proceeds by the consignee. *Kane v. Cook*, 8 Cal. 457.

6. It is the duty of the consignee, not only to inform his principal of the sales, but to remit the proceeds. His neglect deprives the principal of his funds and keeps him in ignorance of his rights. *Ib.*

7. The statute of limitations does not run against a claim of a consignor for moneys in the hands of the consignee, when the latter failed to apprise the former of the sales; for it would permit the consignee to take advantage of his own wrong, and to sustain a defense of which in conscience he ought not to be permitted to avail himself. *Ib.* 458.

CONSOLIDATION.

1. The provisions of the consolidation act of 1856, requiring that the sinking fund created by the act of 1851 should be first exhausted by the redemption of certificates of stock, before the treasurer should make payment annually of the sum of \$50,000 set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional. *People v. Woods*, 7 Cal. 584.

2. The consolidation act of 1856 gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 394; *People v. Scannell*, 7 Cal. 436.

3. There is no constitutional inhibition against incorporating a portion of the inhabitants of a county as a city, or creating a county out of the territory of a city; the very necessity of the case both permits and demands it. *People v. Hill*, 7 Cal. 103.

4. The territory of the county of Sacramento includes the city; but the city forms a portion of the county, and their respective limits are kept distinct in the

consolidation act; the powers of the supervisors being different in respect to the two. The county and city is a corporation for some purposes, while they are distinct as to others. *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

5. Under the Sacramento consolidation act of 1858, query, what becomes of the indebtedness of the county of Sacramento to the city of Sacramento for the services of the recorder in criminal cases under the laws of the State? *Curtis v. Sacramento County*, 13 Cal. 295.

### CONSOLIDATION OF ACTIONS.

1. The law will not tolerate a division of a joint right of action into several actions. *Nightingale v. Scannell*, 6 Cal. 509.

2. A defendant shall not be harassed with several suits for the same matter at the same time; the pendency of one suit may be pleaded in abatement of the other. *Seligman v. Kalkman*, 8 Cal. 216.

3. It often happens that a party has his election to pursue one of two or more remedies, but he should not pursue several at one and the same time. *Ib.* 217.

4. A creditor has not the right to assign a debt in parcels, and thus by splitting up the cause of action, subject the debtor to the costs and expenses of more suits than the parties originally contemplated. *Marziou v. Pioche*, 8 Cal. 536.

### CONSPIRACY.

1. In an action charging conspiracy to obtain a favorable compromise of suits about to be commenced, it is not sufficient merely to show that there were no grounds to warrant the suits; it ought in addition to be proved that the intention of the parties was unfairly directed to the attainment of such an end, by understanding and agreement between them, which may

be shown either by their words or acts. *Leavitt v. Gushee*, 5 Cal. 153.

See CRIMES AND CRIMINAL LAW.

### CONSTABLE.

1. A constable has the right to appoint as many deputies as he pleases; and the deputy is not guilty of any trespass in levying by virtue of any legal process in his hands. *Taylor v. Brown*, 4 Cal. 188.

2. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of fraud by his vendor in the purchase thereof at constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679.

3. An order of the supervisors requiring a new bond of an officer should specify the grounds upon which the order is made; and where the supervisors of Marin county made an order as follows: "Ordered by the board of supervisors that John de Fries, constable of San Rafael township, file another bond with two or more sureties within fifteen days:" held, that this order was fatally defective. *People v. Supervisors of Marin County*, 10 Cal. 345.

4. The power to declare an office vacant is vested, under the statute, where the duty to approve the bond of the office is lodged. That duty is imposed upon the county judge, and not the supervisors; and where the supervisors of Marin county declared the office of constable vacant, because the constable failed to comply with their order to file a new bond: held, that they exceeded their jurisdiction. *Ib.*

5. An action on the official bond of a constable lies primarily upon breach of the condition of the bond, whether the injury for which suit is brought be a trespass or not, the result of the nonfeasance or misfeasance of the officer. *Van Pelt v. Littler*, 14 Cal. 196.

6. The condition of the bond is that the officer shall well and faithfully discharge the duties of his office; and if it is admitted that the facts of this case establish a breach of the condition, we think

there can be nothing in the point that the primary remedy is against the officer as a trespasser, and not on the bond. *Ib.*

7. Where a sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Ib.* 199.

8. The legislature intended that the officer and his sureties should be responsible for every abuse of his official powers, and we think there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. *Ib.* 200.

9. In an action of damages against a constable for illegal seizure of plaintiff's property, the judgment was for six hundred and fifty dollars, the sum claimed in the complaint, the value of the property being fixed therein at four hundred and fifty dollars, and the damages at two hundred dollars. The court found the damages at six hundred and fifty dollars. There was no statement on new trial or appeal: held, that the finding of the court is conclusive; and that the judgment must stand. *Ib.*

10. Where the record shows that suit was brought in township No. 4, Sierra county, that the summons was served, by the constable of that township, in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, (Wood's Dig. 232, 233) the judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder. A constable has no power to execute process out of his township.\* *Lowe v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 16 Cal. 392.

## CONSTITUTIONAL LAW.

- I. In general.
- II. Unconstitutionality of Laws.
- III. The Federal Constitution.

\* The act of February, 1861, empowers constables to serve process in any township in the county in which they are elected.

### IV. Special Acts passed upon.

- 1. Those constitutional.
- 2. Those unconstitutional.

### V. Construction of the Constitution.

#### 1. Art. I. Declaration of Rights.

- a. Sec. 1. Right to acquire and possess Property.
- b. Sec. 3. Trial by Jury.
- c. Sec. 4. Free exercise and enjoyment of Religious Worship.
- d. Sec. 8. Rights of Persons.
  - a. Criminal Trials.
  - b. Condemnation of Private property to Public uses.
- e. Sec. 15. No imprisonment for Debt, except for Fraud.
- f. Sec. 16. No ex post facto Law, or Law impairing the obligation of Contracts.
- g. Sec. 17. Foreigners who become bona fide Residents may enjoy and inherit Property.

#### h. Sec. 18. No Slavery.

#### 2. Art. II. Right of Suffrage.

- a. Sec. 1. Who may Vote.
- b. Sec. 6. Elections.

#### 3. Art. III. Distribution of Powers.

#### 4. Art. IV. Legislative Department.

- a. Sec. 3. Members of Assembly.
- b. Sec. 17. Approval of Bills.
- c. Sec. 21. No person eligible who holds a lucrative Federal office.
- d. Sec. 22. No money to be drawn from the treasury but as appropriated.
- e. Sec. 25. Every Law to embrace but one object.
- f. Sec. 31. Formation of Corporations.
- g. Sec. 37. Organization of Cities.

#### 5. Art. V. Executive Department.

- a. Sec. 2. Election of a Governor.
- b. Sec. 8. Governor to fill vacancy in office.
- c. Sec. 16. Vacancy in office of Governor.
- d. Sec. 18. State Officers.

#### 6. Art. VI. Judicial Department.

- a. Sec. 1. Courts of the State.
- b. Sec. 2. Judges of the Supreme Court.
- c. Sec. 4. Jurisdiction of the Supreme Court.
- d. Sec. 5. Judges of the District Court.
- e. Sec. 6. Jurisdiction of the District Court.
- f. Sec. 7. County Officers.
- g. Sec. 8. County Court and Court of Sessions.
  - a. County Judge.
  - b. Court of Sessions.
  - c. Jurisdiction of the Court of Sessions.
- h. Sec. 9. Jurisdiction of the County Court.

## In general.—Unconstitutionality of Laws.

- i. Sec. 10. Seats of Justice.
- j. Sec. 11. Fees of Judicial Officers.
- k. Sec. 12. Judicial Decisions.
- l. Sec. 14. Justices of the Peace.
- 7. Art. VIII. State Debt.
  - a. Not to exceed \$300,000.
- 8. Art. IX. Miscellaneous Provisions.
  - a. Sec. 1. Seat of Government.
  - b. Sec. 11. Suits against the State.
  - c. Sec. 13. Taxation shall be equal and uniform.
  - d. Sec. 14. Separate and common Property of Husband and Wife.
  - e. Sec. 15. Homestead Law.

## IN GENERAL.

1. The Mexican constitution, admitting the Indian to citizenship, did not remove the restrictions on alienation of land by them. *Sunol v. Hepburn*, 1 Cal. 274.

2. Our constitution must be construed with reference to the known changes in the organic laws of the respective States. *People v. McCauley*, 1 Cal. 381.

3. It is a safe construction that the convention, in framing the constitution, borrowed provisions from those of other States which had already received a judicial construction; they adopted them in view of such construction, and acquiesced in its correctness. *People v. Coleman*, 4 Cal. 50.

4. We recognize the rule that in the exposition of constitutions as of inferior laws, the solemn, deliberate, and long settled precedents of courts, and the practice and acquiescence of governments and people should possess a controlling weight. *Seale v. Mitchell*, 5 Cal. 405; *Ferris v. Coover*, 11 Cal. 178.

5. It is the duty of the court to adopt such a construction as will carry out the plain intendments of the constitution. *People v. Reid*, 6 Cal. 290.

6. If the court were at liberty to say that the organic law of the State was directory, then the whole constitution could be frittered away by judicial decisions, involving in its abnegation the social and political rights of the citizen. *People v. Johnson*, 6 Cal. 504.

7. The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the constitution. *Nouques v. Douglass*, 7 Cal. 70.

8. The judiciary, from the very nature of its powers and the means given it by the constitution, must possess the right to construe the constitution in the last resort, in those cases not expressly or by necessary implication reserved to the other departments. *Ib.*

9. The legislature has the actual power to pass any act it pleases, and the supreme court would never interfere by injunction or otherwise to prevent the passage of such acts, as the constitution has provided other and more appropriate remedies. *Ib.*

10. If some provisions of an act are unconstitutional, this will not vitiate the whole act, unless they enter so entirely into the scope and design of the law that it would be impossible to maintain it without such obnoxious provisions. *People v. Hill*, 7 Cal. 103.

11. The legislature may use or refer to an act unconstitutional in itself to indicate its will in respect to a constitutional purpose. *People v. Bircham*, 12 Cal. 55.

12. The delicate office of declaring an act of the legislature void and unconstitutional should never be exercised, unless there be a clear repugnancy between the inferior and the organic law. *People v. Burbank*, 12 Cal. 384.

13. The constitution is not a grant of power or an enabling act to the legislature. It is a limitation on the general powers of a legislative character, and restrains only so far as the restriction appears, either by express terms or by necessary influence. *State of California v. Rogers*, 13 Cal. 165.

## II. UNCONSTITUTIONALITY OF LAWS.

14. To contend that a law is unconstitutional and not void, would involve a legal solecism and the paradox of an inferior agent of the government setting aside the solemn mandates of the constitution by an act of ratification. *Phelan v. San Francisco County*, 6 Cal. 540.

15. To render a law unconstitutional because opposed to the general policy of the constitution, that policy must be manifested by the terms of the constitution fixing with precision the particular rule, and not as gathered by general inference. *Pattison v. Supervisors of Yuba County*, 13 Cal. 182.

### III. THE FEDERAL CONSTITUTION.

16. In determining the boundaries of apparently conflicting powers between the States and the general government, the proper question is not so much what has been in terms reserved to the States, as what has been expressly or by necessary implication granted by the people to the national government. Each State possesses all the powers of an independent and sovereign nation, except as far as they have been ceded away by the constitution. *People v. Naglee*, 1 Cal. 234.

17. This State may levy a poll tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, and there is nothing in the constitution of the United States which deprives the State of the power of imposing it. *Id.* 238.

18. The constitution of the United States gives no authority to the supreme court of the United States to exercise appellate jurisdiction over the State courts, nor can such authority be derived by implication or construction. *Johnson v. Gordon*, 4 Cal. 369.

19. The provision of the constitution of the United States which gives congress the power to establish "a uniform rule of naturalization," is construed to mean that the rule, when established, shall be executed by the States. *Ex parte Knowles*, 5 Cal. 303.

20. The national constitution must be subject to the general rule, that an instrument is to be construed so as to reconcile and give meaning and effect to all its parts. *People v. Gerke*, 5 Cal. 382.

21. The provision of the practice act authorizing judgment, personal and final, against an absent defendant, for whom the court has appointed an attorney with privilege to the defendant to come in and deny in six months, is not in violation of the constitution of the United States or of this State. *Ware v. Robinson*, 9 Cal. 111.

22. Under the treaty between the United States and China of July 3d, 1844, and the act of congress carrying it into effect, the United States commissioner and consuls constitute a judiciary for the government of the citizens of the United States in China, and are governed by the law of nations, the laws of the United States, the

common law, and the decrees and regulations of the commissioner, until modified or annulled by congress; and such a judicial system is constitutional. *Forbes v. Scannell*, 13 Cal. 281.

### IV. SPECIAL ACTS PASSED UPON.

#### 1. Those constitutional.

23. The insolvent law of this State is not obnoxious to any provisions of the constitution. *Clarke v. Ray*, 6 Cal. 605.

24. The legislature has the constitutional power to require a less amount of proof of the authenticity of a judgment rendered in another State than is set forth in the act of congress. *Parke v. Williams*, 7 Cal. 249.

25. It is within the legitimate power of the judiciary to declare the action of the legislature unconstitutional, where that action exceeds the limits of the supreme law; but the courts have no means and no power to avow the effects of nonaction. *Myers v. English*, 9 Cal. 349.

26. No provision of our constitution delegates to the legislature the power to enlarge the jurisdiction of the federal courts, and the act of 1855 authorizing writs of error from the State courts to the federal courts is void. *Ferris v. Coover*, 11 Cal. 185.

27. The act of the legislature authorizing and directing the board of supervisors of the city and county of San Francisco to audit and allow the claim of a judgment creditor, is not judicial in its character and is constitutional. *People v. Supervisors of San Francisco County*, 11 Cal. 211.

28. The statutory provision that exception to the grand jury must be made at a particular time is constitutional. The legislature have the right to prescribe rules of practice in criminal or civil cases, and among such rules are provisions as to the time and mode of excepting to irregularities of proceeding. *People v. Beatty*, 14 Cal. 573; *People v. Arnold*, 15 Cal. 479.

29. The fact that the act of 1856 authorizes the transfer of the convicts to private individuals, and the lease of the labor of future convicts, does not render the act unconstitutional. The power over the whole subject of punishment for crime is vested in the legislature—the only limita-



## Construction of the Constitution.—Declaration of Rights.

tion being the inhibition against the infliction of cruel and unusual punishments, which mean those of a barbarous character unknown to the common law. *State of California v. McCauley*, 15 Cal. 455.

30. The act of April 27th, 1857, prohibiting gaming, is constitutional. *People v. Beatty*, 14 Cal. 573.

## 2. Those unconstitutional.

31. The act of 1855, imposing a tax of fifty dollars on every person arriving in this State by sea who is incompetent to become a citizen, is unconstitutional and void. *People v. Downer*, 7 Cal. 171.

## V. CONSTRUCTION OF THE CONSTITUTION.

### 1. Art. I. Declaration of Rights.

#### a. Sec. 1. Right to acquire and possess Property.

32. The constitution of this State declares, among the inalienable rights of each citizen, that of acquiring, possessing and protecting property. This is one of the primary objects of government—is guaranteed by the constitution, and cannot be impaired by legislation. *Billings v. Hall*, 7 Cal. 6.

33. If the treaty of Guadalupe Hidalgo, or the federal constitution, could be held to apply to laws concerning real estate, it is apparent that the rule must be extended further, and that all legislation touching property, or affecting the rights of the citizen, might be successfully attacked, and that State sovereignty would become State imbecility. *Ib.*

#### b. Sec. 3. Trial by Jury.

34. The waiver of a trial by jury, as guaranteed by the constitution in every case, must appear affirmatively, and not by implication. *Smith v. Pollock*, 2 Cal. 94.

35. An act to prevent extortion in

office, passed March, 1853, is not in conflict with the constitution—it does not deprive the defendant of the right of trial by jury. *Ryan v. Johnson*, 5 Cal. 87.

36. The constitution provides that the right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. This latter clause refers to legislation, and is not given to courts by rule to refuse a jury trial. *Exline v. Smith*, 5 Cal. 112.

37. The act of 1860, providing for the construction of a State capitol at Sacramento, is not unconstitutional because it authorizes the compensation to the owners for the land taken to be ascertained by commissioners, and not a jury. The provision of the constitution, that “the right of trial by jury shall be secured to all, and remain inviolate forever,” applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of plaintiff’s property, and the compensation to be made to him, is not an action at law—it is an inquisition on the part of the State for the ascertainment of a particular fact, as preliminary to future proceedings; and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without the intervention of a jury, opportunity being allowed to the owners or parties interested in the property to present evidence respecting its value, and to be heard thereon. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

38. The provision of the constitution relative to the trial by jury relates to the trial of issues of fact in civil and criminal proceedings in courts of justice, and has no relation to cases of equity, unless an issue of fact be framed for the jury under the direction of the court. *Ib.* 254.

#### c. Sec. 4. Free exercise and enjoyment of Religious Worship.

39. Our constitution, when it forbids discrimination or preference in religion, does not mean merely to guarantee religious toleration, but religious liberty. *Ex parte Newman*, 9 Cal. 506.

Rights of Persons.

40. The act of April, 1858, "for the better observance of the Sabbath," is in conflict with the first and fourth sections of article first of the constitution of this State, and is therefore void. *Ib.* 510.

41. The constitution of this State will not tolerate any discrimination or preference in favor of any religion; and so far as the common law conflicts with this provision it must yield to the constitution. *Ib.* 512.

d. Sec. 8. Rights of Persons.

a. In criminal trials.

42. A prisoner was indicted and tried for murder, and found guilty of manslaughter only, which verdict the appellate court set aside for irregularity: held, that the conviction for manslaughter is an acquittal for murder; and that any law which would compel a party to be retried for murder, in order to escape the minor offense, thereby putting the party "twice in jeopardy for the same offense," is unconstitutional. *People v. Gilmore*, 4 Cal. 378; *People v. Backus*, 5 Cal. 278.

43. The constitution directs that a culprit shall be presented by indictment, not the accused by his true name, but the person himself, leaving the precise form or words to be determined by the legislature. *People v. Kelly*, 6 Cal. 213.

44. Where a defendant was indicted and convicted of murder, and on appeal a new trial was ordered on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling of the grand jury, and subsequently a new indictment was found against him by another grand jury, under which the prisoner was convicted: held, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not put in jeopardy by the first trial, which had been held to be erroneous. *People v. March*, 6 Cal. 546.

45. The amendatory act of 1855 provides that "the testimony given by a witness shall in no instance be given against himself in any criminal prosecution," and the witness is bound to answer any ques-

tion pertinent to the issue, being thus protected as contemplated by the constitution. *Ex parte Rowe*, 7 Cal. 185.

46. In a criminal case, if the court below impose upon counsel, against their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown that the prisoner was deprived of the opportunity of a full defense, for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

b. Condemnation of private property for public use.

47. The destruction of a building to stop the spread of a conflagration cannot be deemed a taking of private property for public use, within the meaning of that clause in the constitution which prohibits such taking without just compensation. *Dunbar v. City of San Francisco*, 1 Cal. 357; *Surrocco v. Geary*, 3 Cal. 73.

48. Parties in possession of land are entitled to compensation therefor before it can be taken for public use. *Gunter v. Geary*, 1 Cal. 65; *City of San Francisco v. Scott*, 4 Cal. 116; *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75; *McCann v. Sierra County*, 7 Cal. 124; *Colton v. Rossi*, 9 Cal. 599; *McCauley v. Weller*, 12 Cal. 528, 531; *Bensley v. Mountain Lake Water Co.*, 13 Cal. 313; *Johnson v. Alameda County*, 14 Cal. 107; *People v. Brooks*, 16 Cal. 47.

49. The act of 1860 providing for the construction of a State capitol at Sacramento is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provisions of the constitution that "the right of trial by jury shall be secure to all, and remain forever inviolate," applies only to civil and criminal cases in which an issue of fact is joined. The proceedings to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some

## No Imprisonment for Debt.—No ex post facto Law.

equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Koppikus v. State Capital Commissioners*, 16 Cal. 253.

e. *Sec. 15. No Imprisonment for Debt except for Fraud.*

50. In an action to recover money received by a person as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal, and a refusal by him to pay. An arrest in such a case is prohibited by section fifteen, article first, of the constitution. *Ex parte Holdforth*, 1 Cal. 440; *Ex parte Prader*, 6 Cal. 240.

51. An assault and battery is not a case of fraud warranting imprisonment, in the sense that term is employed by the constitution. Neither can it be made so by the legislature, and the judgment is a debt as much as though recovered in an action of assumpsit. *Ib.*

52. The constitution of California prohibits imprisonment for debt except in cases of fraud; consequently every intendment must be in favor of the liberty of the subject and his right to trial by jury, which is likewise secured. *Mattoon v. Eder*, 6 Cal. 60; *Ex parte Prader*, 6 Cal. 240.

f. *Sec. 16. No ex post facto Law, or Law impairing the obligation of Contracts.*

53. An act which divests the creditor of his lien, exempts the property of the judgment debtor from execution, and places it in the hands of trustees, with power to sell if they think proper, and compels the creditor to submit to a delay of twenty years, with no security, impairs the obligation of the contract, and is unconstitutional and void. *Smith v. Morse*, 2 Cal. 553.

54. The act of May 1st, 1851, funding the debt of the city of San Francisco, is unconstitutional so far as it affects the rights of judgment creditors. *Ib.* 557.

55. The suspension of the statute of

remedies or any part thereof existing when the contract was made, is more or less impairing the obligation of the contract, and therefore unconstitutional. *Thorne v. City of San Francisco*, 4 Cal. 131.

56. An act to fund the debt of a county does not impair the obligation of contracts, and is not, therefore, unconstitutional; the obligation to pay is fully acknowledged, and the right to secure the whole amount of his debt is unaffected. *Hunsaker v. Borden*, 5 Cal. 289.

57. The provisions of the "settler's act" of 1856, requiring the party recovering in ejectment to pay the defendant the value of his improvements, it seems are not in violation of the provisions of the Federal constitution prohibiting States from passing laws impairing the obligation of contracts. *Billings v. Hall*, 7 Cal. 6.

58. The legislature is without power to affect past contracts or to alter or destroy the nature and tenure of estates. *Dewey v. Lambier*, 7 Cal. 348.

59. The forty-first section of the recording act relative to conveyances made before the passage of the act requiring them to be recorded is not in violation of the constitution of the United States nor of this State, as it does not impair the obligation of contracts, but merely establishes what shall be constructive notice to third parties; nor does it divest vested rights, but only introduces a rule for the subsequent protection of the rights of parties. *Stafford v. Lick*, 7 Cal. 487.

60. The provisions of the consolidation act of 1856, requiring that the sinking fund created by the act of 1851 should be first exhausted by the redemption of the certificates of stock before the treasurer should make payment annually of the sum of \$50,000, set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional. *People v. Woods*, 7 Cal. 584.

61. The power to impose conditions after a contract is once perfect and complete is a power to impair its obligations, and this the constitution of the United States and of this State have prohibited. *Robinson v. Magee*, 9 Cal. 84.

62. The provisions of the act of April 27th, 1855, requiring all persons holding certain warrants upon the treasurer of Calaveras county to present the same for registry before a certain day, or be forever

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barred from enforcing the payment thereof, are therefore unconstitutional. *Ib.* 85.

63. The provision of the constitution which prohibits the passage of any law impairing the obligation of contracts relates solely to contracts between individuals, and not between individuals and the State. *Myers v. English*, 9 Cal. 349.

64. It is well settled that a judgment rendered in one State, and upon which suit is instituted in another, is a contract in the sense of the constitution. *Scarborough v. Dugan*, 10 Cal. 308.

65. The act of May 1st, 1851, authorizing the "funding of the floating debt of the city of San Francisco, and to provide for the payment of the same," is constitutional. The amendment that the commissioners may purchase stock at five per cent. above par does not affect injuriously the creditors under the act of 1851. *Thorn-ton v. Hooper*, 14 Cal. 11.

66. This act of 1851 is a law as well as a contract, and those provisions which are mere modes of giving effect to the substantial purposes of the act may be revised and altered. The constitution forbids impairing the obligation of contracts, but does not inhibit legislation respecting them. *Ib.*

67. An act denying a right of sale for the enforcement of the contract would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 524.

68. It is said that the requirement of the statutes as to the previous approval of the board of examiners merely affects the remedy of State warrants. This is not so. On the contrary, the requirement operates directly upon the contract itself, interpolating a new term and changing the absolute right of the lessee to the warrants into a conditional and dependent one. But admitting that the requirement relates only to the remedy—that remedy is so changed by it as to materially impair the right; and legislation producing this result is as much within the inhibition of the constitution as if it directly assailed the right. *People v. Brooks*, 16 Cal. 31.

69. The grantees under the act "to pro-

vide for the construction of canals and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11, 1857, having surveyed the lines of the canals mentioned therein, and commenced the work of excavating one of them, and continued the same within and during the year after the passage of the act, have brought themselves within the first section thereof, and secured the right to proceed with the reclamation; and, when this is accomplished, to take one-half of the lands. And if within the five years limited in the act, the reclamation be effected, the title to the alternate sections designated will vest in the grantees absolutely. With the contract and the rights of the grantees thereunder acquired by this part performance of its consideration, the legislature cannot interfere. They are protected by both the federal and the State constitutions. The act of April 20th, 1858, repealing the act of April 11th, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. *Montgomery v. Kasson*, 16 Cal. 194.

g. Sec. 17. *Foreigners to enjoy and inherit Property.*

70. Aliens cannot be said to have any property to enjoy in the mineral or public land by which the constitution of the State would guarantee them against taxation for working and extracting the metals therefrom. *People v. Naglee*, 1 Cal. 252.

71. The provisions of the constitution giving to aliens who are bona fide residents the right to inherit, by the rules of construction, exclude nonresident aliens. *Siemssen v. Bofer*, 6 Cal. 253.

72. The constitution expressly prohibits nonresident aliens from inheriting, and being thus incapacitated, they cannot maintain an action of ejectment for lands devised or bequeathed. *Ib.* 254.

73. The seventh section of the first article of the constitution of this State only removes the disability of alienage to such foreigners as are bona fide residents of the State; it leaves the right of nonresident foreigners, in respect to real property, as it exists at common law. *Farrell v. En-right*, 12 Cal. 456.



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No Slavery.—Right of Suffrage.—Elections.—Distribution of Powers.

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74. The constitution gives to the bona fide resident alien certain rights which may be enlarged, but cannot be abridged by the legislature.\* *State of California v. Rogers*, 13 Cal. 165.

h. *Sec. 18. No Slavery.*

75. By virtue of their police power, the States possess jurisdiction to arrest and restrain fugitive slaves and to remove them from their borders, but not so as to obstruct the owner in reclaiming his slave under the constitution of the United States. *Ex parte Perkins*, 2 Cal. 434.

76. If the constitution of the State does abolish slavery and affirm the Mexican law, and if she have the power to control her own internal police as fully before as after her recognition by the other States, yet it does not follow that upon her admission into the Union she will have any authority to impair the obligation of rights subsisting under the federal constitution. *Ib.*

77. The right of transit through each State with every species of property known to the constitution of the United States and recognized by that paramount law, is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte Archy*, 9 Cal. 165.

78. To allow mere visitors to this State for pleasure or health to bring with them as personal attendants their own slaves, is not any violation of the end contemplated by the constitution of this State. *Ib.* 166.

2. *Art. II. Right of Suffrage.*

a. *Sec. 1. Who may vote.*

79. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People v. Riley*, 15 Cal. 49.

80. And a mere residence or sojourn in

the county as a soldier does not make him a citizen, or prove him to be such. The rule, as fixed by the constitution, is that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship—leaving the political status of the soldier where it was before. *Ib.*

See ALIENS, NATURALIZATION, VOTE.

b. *Sec. 6. Elections.*

81. An election cannot take place under the constitution without statutory regulation. *People v. Weller*, 11 Cal. 60.

See ELECTION.

3. *Art. III. Distribution of Powers.*

82. The constitution forbids not only the exercise of the functions of one department by any other department, but it has gone further, and to secure the complete integrity of each, has by the third article expressly forbidden persons charged with the powers of one from exercising duties properly belonging to another department. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 21; *People v. Town of Nevada*, 6 Cal. 144.

83. That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the State interest within the water line of San Francisco is unconstitutional, as it exercises judicial functions. *Guy v. Hermance*, 5 Cal. 74.

84. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the constitution, or by existing laws. The legislature can pass such laws as it may judge expedient, subject only to the prohibitions of the constitution. If it overstep those limits and attempt to impair the obligation of contracts, or to pass ex post facto laws, or grant special acts of incorporation for other than municipal purposes, the judiciary will set aside its legislation and protect the rights it has assailed. Within certain limits it is independent; when it passes over those limits its power for good or ill is gone. *People v. Brooks*, 16 Cal. 39.

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\*The act of April 19th, 1856, enlarged the powers of inheritance, and extended it to nonresident aliens.



Legislative Department.

85. The fourth article of the constitution reads as follows: "The powers of the government of the State of California shall be divided into three separate departments—the legislative, the executive and judicial—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted." There is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. It simply provides that there shall be separate departments, and it is only in a restricted sense that they are independent of each other. *Ib.*

4. *Art. IV. Legislative Department.*

a. *Sec. 3. Members of Assembly.*

86. The legislature has power so to change the assembly districts as to join two counties in one district. *People v. Hill*, 7 Cal. 104.

b. *Sec. 17. Approval of Bills.*

87. The court may go behind the record evidence of a statute and inquire whether it was passed or approved in accordance with the constitution. *Fowler v. Pierce*, 2 Cal. 171.

88. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him—Sundays excepted—the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return. *Price v. Whitman*, 8 Cal. 415; overruling *People v. Whitman*, 6 Cal. 660.

c. *Sec. 21. No person eligible who holds a lucrative Federal office.*

89. The federal office of surveyor general is a "lucrative office," and the office of

comptroller of the State an "office of profit," under the twenty-first section of article fourth of the constitution of this State. *People v. Whitman*, 10 Cal. 43.

90. Under the twenty-first section of article four of the constitution of this State, a person holding the federal office described in that section is incapable of being elected to a State office; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word "eligible" in this section means capable of being chosen—the subject of selection or choice. *Searcy v. Grow*, 15 Cal. 121.

91. The term "compensation" in sec. 21, art. 4, of the constitution of this State, means the income of the office, not the profit over and above the necessary expenses of the office. *Ib.* 123.

d. *Sec. 22. No money to be drawn from the treasury but as appropriated.*

92. When the constitution, therefore, says that "no money shall be drawn from the treasury but in consequence of appropriations made by law," it only means that no money shall be drawn except in pursuance of law. *People v. Brooks*, 16 Cal. 28.

93. To an appropriation within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation acts of each year. The appropriation is made in anticipation of the receipt of the yearly revenues. *Ib.*

e. *Sec. 25. Every Law to embrace but one object.*

94. The constitution requires that every law enacted by the legislature shall embrace but one object, and that shall be expressed in the title. A law is constitutional in view of this section, where the

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subjects embraced in the same statute, and not expressed by the title, have congruity or proper connection. *De Witt v. City of San Francisco*, 2 Cal. 299.

95. The constitution of the State is not to be considered as a grant of power, but rather as a restriction upon the powers of the legislature; and that it is competent for the legislature to exercise all powers not forbidden by the constitution of the State, or delegated to the general government, or prohibited by the constitution of the United States. *People v. Coleman*, 4 Cal. 49; *Thompson v. Williams*, 6 Cal. 89.

96. The provision that "every law enacted by the legislature shall embrace but one subject, which shall be expressed in the title." is merely directory, and does not nullify laws passed in violation of it. *Washington v. Page*, 4 Cal. 388.

97. A legislature may exercise all powers not prohibited to them by the constitution; except, perhaps, in the single case of acts contrary to natural justice; and even this exception has more foundation in the speculation of moralists than the decisions of wise jurists. *People v. Bigler*, 5 Cal. 27.

98. Under the constitution of this State the amendment of a statute operates as an absolute repeal of the old statute or section so amended, even if the amendment takes nothing away from the old law, but merely adds a proviso in certain cases. *Billings v. Harvey*, 6 Cal. 383.

99. Whether there is any restriction upon legislative power irrespective of the constitution, is a question upon which ethical and political writers have differed. *Billings v. Hall*, 7 Cal. 10.

100. It is an express restriction upon the powers of the legislative department so full, clear, definite and certain, that it would seem to need no application of legal rules of construction; and where the language of the constitution is express, and the intent plain, there is no power in the judicial department to set it aside, whatever inconvenience may result from a legitimate application of the provision. *Nouques v. Douglass*, 7 Cal. 66.

101. The twenty-fifth section of art. 4 of the constitution, which requires that every law enacted by the legislature shall embrace but one object, and that shall be embraced in the title, is merely directory;

it does not defeat laws passed in violation of it. *Pierpont v. Crouch*, 10 Cal. 316.

f. *Sec. 31. Formation of Corporations.*

102. The 31st section of the 4th article of the constitution provides that corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes: held, that the term "municipal purposes" is limited to governmental and cannot be extended to commercial purposes. *Low v. City of Marysville*, 5 Cal. 216.

g. *Sec. 37. Organization of Cities.*

103. There is no constitutional inhibition against incorporating a portion of the inhabitants of a county as a city, or creating a county out of the territory of a city; as a consolidation, the very necessity of the case both permits and demands it. *People v. Hill*, 7 Cal. 103; *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

5. *Art. V. Executive Department.*

a. *Sec. 2. Election of a Governor.*

104. The constitution is just as clear and express that the governor shall hold his office until his successor is qualified, as it is that he shall hold it two years from the time of his installation. *People v. Whitman*, 10 Cal. 44.

b. *Sec. 8. Governor to fill vacant offices.*

105. The constitutional power of filling vacancies vested in the governor applies only to vacancies occurring under circumstances when the original appointing or electing power cannot act. *People v. Fitch*, 1 Cal. 535.

106. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appoint-

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ment returns to the original appointing power. *Ib.*

107. The power to remove an officer is an incident to the power to appoint, as a general proposition, and is made so expressly by the constitution. *People v. Hill*, 7 Cal. 102.

108. The power of a governor to fill a vacancy in an office is not derived from the statute, but from article 5, section 8 of the constitution, and that the appointee of the executive would only hold until an election by the next legislature. *People v. Langdon*, 8 Cal. 12.

109. It would seem the evident intent of the constitution is to limit the executive patronage, and where the term of an office is fixed by the constitution or a statute, the power of a removal does not exist in the executive. *People v. Mizner*, 7 Cal. 523; *People v. Whitman*, 10 Cal. 46.

110. To constitute the "holding" of an office within the meaning of the constitution, there must be a concurrence of two wills—that of the appointing power and that of the person appointed. The appointment is complete when the commission is duly issued, but the person appointed is required to give bonds and take the oath of office before he can possess the office. These acts constitute a condition precedent to the holding the office. *People v. Whitman*, 10 Cal. 43.

111. Where the constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious consequences. *Ib.* 45.

c. Sec. 16. Vacancy in the office of Governor.

112. The constitution itself clearly defines the sense of the phrase "vacancy" of the office of governor, as used in the 16th section, by specifically enumerating in the succeeding section the instances which devolve the duties of the executive upon the lieutenant governor. *Ib.*

d. Sec. 18. State Officers.

113. It is part of the constitutional pol-

icy of this State that all elective officers connected with the executive department of the government shall be elected at the same time and place and in the same manner. *People v. Meloney*, 15 Cal. 62.

114. A controller must be elected biennially, at the same time and place and in the same manner with the governor and lieutenant governor, and an appointment of a controller by the governor before this biennial general election, whatever its effect otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *Ib.*

6. Art. VI. Judicial Department.

a. Sec. 1. Courts of the State.

115. Where the statute fails to provide for an appeal, the party must bring himself within the constitutional provisions of appeals; or the judgment of the court below will be final and conclusive. *Webb v. Hanson*, 3 Cal. 68; *Ib.* 105.

116. The constitution of the State recognizes a distinction between law and equity. *Smith v. Rowe*, 4 Cal. 7.

117. Each branch of the judicial department had its functions assigned by the constitution and was beyond the control of either of the other departments of the government as far as its powers and jurisdiction are concerned. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

118. The superior court of San Francisco, as an inferior municipal court, is a constitutional court. *Seale v. Mitchell*, 5 Cal. 403.

119. The distribution of power among the several courts enumerated in the constitution embraces all cases of ordinary judicial cognizance, whether of law or equity, or criminal, or such as pertain to the administration of estates of deceased persons, or such as may not be classed as those belonging to law or equity, but are such special cases as the legislature may prescribe. *Zander v. Coe*, 5 Cal. 232.

120. Where the constitution does not limit the jurisdiction of the various courts of this State to a particular class of cases or subject matter, and jurisdiction in certain cases is not conferred exclusively up-

## Judges of the Supreme Court.—Jurisdiction of the Supreme Court.

on any particular court, the same may be disposed of among the various courts as the legislature may think proper. *O'Callaghan v. Booth*, 6 Cal. 67.

121. The superior court of the city of San Francisco, which was created under the power of the constitution, "to establish such municipal and other inferior courts as may be deemed necessary," is a municipal court, whose jurisdiction need not necessarily be confined to its municipality, and the act extending its jurisdiction so as to let its process run beyond its territory is constitutional. *Hickman v. O'Neal*, 10 Cal. 294; overruling *Meyer v. Kalkman*, 6 Cal. 589.

*b. Sec. 2. Judges of the Supreme Court.*

122. The unconstitutionality of the statute empowering the Governor to commission a person as judge of the supreme court during the temporary absence of one of its judges fully discussed. *People v. Wells*, 2 Cal. 198, 610.

*c. Sec. 4. Jurisdiction of the Supreme Court.*

123. The constitution of the State confers the authority of peace officers upon the justices of the supreme court and the district judges. *People v. Smith*, 1 Cal. 13.

124. The supreme court has no jurisdiction in cases where the matter in dispute is less than two hundred dollars, nor has the constitution which defined this jurisdiction excepted those cases pending before its adoption. *Luther v. Ship Apollo*, 1 Cal. 16.

125. The legislature has not provided the supreme court with a jury in any case, nor authorized it to cause an issue of facts to be made up in that court and referred to another court for trial. All issues of fact are to be tried in the inferior courts of this State. *Ex parte the Attorney General*, 1 Cal. 87.

126. The constitution has not clothed the supreme court with the powers and jurisdiction of the court of king's bench in England. *Ib.*

127. The supreme court is strictly an

appellate tribunal, and has no original jurisdiction except in cases of habeas corpus, and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of an office. *Ib.* 88.

128. The supreme court having no original jurisdiction to issue a writ of quo warranto, application for the same should be made to the district court, and should the relief be refused which it alone has the power to grant, the supreme court may issue the writ of mandate commanding the necessary process to be issued, or by its writ of injunction or prohibition prevent the abuse of the power and correct errors on appeal in the exercise of their powers. *Ib.* 89.

129. The constitution has not enumerated the courts from whose judgments an appeal will lie to the supreme court, and the statutes have not conferred upon the supreme court appellate jurisdiction over judgments of county courts.\* *Warner v. Hall*, 1 Cal. 91.

130. The supreme court cannot exercise the jurisdiction conferred by the constitution until the mode in which it shall be exercised is prescribed by statute. *Ib.*

131. Authority is vested by the statute in the supreme court to issue writs of mandamus in all cases in which it may appear to form the appropriate remedy, and the constitution warrants that authority whenever the issuance of that writ may be necessary to render the appellate jurisdiction effectual. *People v. Turner*, 1 Cal. 145.

132. It could never have been the intention of the framers of the constitution to deny to the higher courts, both original and appellate, any jurisdiction in that large class of cases where the relief sought is not susceptible of pecuniary estimation. *Conant v. Conant*, 10 Cal. 253.

133. The supreme court is limited in its appellate jurisdiction to actions where the amount involved is over two hundred dollars, and cannot entertain an appeal in an action where the amount in controversy is less, though the costs added thereto exceed two hundred dollars. *Dumphy v. Guindon*, 13 Cal. 30; overruling *Gordon v. Ross*, 2 Cal. 156.

134. The words "matter of dispute" in

\*The act of May 15th, 1854, confers this appellate jurisdiction on the supreme court.

Judges of the District Court.—Jurisdiction.—County Officers.

the constitution, conferring jurisdiction on the supreme court, mean the subject of litigation—the matter for which suit is brought. *Dumphy v. Guindon*, 13 Cal. 30.

*d. Sec. 5. Judges of the District Court.*

135. When a district judge is elected by the people on the occasion of a vacancy in the office, he is under the constitution elected for a full term of six years. *People v. Burbank*, 12 Cal. 387; *People v. Weller*, 11 Cal. 85.

136. The constitution, though it fixes the period of the tenure of the office of district judge, does not fix any day for the commencement of the term; and if it did, it would not follow that it applies to judges afterwards elected to new districts. *People v. Burbank*, 12 Cal. 391; *People v. Weller*, 11 Cal. 85.

137. All the constitution means by the expression "during the term," as used in secs. 15 and 16 of art. 6, is during the time or period for which the officer is elected. *People v. Burbank*, 12 Cal. 392.

*e. Sec. 6. Jurisdiction of the District Court.*

138. District courts have no appellate jurisdiction constitutionally. *People v. Peralta*, 3 Cal. 379; *Caulfield v. Hudson*, 3 Cal. 389; *Hernandes v. Simon*, 3 Cal. 464; *Gray v. Schupp*, 4 Cal. 185; *Reed v. McCormick*, 4 Cal. 342.

139. Although the jurisdiction of mining claims is given to justices' courts, yet if the amount in controversy is above two hundred dollars, the district court has jurisdiction as defined and confirmed by the constitution. *Ilicks v. Bell*, 3 Cal. 224.

140. Where the principal sum sued for is less than two hundred dollars, the district court has no jurisdiction constitutionally. *Arnold v. Van Brunt*, 4 Cal. 89.

141. The constitutional provision that in all issues of fact joined in the probate courts the jurisdiction of the district courts shall be unlimited, does not confer appellate jurisdiction on the district courts from the probate courts. *Reed v. McCormick*, 4 Cal. 343.

142. The district courts of this State have the same control over the persons of minors as well as their estates that the court of chancery in England has. This jurisdiction is conferred by the constitution, and cannot be divested by any statute. *Wilson v. Roach*, 4 Cal. 366.

143. Where an action has been commenced in a district court in good faith for a sum greater than two hundred dollars, exclusive of interest, a judgment may be rendered for an amount less than the sum prescribed by the constitution limiting the jurisdiction of the court in the commencement of the action. *Jackson v. Whartenby*, 5 Cal. 95.

144. The jurisdiction given by the constitution to the district court is exclusively original and not appellate, and only when the amount in controversy exceeds two hundred dollars. *Zander v. Coe*, 231.

145. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court, is unconstitutional and void. *Deck's Estate v. Gherke*, 6 Cal. 669.

146. The legislature must directly select the places for holding the district court; it does not follow that the right to select a county seat may not be conferred by law upon the people, as the constitution does not require that the district court shall be held at a county seat. *Upham v. Supervisors of Sutter County*, 8 Cal. 382.

*f. Sec. 7. County officers.*

147. The office of sheriff and tax collector are constitutional offices, and though the offices of sheriff and tax collector are distinct from the constitution, yet they may be united in the same hands. *People v. Squires*, 14 Cal. 15.

148. The vesting of the office of tax collector in the sheriff being by legislative act, although the office cannot be destroyed by the legislature, yet the legislature is not restricted in this respect by the constitution, may direct in what manner the duties shall be discharged, and how the office may be temporarily filled *Ib.* 17.

149. The constitution of this State does not fix the term of the office of district attorney, but merely directs (art. 6, sec. 7) that the legislature shall provide for



## County Court and Courts of Sessions.

his election by the people, and shall fix by law his duties and compensation. *People v. Brown*, 16 Cal. 442.

g. Sec. 8. County Court and Court of Sessions.

a. County Judge.

150. By the constitution, judges of the county courts held their offices, when elected, for four years. *People v. Templeton*, 12 Cal. 401.

151. The period of the tenure of a county judge is fixed by the constitution at four years. The legislature may fix the commencement of the term, as also the time of the election. *People v. Rosborough*, 13 Cal. 187.

b. Courts of Sessions.

152. The officers composing the court of sessions are judicial officers, and consequently are forbidden by the constitution from exercising any other functions. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 22; *Phelan v. Supervisors of San Francisco County*, 6 Cal. 540.

153. The justices of the peace, are not regarded in the constitution as supernumeraries of the court of sessions, and in the language of the decision there quoted, they must, as necessary officers, begin with and continue through the trial. *People v. Ah Chung*, 5 Cal. 105.

c. Jurisdiction of the Courts of Sessions.

154. The eighth section of the sixth article of the constitution necessarily limits the jurisdiction of the courts of sessions to criminal business. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 22.

155. The appellate jurisdiction, in either civil or criminal cases, conferred on the courts of session by the statute, is unconstitutional. *People v. Applegate*, 5 Cal. 295; *People v. Shear*, 7 Cal. 141; *People v. Vick*, 7 Cal. 166; *People v. Fowler*, 9 Cal. 87.

156. The court of sessions, under the constitution, can only exercise powers of a judicial character. *Hardenburgh v. Kidd*, 10 Cal. 403.

h. Sec. 9. Jurisdiction of the County Court.

157. The "special cases" mentioned in the constitution, as those which the legislature may confer jurisdiction on the county court, was not meant to include any class of cases for which the courts of general jurisdiction had always supplied a remedy. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

158. The constitutional provision "that county courts shall have such jurisdiction, in cases arising in justices' courts and in special cases, as the legislature may prescribe, but shall have no original civil jurisdiction, except in such special cases," cannot be held to confer exclusive original jurisdiction in all special cases upon the county court, but only to such jurisdiction as the legislature may permit to the county courts. *O'Callaghan v. Booth*, 6 Cal. 66.

159. Cases of insolvency under the act of 1852 are special cases within the meaning of the constitution, and the legislature may confer jurisdiction in such cases upon the county courts. *Harper v. Freelon*, 6 Cal. 76.

160. There is no prohibition in the constitution to this grant of authority to the county judge, to award injunctions in cases brought in the district court, and the implication is decidedly in favor of its exercise. *Thompson v. Williams*, 6 Cal. 89; *Orandall v. Woods*, 6 Cal. 451.

161. The act of March 27th, 1850, conferring upon the county court the power to incorporate towns, is unconstitutional. *People v. Town of Nevada*, 6 Cal. 144.

162. The act giving jurisdiction over the subject of contested elections to the county judge is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

163. County courts, under the statute, have jurisdiction in proceedings by mandamus, and the statute is constitutional. *Jacks v. Day*, 15 Cal. 92.

164. Aside from previous decisions of

this court, the true construction of our constitution (art. 6, sec. 9) is, that the legislature has power to confer on county courts jurisdiction in such specially enumerated and defined cases as, in its discretion, should be confined to those tribunals. *Ib.*

i. *Sec. 10. Seats of Justice.*

165. By the constitution of this State, the legislature must fix the seats of justice in the county, and cannot delegate that power to any body, or to a decision by popular vote. *Dickey v. Hurlbut*, 5 Cal. 344—see *Upham v. Supervisors of Sutter County*, 8 Cal. 382.

j. *Sec. 11. Fees to Judicial Officers.*

166. Recorders of cities cannot, within the provision of the constitution inhibiting judicial officers, except justices of the peace from taking fees. *Curtis v. Sacramento County*, 13 Cal. 294.

k. *Sec. 12. Judicial Decisions.*

167. The legislature cannot require the supreme court to give the reasons of its decisions in writing. The constitutional duty of the court is discharged by the rendition of its judgment. *Houston v. Williams*, 13 Cal. 25.

l. *Sec. 14. Justices of the Peace.*

168. The cognizance of all cases under two hundred dollars, and only in these cases, in civil actions, is left to justices courts. *Zander v. Coe*, 5 Cal. 232.

169. The apparently unlimited power granted by the fourteenth section of the constitution to the legislature to prescribe the powers of justices of the peace, must be taken with the qualifications attached to this grant by the previous section; and when so construed, it is obvious and apparent that it is only those cases which were undisposed of by the previous grants

of powers which are within the control of the legislature, and which may be vested either in the magistrates or county courts. Such are all cases of law and equity, where the amount does not exceed two hundred dollars. *Ib.* 234.

170. The statute which vested magistrates with jurisdiction in civil cases, where the sum in controversy amounts to more than two hundred dollars, is unconstitutional and void. *Zander v. Coe*, 5 Cal. 234; *Freeman v. Powers*, 7 Cal. 105.

171. The constitution vests the legislature with power to confer such jurisdiction on justices' courts, as are not exclusively vested in other courts. The act conferring criminal jurisdiction on justices' courts is constitutional. *People v. Fowler*, 9 Cal. 87.

7. *Art. VIII. State Debts.*

172. The language of the constitution is without ambiguity, and expressly forbids the legislature from creating a debt of more than \$300,000 in any way, unless the same is left to the vote of the people. *People v. Johnson*, 6 Cal. 500.

173. This feature of our constitution was admirably designed to check the improvident expenditure of money and the accumulation of taxes. *Ib.* 503.

174. The legislature can adopt the present indebtedness of the State over and above the constitutional amount, and submit the same to the people for ratification, in conformity to article eight of the constitution; and also make appropriations for the future necessary expenses of the government over and above the revenues. *Ib.* 506.

175. If the legislature has no right to create a State debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. *Nougues v. Douglass*, 7 Cal. 70.

176. The provision of the constitution which prohibits the State from creating debts over \$300,000, or loaning its credit only, applies to the State as a corporation, as a political sovereign represented by the law-making power, and does not prevent the State authorizing counties or municipal corporations to create debts beside the State debt up to the constitutional limit.

## State Debt.—Promiscuous Provisions.

*Pattison v. Supervisors Yuba County*, 13 Cal. 183.

177. The act of March 21st, 1856, creating a board of State prison commissioners and defining their duties, is constitutional. It does not create a debt or liability against the people of the State, in contravention of the eighth article of the constitution, and the contract made with Estill under the act is valid and binding upon the State. *State of California v. McCauley*, 15 Cal. 454.

178. The support of convicts is as much the duty of the State as to provide for the salaries of her officers. It constitutes one of the ordinary sources of the State's expenditures; and a law authorizing a contract for keeping the prisoners at a fixed price—the payment and service being future acts—is not in conflict with the constitution. *Ib.* 455.

179. Under the contract made with Estill for the payment to him of \$10,000 per month on his lease of the prison and convicts, that sum per month is appropriated by the act; but these appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered, there is no debt on the part of the State. The State became indebted only as the services were each month performed. The lessee could not have claimed, at any time after the contract was made, the aggregate of all the monthly installments, because the State never owed him that amount. *Ib.*

180. The eighth article of the constitution was intended to prevent the State from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the service operates in the nature of a cash payment. *Ib.*

181. The act of March 29th, 1860, providing for the construction of a State capitol in the city of Sacramento, is not unconstitutional, as creating an indebtedness or liability on the part of the State exceeding the limit of \$300,000 prescribed

by the constitution. The act authorizes the commissioners therein named to contract only to the extent of \$100,000. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

182. The provision in section five, article three, of the charter of San Francisco of 1851, as to not creating liabilities beyond \$50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. The legal effect of this provision is entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Argenti v. City of San Francisco*, 16 Cal. 264.

#### 8. Art. XI. Miscellaneous Provisions.

##### a. Sec. 1. Seat of Government.

183. The legislature by a constitutional vote passed an act to remove the capital from San José to Vallejo. It would seem as though the fact that it secured to our State, then in its infancy, without funds or credit, so munificent a donation, that it ought not to be regarded as a wanton abuse of constitutional power. *People v. Bigler*, 5 Cal. 27.

184. Vested rights have grown up under the laws passed at the place to which the capital was changed, and unless it be constitutional, all laws there passed are a dead letter. *Ib.* 28.

##### b. Sec. 11. Suits against the State.

185. In the absence of any statute to that effect, the State cannot be sued, and the judgment against her is erroneous. *People v. Talmage*, 6 Cal. 258.

##### c. Sec. 13. Taxation shall be equal and uniform.

186. The constitutional provision that requires taxation to be uniform, refers only to property, and not that the entire aggregate amount of taxation upon per-

Uniform Taxation.—Separate and common Property.

sons or the value of property in every city and town of the State should be equal to and uniform with the amount in every other city and town. *People v. Naglee*, 1 Cal. 252.

187. The provision that taxation shall be equal and uniform throughout the State does not operate as a limitation to the taxing power of the legislature, and apply to every species of taxation; but is to be taken as applying only to direct taxation on property as such. *People v. Coleman*, 4 Cal. 49.

188. The power of the legislature to tax trades, professions and occupations, is a matter completely within the control and rules inhibited by the constitution, eminently belonging to and vesting in the sound discretion of the legislature. *Ib.*

189. The revenue act of May, 1853, does not violate that provision of the State constitution which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation, it was intended that laws must, if possible, affect persons and property alike. A perfectly equal tax law is utopian and impossible, from the very nature of the subject. *Ib.* 55.

190. The provision of the charter of Sacramento authorizing the improvement of the streets, and the mode and manner of the assessment, is not in conflict with section thirteen of article eleven of the constitution. *Burnett v. City of Sacramento*, 12 Cal. 83.

191. Where the legislature passed an act to remedy the failure on the part of the tax collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special. *Moore v. Patch*, 12 Cal. 272.

192. The only limitation upon the taxing power of the legislature is the provision for equality and uniformity found in the constitution. *People v. Burr*, 13 Cal. 350.

193. The fact that the legislature has once exercised its powers in limiting the extent of taxation in municipal corporations under the provision of the constitution, does not prevent the legislature from again exercising its power by enlarging the authority to tax. *Ib.* 355.

194. An act of the legislature authoriz-

ing boards of supervisors to appoint a collector of foreign miners' licenses, is not unconstitutional. Assessors and tax collectors are constitutional officers; but it is not necessary under the thirteenth section of article eleven of the constitution that every portion of the revenue pass through their hands. *People v. Squires*, 14 Cal. 17.

195. The act of 1860 authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859 in the city and county of Sacramento; and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax; and making certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *People v. Seymour*, 16 Cal. 343.

196. Nor is the act unconstitutional because it compels the delinquent, if sued, to pay costs, and a percentage by way of attorney's fees, in addition to the tax assessed. *Ib.* 344.

197. Nor is it any constitutional objection to the act that the delinquent tax list for 1859 was not properly published. The liability to pay the tax assessed preceded the publication of the delinquent list, and suit, under the act of 1860, is based upon that liability. *Ib.*

198. The tax levied in Sacramento county for the wagon road from the eastern boundary line of said county through El Dorado county to Carson Valley, under the act of 1858, and the tax for the agricultural hall, under the act of 1859, are constitutional. *Ib.* 345.

d. Sec. 14. *Separate and common Property of Husband and Wife.*

199. The capacity of the wife to hold separate property is created by the constitution; and her title thereto depends upon the mode of acquisition, and vests before the inventory can be filed. *Selover v. American Russian Com. Co.*, 7 Cal. 270.

200. Neither the husband nor his creditor can claim the proceeds or fruits of the separate estate of the wife. A law giv-

ing them such fruits is unconstitutional. *George v. Ransom*, 15 Cal. 323.

201. The term "separate property," in the fourteenth section of article eleven of the constitution, is used in its common law sense, and by that law "separate property" means an estate held, both in its use and its title, for the exclusive benefit of the wife. *Ib.* 324.

202. The wife cannot mortgage her separate real estate, unless her husband unites in the conveyance in the mode prescribed by our statutes; and these statutes, when operating in futuro, are constitutional. *Harrison v. Brown*, 16 Cal. 290.

#### e. Sec. 15. Homestead Law.

203. It is the homestead and other property of the head of the family which is by the constitution to be protected from forced sale. It is the alienation by the owner, if a married man, which the statute declares shall be invalid without the signature of the wife. *Gee v. Moore*, 14 Cal. 474.

204. The constitution provides, in the fifteenth section of article eleven, that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." It only requires legislation exempting the property from forced sale. It does not look to legislation in restraint of voluntary alienation. The statute goes beyond the constitutional provision. Neither the constitution or the statute recognize any estate in the wife; on the contrary, it is clear that both were framed upon the idea that it was out of the property of the husband, or at least, common property, that the homestead was to be carved. *Bowman v. Norton*, 16 Cal. 217.

## CONSTRUCTION OF STATUTES.

- I. In general.
- II. Federal Laws.
- III. Powers of the Legislature.
- IV. Conflict of Statutes.
- V. Approval of Statutes.
- VI. Amendment of Statutes.
- VII. Repeal of Statutes.
- VIII. Adjudications upon various Statutes.

### I. IN GENERAL.

1. Provisions of a statute which are retroactive in their effect, impairing vested rights, are repugnant to the principles of the common and civil law, and are void. *Gonzales v. Huntley*, 1 Cal. 33.

2. A statute should be construed to operate upon the future and not upon the past, but with the exception of these cases which come within the purview of prohibitory clauses in State constitutions, or that of the United States, there is no case in which it is not competent for a State legislature to give to a statute a retroactive effect. *Von Schmidt v. Huntington*, 1 Cal. 65; *Thorne v. City of San Francisco*, 4 Cal. 131.

3. Where a statute prescribes unequivocally the rights of a party in the course of a judicial proceeding, the court has no discretion to deprive him of those rights. *Stevens v. Ross*, 1 Cal. 97.

4. Where a remedy is strictly given by statute, and of a character not recognized by the common law, and no personal notice on the person proceeded against, the statute should be strictly construed. *Souter v. Ship Sea Witch*, 1 Cal. 163.

5. A statute must be construed so as to give meaning and intent, if possible, to every clause and word. *Souter v. Ship Sea Witch*, 1 Cal. 164; *City of San Francisco v. Hazen*, 5 Cal. 171.

6. To hold that a law operates all that part of the day of its passage prior thereto, is as absurd and as much of a fiction as the old doctrine that by relation it should commence running on the first day of parliament. *People v. Clark*, 1 Cal. 407.

7. If no time be specified when a statute shall be in force, it ought to go into effect from and after its passage—that is, when its existence is perfected. *Ib.*

8. Courts ought not, on slight implication or vague suspicion, to declare a law unconstitutional, but by every settled rule of construction are bound to suppose that the legislature had some proper motive in view; and if an act by one construction would be unconstitutional for a certain purpose, but by another construction constitutional for certain other purposes, the latter must be adopted. *Ex parte Perkins*, 2 Cal. 438.

9. The words "may and shall" should



## In general.

be considered in the construction of the law as incontrovertible terms. *Cooke v. Spears*, 2 Cal. 412.

10. Where a right exists at common law, and a new remedy is given by statute, the latter is cumulative, and either remedy may be pursued; but where the right and the remedy both are given by statute, that remedy can alone be pursued. *People v. Craycroft*, 2 Cal. 244; *People v. Raynes*, 3 Cal. 367; *Cohen v. Barrett*, 5 Cal. 210; *Ward v. Severance*, 7 Cal. 129; *Roberts v. Landecker*, 9 Cal. 267; *State v. Poulterer*, 15 Cal. 526.

11. In construing a statute, the sections must be taken together, and that interpretation should be placed upon the language which will give the particular section utility and effect—make it compatible with common sense and the plainest principles of justice. *Burnham v. Hays*, 3 Cal. 119.

12. In construing statutes, force and meaning should be given to every part, and courts will not, except when the language is so vague and indefinite as to be wholly destitute of meaning, reject any portion. *Chever v. Hays*, 3 Cal. 473.

13. Where a law is capable of two constructions, that one must be adopted which will preserve the sense as well of the several parts as of the whole act. *City of San Francisco v. Hazen*, 5 Cal. 171.

14. The title of an act is no part of the law itself, although it may be referred to in cases of doubt to ascertain the intention of the legislature. *Cohen v. Barrett*, 5 Cal. 209.

15. In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of stare decisis. *Seale v. Mitchell*, 5 Cal. 403.

16. In construing statutes, the words must be interpreted according to their common acceptance. *Quigley v. Gorham*, 5 Cal. 418; *Harris v. Reynolds*, 13 Cal. 518.

17. It is a familiar rule in construing statutes, that where there are two laws upon the same subject, they must be so construed as to maintain both, if it can be done without destroying the evident intent and meaning of the latter act. *Merrill v. Gorham*, 6 Cal. 42.

18. The intention of the legislature, where it can be ascertained, must govern in the construction of a statute. *Smith v. Randall*, 6 Cal. 50; *People v. Roberts*, 6 Cal. 216; *Ex parte Ellis*, 11 Cal. 223.

19. The rule of law in the construction of remedial statutes requires great liberality, and whenever the meaning is doubtful it must be so construed as to extend the remedy. *White v. Steam Tug Mary Ann*, 6 Cal. 470.

20. In construing statutes, the rule is that general words are controlled by specific exceptions. *Lucas v. Payne*, 7 Cal. 96.

21. Where words have a distinct and separate meaning, well recognized, the court is bound to suppose the legislature employs words with reference to their correct signification. *People v. Stewart*, 7 Cal. 144.

22. When a statute assumes to specify the effects of a certain provision, we must presume that all the effects intended by the law makers are stated. *Bird v. Denison*, 7 Cal. 307; *Lee v. Evans*, 8 Cal. 435; *People v. Whitman*, 10 Cal. 45; *Perkins v. Thornburgh*, 10 Cal. 191.

23. Statutes in derogation of common law principles are construed with strictness. *People v. Buster*, 11 Cal. 221.

24. It is a well settled rule of construction that statutes upon the same matter must be construed together, and that a general provision must be controlled by one that is special. *American River Water Co. v. Bear River Water Co.*, 11 Cal. 338.

25. Where a statute introduces a new offense, without reference to anything else, an indictment describing the offense in the words of the statute is sufficient. *People v. Saviers*, 14 Cal. 30.

26. Provisions in a statute in regard to the time within which an act is required to be done are generally to be construed as directory; but such a construction is improper where a consequence is attached to a failure to comply with the statute. *Shaw v. Randall*, 15 Cal. 387.

27. Statutes should be construed according to what appears to be the intention of the legislature, and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the latter statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. *City of Sacramento v. Bird*, 15 Cal. 296.

28. The title of an act cannot be used to restrain or control any positive provision of the act; but where the meaning of

## Federal Laws.—Powers of the Legislature.

the body of the act is doubtful, the title may be resorted to as a means of ascertaining the intention of the Legislature. *Flynn v. Abbott*, 16 Cal. 365.

## II. FEDERAL LAWS.

29. A certificate of exemplification of a judgment rendered in another State, when attested to by the clerk under the seal of the court, and when the judge certifies that the attestation is in due form of law, is sufficient under the act of congress of May 26th, 1790, to sustain an action upon the judgment in another State. *Thompson v. Manrow*, 1 Cal. 428.

30. Justices of the peace alone have power to try and commit deserted seamen under the act of congress of 1790, and commissioners of the United States courts can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

## III. POWERS OF THE LEGISLATURE.

31. The constitution requires that "every law shall embrace but one object, and that shall be expressed in the title." A law is constitutional in this respect where the subjects embraced in the same statute and not expressed by the title have congruity or proper connection. *De Witt v. City of San Francisco*, 2 Cal. 299.

32. The arrest and commitment for deportation of fugitive slaves under the statute does not determine their slavery. It leaves that to future adjudication. *Ex parte Perkins*, 2 Cal. 438.

33. A deed void by reason of fraud cannot be made valid by statute so as to affect the rights of third persons. *Smith v. Morse*, 2 Cal. 542.

34. The legislature may from time to time alter or change the remedy, provided they do not impair the right; but whenever they so far alter the remedy as to impair, destroy, change or render the right scarcely worth preserving, they impair the obligation of the contracts upon which the right is founded. *Ib.* 552.

35. The power of the legislature to tax trades, professions and occupations, is a matter completely within their control, and

unless inhibited by the constitution, eminently belonging to and resting in the sound discretion of the legislature. *People v. Coleman*, 4 Cal. 49.

36. If the legislature should pass a revenue act designedly operating unequally, or if a want of uniformity in its operation was apparent upon its face, it would be the duty of the supreme court to interfere and prevent the commission of so grave an injustice. *Ib.* 55.

37. The legislature possessed an undoubted right to transfer the criminal business of the court of sessions to the district court. *People v. Gilmore*, 4 Cal. 380.

38. The provision of the constitution which requires that every law enacted by the legislature shall embrace but one object, which shall be expressed in its title, is merely directory and does not nullify laws passed in violation of it. *Washington v. Page*, 4 Cal. 389; *Pierpont v. Couch*, 10 Cal. 316.

39. The legislature may exercise all powers not prohibited to them by the constitution, except perhaps in the single case of acts contrary to natural justice; and even this exception has more foundation in the speculation of moralists than the decisions of wise jurists. *People v. Bigler*, 5 Cal. 27.

40. The constitution directs that the accused shall be presented by indictment; not the accused by name, but the person himself, leaving the precise form or words to be determined by statute. *People v. Kelly*, 6 Cal. 212.

41. While the legislature has power to direct in what manner county revenues shall be disposed of, still they cannot divest a right of a party which is complete and vested. *Laforge v. Magee*, 6 Cal. 651.

42. When the right to determine the extent and effect of a constitutional restriction is either expressly or by necessary implication confided to the legislature, then the judiciary has no right to interfere with the legislative construction, but must take it to be correct. *Nouques v. Douglass*, 7 Cal. 69.

43. An act of the legislature passed in pursuance of the constitution is as much the will of the people as a constitutional provision itself. The only difference between the two cases is, that they are changeable in different modes. *Myers v. English*, 9 Cal. 348.

44. It is within the legitimate power of the judiciary to declare the action of the legislature unconstitutional, where that action exceeds the limits of the supreme law, but the courts have no means and no power to avoid the effects of nonaction. *Ib.* 349.

45. The legislature may use or refer to an act unconstitutional in itself, to indicate its will in respect to a constitutional purpose. *People v. Bircham*, 12 Cal. 55.

46. The legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves. *People v. Burr*, 13 Cal. 349.

47. Laws may be absolute, dependent upon no contingency, or they may be subject to such conditions as the legislature in its wisdom may impose. They may take effect only upon the happening of events which are future and uncertain, and among others the voluntary act of the parties upon whom they are designed to operate. *Ib.* 357.

48. The legislature has a right to authorize a local tax for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition or without it, or by or without a submission of the proposition to the people, and it is not essential that the improvement should be within or confined to the locality taxed, and a subscription for stock to be paid for by taxation is a valid contract to pay it. *Pattison v. Supervisors of Yuba County*, 13 Cal. 189.

49. The legislature can pass such laws as it may judge expedient, subject only to the prohibitions of the constitution. If it overstep those limits and attempt to impair the obligation of contracts, or to pass ex post facto laws, or grant special acts of incorporation for other than municipal purposes, the judiciary will set aside its legislation and protect the rights it has assailed. *People v. Brooks*, 16 Cal. 34.

50. The legislature possesses the entire control and management of the financial affairs of the State that it can levy such taxes as it may deem expedient, subject only to the constitutional requirements of equality and uniformity, and devote the proceeds of the taxation to such specific objects as it may think proper. But we deny that after having made an appropriation in view of a contemplated contract

to be based thereon, and such contract is made, and funds to meet the appropriation are received into the treasury, it can deprive the party with whom the contract is entered into of such funds by repealing the appropriation. In other words, the control of the legislature over particular funds, when received, may be subject to the obligations of a contract made with reference to them. By such contract the legislature does not derogate from its own power or that of any subsequent legislature. It only acts finally upon a particular subject which is thus placed beyond the reach of future action. It is true, the legislature may not direct any taxation; may repeal all laws relating to the collection of the revenue, and thus prevent the receipt of any funds upon which the appropriation can operate; but this possibility does not affect the right of the parties when such funds are actually received. *Ib.*

51. The duty of the judiciary is to pronounce upon the validity of the laws passed by the legislature, to construe their language, and enforce the rights acquired thereunder. Its judgment in those matters can only be controlled by its intelligence and conscience. From the nature of its duties, its action must be free from coercion. But it is not independent of the legislature in numerous matters materially affecting its action and usefulness. The legislature fixes the places of its sessions, determines the number of its terms, and in the regulation of proceedings in civil and criminal cases, provides the manner in which suits shall be brought, prosecutions conducted, appeals taken, and all the vast machinery by which rights are asserted and wrongs redressed. *Ib.* 39.

52. The legislature has no power to take the property of one person and give it to another; nor can private property be taken for public use, unless compensation to the owner precede or accompany the taking. *Gillan v. Hutchinson*, 16 Cal. 155.

#### IV. CONFLICT OF STATUTES.

53. The law of Louisiana requires a co-partnership contract to be in writing; the law of California does not: held, that a verbal contract of copartnership made in

## Conflict of Statutes.—Approval of Statutes.

Louisiana to be executed in California was valid. *Young v. Pearson*, 1 Cal. 450.

54. The political laws, as the laws of slavery of the ceded or conquered country, give way to the laws of the acquiring country. *Ex parte Perkins*, 2 Cal. 439.

55. On May 1st, 1851, the legislature "passed" two acts; one to regulate criminal cases, the other to regulate fees in office; both fixing the fees of the clerk in criminal cases, and essentially different: held, that the latter act must govern, as the subject of fees was the sole object of that act, and a mere incident of the criminal act. *Dobbins v. Supervisors Yuba County*, 5 Cal. 415.

56. The act of May 3d, 1852, providing for the disposal of the 500,000 acres of land granted by Congress to this State, is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims v. Palmer*, 6 Cal. 13.

57. From our constitution, if a statute or section of a statute is reenacted, it is totally inconsistent with the idea that the old statute or section still remains in force, or has vitality for any purpose whatever. *Billings v. Harvey*, 6 Cal. 383.

58. Where an act is passed between the time of the commission of the act and the death of the victim, defining the offense and providing for its punishment, and providing that upon trials for crimes committed previous to its enactment the party should be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed. *People v. Gill*, 6 Cal. 638; 7 Cal. 357.

59. The law does not favor repeals by implication; where there is an apparent conflict between two acts, it is the duty of the court, if possible, to reconcile them; but if this cannot be done, then the last act must govern. *Scofield v. White*, 7 Cal. 401; *Pierpont v. Crouch*, 10 Cal. 316.

60. The power of congress to regulate commerce is exclusive when exercised. The act of congress of July 29th, 1850, authorizing mortgages upon sea-going vessels to be recorded, and making the record notice to third parties, being in conflict with our statute of frauds, the latter must yield. *Mitchell v. Steelman*, 8 Cal. 370.

61. Different principles of the law must

be harmoniously applied to the circumstances of the particular case. *Adams v. Woods*, 9 Cal. 29.

62. Rights of property acquired by contract, valid in the place where made, will be protected here. *Forbes v. Scannell*, 13 Cal. 276.

63. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853 relative to pledges of stock by delivery of the certificates. The act of 1853 has no effect on the act of 1857. *Ede v. Johnson*, 15 Cal. 58.

64. Statutes should be construed according to what appears to be the intention of the legislature; and even though two statutes relating to the same subject be not in terms repugnant or inconsistent, if the later statute was clearly intended to prescribe the only rule which should govern, it will be construed as repealing the original act. *City of Sacramento v. Bird*, 15 Cal. 295.

65. The fifty-fourth section of the act of April 16th, 1850, concerning crimes and punishments, (Wood's Dig. 335) is not repealed by the act of April 19th, 1856, (statutes 1856, 131) amendatory of, and supplementary to the act of 1850. Section two of the act of 1856 does not conflict with section fifty-four of the act of 1850. These sections refer to a different class of offenses. Under the latter, the abduction must be accompanied with a removal into another county, State or territory, or a design to remove the party beyond the limits of the State. Under the former, the abduction need not be accompanied with any such removal or design—the intent to detain and conceal being the gist of the offense. *People v. Chu Quong*, 15 Cal. 333.

## V. APPROVAL OF STATUTES.

66. The hour of the approval of a statute is a fact to be ascertained and proved in all cases where the rights of parties are in any manner to be affected by the time of the approval. *People v. Clark*, 1 Cal. 407.

67. The court may go beyond the rec-



## Amendment—Repeal.—Adjudications upon various Statutes.

ord evidence of a statute, and inquire whether it was passed or approved in accordance with the constitution. *Fowler v. Pierce*, 2 Cal. 168.

68. In approving the statutes the executive acts as a component part of the making power, and his power of approval ceases on the adjournment of the legislature. *Ib.*

69. Where an act was presented to the governor for approval on the last day of the session, and purports to have been approved on that day, but was in fact not approved until the next day after the adjournment: held, that the act was void, and that parol evidence was admissible to show when the act was approved. *Ib.*

70. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him—Sundays excepted—the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return. *Price v. Whitman*, 8 Cal. 415; overruling *People v. Whitman*, 6 Cal. 660.

## VI. AMENDMENT OF STATUTES.

71. A general statute controlled in some of its provisions by a subsequent special statute is revived by the amendment of the latter intended to give effect to the former; and though the first statute gave jurisdiction to a court which could not constitutionally exercise it, the act becomes effectual by an amendment passed still later, transferring the jurisdiction to the proper body. *People v. Phoenix*, 6 Cal. 93.

72. The amendment of a statute operates as an absolute repeal of the old statute or section so amended, even if the amendment takes nothing away from the old law, but merely adds a proviso in certain cases. *Billings v. Harvey*, 6 Cal. 383.

## VII. REPEAL OF STATUTES.

73. At a regular term of the district court the court fixed the time of holding an adjourned term in accordance with another statute; a statute was passed in the

interval appointing other regular terms, and repealing the previous law authorizing the regular terms: held, that the law authorizing the time of holding adjourned terms was impliedly repealed, and that a term so holden was not legal. *Domingues v. Domingues*, 4 Cal. 186.

74. The legislature on the same day passed two acts: one to regulate proceedings in criminal cases, the other to regulate fees in office—both fixing the fees of the clerk in criminal cases, and essentially different: held, that the latter act must govern, as the subject of fees was the sole object of that act, and the fixing of fees in the former act being a mere incident, the main purpose of that act being to regulate criminal proceedings. *Dobbins v. Supervisors of Yuba County*, 5 Cal. 415.

75. A statute may be repealed by implication as well as in direct terms, and it is well settled that where a subsequent act is repugnant to a former one, the last operates without any repealing clause as a repeal of the first; and where two acts passed at different times are not in terms repugnant, yet if it is clearly evident that the last was intended as a revision or substitute of the first, it will repeal the first to the extent in which its provisions are revised or substituted. *Pierpont v. Crouch*, 10 Cal. 316.

76. It may be presumed that the law does not favor repeals by implication; that where there is an apparent conflict between two acts it is the duty of the court, if possible, to reconcile them; but if this cannot be done, then the last act must govern. *Scofield v. White*, 7 Cal. 401.

77. Where a general repealing statute is passed, and on the next day a supplementary act is passed, excepting certain counties from the operation of the repeal to a certain extent: held, that the case was a special one, and there being no doubt of the true intention of the legislature, the supplemental act must be regarded as a part of the repealing act, and must be given the same effect as if passed on the same day. *Manlove v. White*, 8 Cal. 377.

## VIII. ADJUDICATIONS UPON VARIOUS STATUTES.

78. The authority to issue writs of



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certiorari, given by the statute to the supreme court, is to be regarded only as auxiliary to the complete jurisdiction of the supreme court over proceedings in inferior courts from which appeals lie direct. *Warner v. Kelly*, 1 Cal. 91.

79. The supreme court is authorized to render such judgment as substantial justice shall require; but by this is intended substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual. *Harris v. Brown*, 1 Cal. 98.

80. District courts have no statutory right to allow counsel fees in admiralty cases. *Selby v. Bark Alice Tarlton*, 1 Cal. 104.

81. District courts have no statutory authority to inquire into the propriety or validity of judgments to the courts of first instance transferred to the district courts, unless, perhaps, where a clear case of fraud should be made out. *Belt v. Davis*, 1 Cal. 141.

82. Authority is vested in the supreme court by statute to issue writs of mandamus when it is an appropriate remedy; and the constitution warrants that authority when necessary to render the appellate jurisdiction effectual. *People v. Turner*, 1 Cal. 145.

83. To enable persons entitled to the benefits of the mechanic's lien to avail themselves of this extraordinary remedy, all the provisions of the law must be strictly complied with. *Walker v. Hauss Hijo*, 1 Cal. 185.

84. An action founded upon a statute to recover a penalty, where no penalty is imposed, cannot be sustained. *Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 198.

85. In such a case, the action should be brought, if at all, to recover such damages as the plaintiffs can show they have actually sustained by reason of a refusal to comply with the statute. *Ib.*

86. Where statutes are in force requiring mortgages to be recorded, if a subsequent mortgagee has notice of the existence of a prior, unrecorded mortgage, he takes his lien subject to that of the first mortgage. *Woodworth v. Guzman*, 1 Cal. 205.

87. Corporations can possess or exercise such corporate powers only as are

expressly given by the statute or by their charters, and such as shall be necessary to the exercise of the powers enumerated and given. *Dunbar v. City of San Francisco*, 1 Cal. 356.

88. The act of the legislature, by which a district judge is empowered to hold court in another district, is constitutional and valid; and a court so held is not improperly organized. *People v. McCauley*, 1 Cal. 380.

89. The statute authorizing the granting of a license to keep a gambling house could not be construed as conferring a right to sue for a gaming debt, but as a protection solely against a criminal prosecution. *Bryant v. Mead*, 1 Cal. 441.

90. Our statute, allowing persons to testify in their own cases, is in derogation of the common law rule, and opens a wide door to perjury, and cannot be too strictly construed by courts. *Hotaling v. Cronise*, 2 Cal. 63.

91. The act "requiring the treasurer to retain certain moneys," approved January 27th, 1852, does not affect money in the treasury prior to its approval. *McDougal v. Roman*, 2 Cal. 80.

92. The mechanic's lien law is in derogation of the common law, and must be strictly construed. *Bottomly v. Grace Church*, 2 Cal. 91.

93. The authority to erect a court house and jail would necessarily embrace the power to purchase the land on which to erect them. *De Witt v. City of San Francisco*, 2 Cal. 295.

94. The rule which requires seizure of a thing to give jurisdiction in actions in rem, is altered by our statute. Service on a person standing in particular relation to the thing, confers jurisdiction on the court from which the process issues. *Averill v. Steamer Hartford*, 2 Cal. 309.

95. Where the hospital law was repealed, and a charter granted to the new one, and the officers of the former were directed to deliver to the trustees of the latter "all property, real and personal, held by them in trust for the old institution; and that the latter pay out of the funds in its hands all the debts owing by the old one:" held, that the new corporation was bound to pay all such debts without regard to the sufficiency of the fund derived from the corporation. *Johnson v. State Marine Hospital*, 2 Cal. 319.

96. A statute is not ex post facto, and impairs no obligation which denies no right, and does not constitute the refusal to return to servitude a crime, but simply provides for the deportation of slaves. *Ex parte Perkins*, 2 Cal. 440.

97. The constitution provides that all property shall be taxed; but the manner is a matter of legislative control, and the statute must be strictly followed. *De Witt v. Hays*, 2 Cal. 468.

98. The code provides that there shall be but one form of civil action, but it does not intend to abolish all distinctions between law and equity as to actions. The innovation extends only to the form of action and the pleadings; while the technicalities of pleading have been dispensed with. *De Witt v. Hays*, 2 Cal. 468; *Smith v. Rowe*, 4 Cal. 7.

99. An act which divests the creditor of his lien, exempts the property of the judgment debtor from execution, and places it in the hands of trustees, with power to sell if they think proper, and compels the creditor to submit to a delay of twenty years, with no security, impairs the obligation of the contract, and is unconstitutional and void. *Smith v. Morse*, 2 Cal. 553.

100. The statute of April 12th, 1850, has placed liens for materials and for labor on the same footing, and the proceeds of sale must be distributed in conformity to the same. *Moxley v. Sheppard*, 3 Cal. 64.

101. The statute of husband and wife confers on the parties before marriage an unlimited right to make whatever stipulation they may agree upon in respect to property; and this is not confined to property in esse, but contemplates property to be acquired, and the rents and profits of the present estate. *Snyder v. Webb*, 3 Cal. 87.

102. Our statute does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects the common law remains unaltered, and the wife may resort to trustees for all purposes of security. *Ib.*

103. The law which deprives a married woman of the right to make contracts is not altered by the statute, unless in respect to the property specified by it; and she cannot bring suit in her own name upon a

contract which she is not authorized by statute to make. *Ib.* 88.

104. By the thirteenth section of the act concerning forcible entries, it was the intention of the legislature to make the nonpayment of rent work a forfeiture of the estate of the tenant. But to effect this, the rent must be demanded on the day it becomes due, and at a late hour of the day; and where the record shows no demand there can be no forfeiture. *Chipman v. Emeric*, 3 Cal. 283.

105. It is not important to interpret the literal meaning of the word "annually," or the word "or" as used in the city charter of 1851, respecting the election of municipal officers; the actual and substantial intention of the legislature is to be sought after. *People v. Brenham*, 3 Cal. 488.

106. The revenue act of May, 1853, does not violate that provision of the constitution which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation it was intended that laws would, if possible, affect persons and property alike. A perfectly equal tax law is utopian and impossible from the very nature of the subject. *People v. Coleman*, 4 Cal. 55.

107. The statute does not require in the complaint an allegation of possession; an averment that "the premises are unlawfully withheld from the plaintiff" is somewhat general, but not insufficient in a justice's court, except upon demurrer. *Cronise v. Carghill*, 4 Cal. 122.

108. The suspension by statute of remedies, or any part thereof, existing when the contract was made, is more or less impairing the obligation of the contract, and, therefore, unconstitutional. *Thorne v. City of San Francisco*, 4 Cal. 131.

109. The code of practice is prospective in its operation; and to give it a retrospect beyond the time of its passage would be in violation of all settled rules of construction. *Ib.*

110. All the public streets of San Francisco running into the water as laid down on the official map of the city, were, by the operation of the act of March 26th, 1851, extending the city front, extended and carried into the front line of the city, and subject to the free enjoyment of the public, and exempt from execution as against the city. *Wood v. City of San Francisco*, 4 Cal. 193.

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111. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sale. *Duprey v. Duprey*, 4 Cal. 196.

112. The act of May 4th, 1852, "defining the time of commencing civil actions in certain cases," only alters a portion of the act of April 22d, 1850—section seventeen. It does not change the period of five years in which suit may be brought on judgments or decrees of courts of the United States, or any State or Territory. *Cavender v. Guild*, 4 Cal. 253.

113. The act of May 3d, 1853, entitled "an act for the better publication of official and legal notices," is constitutional, although it impliedly repeals other laws. *Washington v. Page*, 4 Cal. 389.

114. By the act of the twenty-fifth of March, 1854, requiring the sessions of the supreme court to be holden at the capital of the State, it became the duty of the court to ascertain for its own action the locality of the seat of government. *People v. Bigler*, 5 Cal. 24.

115. If the legislature has no authority to annex any conditions to the removal, or enter into any contract by which the State could be benefited in consequence of the location of the seat of government, then so much of the act as refers to and fixes the condition is conditional. Strike this portion of the section out, and still there would remain the act of the legislature fixing the seat of government at Vallejo. *Ib.* 27.

116. The act of February 4th, 1851, removing the State capital, is not unconstitutional; but on the other hand, was a proper exercise of legislative power and discretion, with which a court cannot interfere. *Ib.* 29.

117. That portion of an act prescribing that no injunction shall be issued against the commissioners appointed for the sale of the State's interest within the water line of San Francisco, is invalid. *Guy v. Hermance*, 5 Cal. 74.

118. By the fifth section of the act concerning notaries public, notes are made protestable; and by the tenth section, the protest of a notary is expressly made evidence of demand and nonpayment of notes, as well as bills. *Connolly v. Goodwin*, 5 Cal. 221.

119. The act of April 17th, 1850,

giving to the husband the entire control of the common property, does not invest him with power to dispose of the same by devise, whereby the rights of the wife may be defeated. *Beard v. Knox*, 5 Cal. 256.

120. The third section of the act of 1850, concerning corporations, prohibits them from issuing bills, notes, etc., or other evidences of debt, upon loans or for circulation as money. The act contemplates that corporations will incur debt, and limits their power to incur debts to the amount of the capital stock paid in: held, that they are not prohibited from borrowing money and issuing the usual evidences of debt therefor. *Magee v. Mokelumne Hill C. and M. Co.*, 5 Cal. 259.

121. In permitting persons to go upon public lands occupied by others for the purpose of mining, the legislature has legalized what would otherwise have been a trespass; and the act cannot be extended by implication to a class of cases not specially provided for. *Fitzgerald v. Urton*, 5 Cal. 309.

122. The act of 1855, changing the time of the election of municipal officers in San Francisco, enumerates the officers to be elected; and the rule "expressio unius est exclusio alterius," applies to the time when said officers are qualified to enter upon their respective offices. *People v. Haskell*, 5 Cal. 359.

123. The act of May 3d, 1852, "providing for the disposal of the 50,000 acres of land granted by congress to this State," is not in conflict with the act of congress of 1841, which provides for their disposal after they have been surveyed. *Nims v. Palmer*, 6 Cal. 13.

124. The act of March 27th, 1850, conferring upon the county court the power of incorporating towns, is unconstitutional. *People v. Town of Nevada*, 6 Cal. 144.

125. Section first of the act of 1855, regulating criminal proceedings, is mandatory, and not directory. *People v. Beeler*, 6 Cal. 247.

126. Where a statute authorized a board of examiners, consisting of three executive State officers, to perform the duty of auditing certain accounts, which theretofore had been performed by the controller of State, but which is not prescribed by the constitution as the peculiar

duty of that officer: held, that the act is valid and binding, the power of the legislature being supreme, except where expressly restricted. *Ross v. Whitman*, 6 Cal. 365.

127. The incorporation act of 1853 does not substantially alter that of 1850, relative to the hypothecation of stocks. *Weston v. Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

128. Our statute of wills not only fails to require the probate of wills executed before its passage, but it must, from its terms, be concluded that the legislature actually intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were made, and not disturbing rights which had grown up under the former system. *Grimes' Estate v. Norris*, 6 Cal. 625.

129. The act of April 19th, 1856, "to repeal the several charters of the city of San Francisco," did not go into effect until the first day of July, 1856. *People v. Johnson*, 6 Cal. 674.

130. The act prescribing the manner of commencing and maintaining suits by or against counties, passed May, 1854, applies as well to claims existing before its passage as those which arose afterwards. *Gilmore v. Contra Costa County*, 6 Cal. 677.

131. The amendatory act of 1855 repeals section six of the statute of limitations of 1850, and the five years allowed for the commencement of real actions only begins to run from the date of the passage of the amendatory act. *Billings v. Hall*, 7 Cal. 3.

132. The settlers' act of 1856 does not discriminate between an innocent and tortious possession, nor is it a mere attempt to avoid circuitry of action, by providing for an equitable adjustment of the whole subject in one suit. By its terms, it applies to past as well as present cases. It takes from a party that which before was his; for if he refuses to pay for the improvement put on his land against his will by a trespasser, he loses not only the improvements, but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the constitution. *Ib.* 9.

133. From the framework of the various statutes concerning estates and public

administrators, it must be deduced that the commission of the public administrator, as a public officer, stands in the place of letters of administration,\* and that consequently it is unnecessary to issue them in order to give him control over the property of the estates which comes to his hands. *Beckett v. Selover*, 7 Cal. 228.

134. The design and institution of the registration act was to give constructive notice of the facts which appeared upon the face of the record. *Chamberlain v. Bell*, 7 Cal. 294.

135. The grounds on which statutes of registration are based, are, that the party who fails to record his deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible, as assisting the fraud. *Bird v. Dennison*, 7 Cal. 305.

136. The amendatory act of 1855, concerning conveyances, abolishing joint tenancies except when expressly declared, can only apply to future and not to past conveyances. *Dewey v. Lambier*, 7 Cal. 348.

137. The act of 1856, authorizing the county recorder of Yuba county to be paid out of the county treasury for certain specified services, contains no words which raise a presumption that he was to be allowed a preference over other creditors. *People v. Williams*, 8 Cal. 100.

138. The special act of the legislature, approved April 4th, 1857, fixing the compensation of the county clerk of Placer county at \$3000, was intended in lieu of all fees for services rendered the county. *Mitchell v. Stoner*, 9 Cal. 204.

139. The intention of the legislature to create the office of gauger by the act of May 3d, 1852, entitled "an act to provide for the appointment of a gauger for the port of San Francisco," is too clear to admit of doubt. *People v. Addison*, 10 Cal. 7.

140. The act of the legislature giving the power to the superior court of the city of San Francisco to send its process beyond its territorial limits was constitutional. *Hickman v. O'Neal*, 10 Cal. 294; overruling *Meyer v. Kalkman*, 6 Cal. 590.

141. The statute of limitations can only

\* The statutes of 1860, p. 106, authorize public administrators, in counties other than San Francisco and Sacramento, to perform the duties of administration without obtaining letters.



be construed to apply to judgments not in esse at the time of the passage of the act of 1855, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the act of 1850. *Scarborough v. Dugan*, 10 Cal. 308.

142. The general statute defines the duties of the sheriffs in respect to final process, and these duties are to be construed in pari materia. *Wilson v. Broder*, 10 Cal. 488.

143. The act to regulate interest on money is in derogation of the common law, and must be strictly construed. *Raun v. Reynolds*, 11 Cal. 19.

144. In an action for the division of the common property of husband and wife after a decree of divorce, the plaintiff, in order to bring herself within the provisions of the act "defining the rights of husband and wife," passed April 17th, 1850, must affirmatively state such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 166.

145. The eighth section of the act of 1851, concerning divorces, which provides that "no divorce shall be granted in any action by default of the defendant, nor on the admission or statement of either party," does not prohibit the introduction of confessions in evidence, but simply prevents granting a decree on them alone. *Baker v. Baker*, 13 Cal. 93.

146. The act giving jurisdiction over the subject of contested elections to the judge of the county court is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

147. The act of April 19th, 1856, permitting nonresident aliens to inherit real and personal estate is constitutional. *State of California v. Rogers*, 13 Cal. 165.

148. Under the act of April 28th, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river at or near Knight's ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection. *Pattison v. Supervisors of Yuba County*, 13 Cal. 189.

149. The act of April 20th, 1858, authorizing the issuance of bonds by the city and county of San Francisco, is valid, and the clause in the act requiring the action of the board of examiners to be submitted to a vote of the people in a contingency, does not make the act any the less a law. The act took effect as a law immediately, and was not dependent on the action of the other body. *People v. Burr*, 13 Cal. 356.

150. The act of March, 1851, commonly called the San Francisco water lot act, should be favorably construed to the city, and includes all land fixed by the survey referred to in the act. *Hyman v. Read*, 13 Cal. 451.

151. Neither the general incorporation act nor the act concerning plank roads and turnpikes gives any exclusive privileges to the corporation first established. Others may build a road on or near the same line of travel. *Indian Canon Road Co. v. Robinson*, 13 Cal. 520.

152. The act of 1858, amendatory to the act of May 1st, 1851, authorizing the "funding of the floating debt of the city of San Francisco, and to provide for the payment of the same," is constitutional. The amendment that the commissioners may purchase stock at five per cent. above par does not affect injuriously the creditors under the act of 1851. *Thornton v. Hooper*, 14 Cal. 11.

153. The act of 1851 is a law as well as a contract, and those provisions which are mere modes of giving effect to the substantial purposes of the act may be revised and altered. The constitution forbids impairing the obligation of contracts, but does not inhibit legislation respecting them. *Ib.*

154. If under the act a large surplus accumulates, it may be applied to the purchase of bonds, even if no provision exists in the act for payment before the bonds are due. *Ib.*

155. The act of the legislature authorizing boards of supervisors to appoint a collector of foreign miners' licenses is not unconstitutional. *People v. Squires*, 14 Cal. 17.

156. The sheriff being ex officio tax collector of foreign miners' licenses, by an act of the legislature may be deprived of the office of tax collector before the expiration of his term. *Ib.*



157. The constitution provides in section 15, art. 11, that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." It only requires legislation exempting the property from forced sale. The statute goes beyond the constitutional provision. It not only exempts the homestead from forced sale, but declares that no mortgage, sale or alienation of any kind by the owner, if a married man, be valid without the signature and acknowledgment of the wife, if she be a resident of the State. Neither the constitution or the statute recognizes any estate in the wife; on the contrary, it is clear that both were framed upon the idea that it was out of the property of the husband, or at least common property, that the homestead was to be carved. *Gee v. Moore*, 14 Cal. 474.

158. The act of April 27th, 1857, prohibiting gaming, is constitutional. *People v. Beatty*, 14 Cal. 573.

159. The objection to the State prison contract with Estill, under the act of the twenty-first of March, 1856, that it contained stipulations for the release of claims held by Estill against the State, thereby increasing the amount of the monthly payments, cannot be raised at this late day—three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. *State v. McCauley*, 15 Cal. 455.

160. The fact that the contract with Estill was signed by the commissioners with their individual names, and not with the name of the State, does not make it defectively executed. The contract purports in its body to be between the State, acting by the commissioners under the act of March 21st, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "Board of State Prison Commissioners." This makes it the contract of the State and not of the commissioners. *Ib.* 456.

161. The act of March, 1856, having authorized the commissioners to execute a lease without prescribing any specific form, or containing any restrictions as to assigning, and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the con-

tract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment to McCauley. The security of his bond was not impaired thereby. *Ib.* 457.

162. It is too late for the State to complain that the contract did not exact of the lessee security against breaches thereof, other than the bond of \$200,000 required by the act of March 21st, 1856, or did not reserve to the State the right to reënter and resume possession of the premises and control of the prisoners whenever she deemed proper. *Ib.* 458.

163. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only \$3,000 per annum. He is not entitled to the per centage allowed by the State to county treasurers for money paid by them into the State treasury. This per centage belongs to the city and county of Sacramento. *City of Sacramento v. Bird*, 15 Cal. 295.

164. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853 relative to pledges of stock by delivery of the certificates. The act of 1858 has no effect on the act of 1857. *Ede v. Johnson*, 15 Cal. 58.

165. The general language of section one of the limitation act of 1855, that actions in the cases therein named "can only be commenced within two years from the time the cause of action has accrued, or shall accrue," is controlled and limited by the twenty-second section of the limitation act of 1850. *Palmer v. Shaw*, 16 Cal. 96.

166. The word "return" used in the twenty-second section of the limitation act of 1850, is held by the authorities to apply as well to persons coming from abroad as to the citizens of the country going abroad for a temporary purpose and then returning. But the coming from abroad must not be *clandestine*, and with an intent to defraud the creditor, by setting the statute in operation and then departing. *Ib.* 97.

167. The act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right

## Adjudications upon various Statutes.

of entry upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is invalid. *Gillan v. Hutchinson*, 16 Cal. 155.

168. This act of 1855 seems to proceed upon the idea of an absolute and unconditional right in the miner to enter upon the possessions of another for mining purposes, and the intention of the act was to limit this supposed right, and not to give a right of entry in cases where no such right previously existed. *Ib.*

169. The act of April 19th, 1859, providing for the condemnation and appropriation to the use of the State of the interest of certain parties in the State prison grounds, repealed the act of March 21st, 1856; but such repeal did not affect the contract made under the repealed act. The contract was a thing consummated—and after its execution did not depend for its further existence upon the continuation of the act which originally gave it life. *People v. Brooks*, 16 Cal. 33.

170. The third section of the act "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare valley," passed on the eleventh of April, 1857, is a grant upon condition precedent, and not as counsel of the respondent contend, upon condition subsequent. This is evident from the clause following the condition, and restricting the right of the grantees to take the odd sections until "after the reclamation of the lands," and the accompanying proviso, that none of those sections shall be subject to private entry. *Montgomery v. Kasson*, 16 Cal. 193.

171. The act of April 20th, 1858, repealing the act of April 11th, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. *Ib.* 194.

172. The act of the legislature of 1858, validating the alcalde grants mentioned in the proviso to the second section of the Van Ness ordinance, is effectual for that purpose, whether the grants were originally valid or not, or whether the title of the city of San Francisco came by grant to the old pueblo, or had its origin by presumption or grant in the act of congress. *Payne v. Treadwell*, 16 Cal. 232.

173. The act of March 29th, 1860, providing for the construction of a State capitol in the city of Sacramento, is not un-

constitutional, as creating an indebtedness or liability on the part of the State exceeding the limit of \$300,000, prescribed in the eighth article of the constitution. The act authorizes the commissioners therein named to contract only to the extent of \$100,000. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

174. No analogy exists between this case and *Nougues v. Douglass*, 7 Cal. 65, because there the act of 1856 authorized a contract in a sum not exceeding \$300,000, payable in State bonds, and at the time of its passage the State was indebted to the amount limited by the constitution, without a vote of the people. *Ib.* 254.

175. Nor is the act of 1856 unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provisions of the constitution, that "the right of trial by jury shall be secured to all and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Ib.* 254.

176. The act of February 14th, 1855, makes an exception in case the husband be not, and for one year next preceding the execution of the conveyance of the wife, has not been bona fide residing in this State. But the fact that the husband abandons his wife, or suffers her to act as a femme sole and take care of herself, does not give her a right to mortgage either his or her separate property, whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. *Harrison v. Brown*, 16 Cal. 290.

177. California, upon her admission into the union, acquired under the eighth section of the act of congress of September 4th, 1841, entitled "an act to appropriate

the proceeds of the sales of the public lands and to grant preëmption rights," a vested and present interest in five hundred thousand acres of land, with a right to select and locate the same, in such manner as her legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of congress, or the proclamation of the president. *Doll v. Meader*, 16 Cal. 315.

178. Neither the tenth section of the act of 1841, nor the act of May 23d, 1844, entitled "an act for the relief of citizens of towns upon the lands of the United States under certain circumstances;" nor the act of March 3d, 1853, providing "for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes," in effect reserve town sites from sale. *Ib.* 321.

179. The municipal preëmption act of May 23d, 1844, confers a right upon the corporate authorities or county judges, to purchase the land forming a town site, at the minimum government price, for the benefit of the inhabitants thereof, before the commencement of the public sale of the body of the land in which the town site is included—and if such right be not exercised, such lands, with the general mass, are offered for sale to the public. *Ib.* 323.

180. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859 in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms in relation to the levy and assessment have been complied with, is constitutional. *People v. Seymour*, 16 Cal. 341.

181. The act of April 21st, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21st, whose term of office had not expired when this act went into operation. *Flynn v. Abbott*, 16 Cal. 365.

182. A judgment is a contract within the sixty-seventh section of the act con-

cerning courts of justice and judicial officers. *Stuart v. Lander*, 16 Cal. 375.

183. The act of 1851, providing for the election of a district attorney in each county, at the general election of that year, and every two years thereafter, etc., and the act of 1855, providing that the board of supervisors in each county shall fill vacancies in the office of district attorney, their appointee to hold until the next general election, the person then elected to hold for the balance of the term of the person whose place he is elected to fill, applies to the city and county of San Francisco, and are not repealed by the ninth nor by the last section of the consolidation act of 1856. The policy of the act of 1851 was to create uniformity in the official terms of district attorneys by filling those terms at fixed periods. *People v. Brown*, 16 Cal. 443.

184. The object of the ninth section of the San Francisco consolidation act of 1856 was not to repeal the general law of 1855, relative to filling vacancies, but to provide for cases not embraced by the general law—that is, for certain local offices, made elective by the people, peculiar to San Francisco, and for which no provision had been made. *Ib.*

185. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State v. Poulterer*, 16 Cal. 523.

186. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

187. The forty-ninth section of the act makes the auctioneer liable to pay this duty, and the meaning is, that he shall be legally held to pay it. The fact that a bond is required of the auctioneer, conditioned for the performance of his duty, shows that the legislature did not mean to restrict his responsibility to the penal provision of the act, as the bond covers this duty of paying over the money to the State. *Ib.*

188. The criminal process of the fifty-second section is not a remedy provided by the statute for the payment of the duty

## Consul.—Contempt.

imposed, but a mere provision for the punishment of those who violate the law. The remedy spoken of by the authorities, as excluding any other remedy, means the process provided by the legislature, whereby the specific duty may be enforced. But under our act, the remedy is not such; for, after the party has been fined and imprisoned, the duty of paying over to the State the money in the hands of the auctioneer remains. *Ib.*

## CONSUL.

1. An alien friend may sue an American in the consular courts in China established there under the treaty of 1844. *Forbes v. Scannell*, 13 Cal. 385.

2. The decision of the consul as to the validity of the assignment is not conclusive in the courts of this State. *Ib.* 286.

3. An appeal lies from a consular court to the American commissioner. *Ib.*

4. The general designation in the fourth section of the act of April 16th, 1850, as to conveyances of any notary public, or any consul of the United States, embraces notaries and consuls of every grade; whether principal or inferior notary, or consul general or vice consul. *Mott v. Smith*, 16 Cal. 552.

5. The certificates of a notary public or United States consul, of acknowledgment of a deed, are prima facie evidence of the official character of the persons by whom they are given. *Ib.*

## CONTEMPT.

1. The modes for punishment for contempt as prescribed by statute must be taken as exclusive of all other modes of punishment, and a court has no power to inflict any other kind of punishment. *People v. Turner*, 1 Cal. 149.

2. It is not usual for courts to interpose

by a proceeding for contempt against an attorney for any act independent of his profession, as not connected with his professional employment as an attorney. *Ib.* 150.

3. The statute having made a distinction in contempts between those committed in the presence and out of the presence of the court, the final order of the court committing for contempt should always show upon its face the facts upon which the exercise of the power is based and the adjudication made. *Ib.* 155.

4. If an order fining and imprisoning for contempt does not specify on its face wherein the contempt consisted, it will be reversed on certiorari. *Ex parte Field*, 1 Cal. 187.

5. It is no contempt of a writ of mandamus, directing the respondent to reinstate certain persons as practising attorneys to the rolls of attorneys, that he has again expelled the relator for reasons alleged to have arisen subsequent to the writ. *People v. Turner*, 1 Cal. 189.

6. An attachment for contempt for disobedience of a mandamus will not issue, unless it appear affirmatively that the mandamus was sought to be enforced by some party. *Ib.*

7. The judgments and orders of courts or judges on the subject of contempts are by our statutes declared to be final and conclusive; and it has been established by judicial decisions, that under the writ of habeas corpus we cannot review the orders of another court in such cases. *Ex parte Cohen*, 5 Cal. 495.

8. District courts have jurisdiction to punish for contempts of their processes, and to issue writs necessary to this jurisdiction. *Ib.*

9. They have not the power to issue erroneous writs of contempt; such would be unlawful, and be subject to appeal. *Ib.*

10. Though courts are exclusive judges of their own contempts, still a party cannot be imprisoned for neglecting or refusing to do what it appears is out of his power to perform. *Adams v. Haskell*, 6 Cal. 318.

11. An order committing a party for contempt, and ordering that he be imprisoned until he comply with the previous order commanding him to pay into court a certain sum of money, is an excess of jurisdiction and void where the party had made affidavit, which was uncontradicted,



## Contempt.—Continuance.

that the money had passed from his possession and control before the proceedings in contempt were commenced. *Ib.*

12. A commitment for contempt for refusing to obey an order of court, commanding the imprisonment of the party in contempt until he shall comply with the order, should set forth that it is in the power of the party to comply. *Ex parte Cohen*, 6 Cal. 320.

13. The law regards the substance more than the form; and where the proceeding, though in form a case of contempt, is in substance a private right, the appellate court will compel the court below to issue an attachment to punish a contempt. *Merced M. Co. v. Fremont*, 7 Cal. 133.

14. A party committed for contempt in refusing to answer questions propounded to him as a witness, under an order that he stand committed till he do answer, will be discharged on habeas corpus where it appears that the suit has abated. *Ex parte Rowe*, 7 Cal. 176.

15. A commitment for contempt for refusing to obey an unlawful order of court can be reviewed and set aside by an appellate court. *Ex parte Rowe*, 7 Cal. 178, 183; *Ware v. Robinson*, 9 Cal. 111.

16. In cases where an alleged contempt consists in the disobedience of writs, or orders of the court, or judge at chambers, and in refusing to answer questions as a witness, the contempt can only exist in disobeying legal writs or orders, and in refusing to answer legal questions. *Ex parte Rowe*, 7 Cal. 182.

17. A commitment for contempt "in refusing to answer certain questions propounded to the witness by the grand jury," is not a compliance with the statute, which requires the act to be specified in the commitment. It does not appear from such commitment whether the questions were legal or not. *Ib.* 183.

18. When an injunction granted on an ex parte application was modified on motion of defendant, without notice to plaintiff, on defendant's giving bond: held, that subsequent acts of defendant in violation of the original injunction were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal; but he cannot have a mandamus to compel the issuance of attachment for contempt. *Fremont v. Merced Min. Co.*, 9 Cal. 19.

19. Pending a motion for a new trial, the defendants violated the injunction, and the plaintiffs applied for an attachment against them for contempt of court: held, it was error to refuse the writ on the ground that the pending of the motion operated as a suspension of the injunction. *Ortman v. Dixon*, 9 Cal. 24.

## CONTINUANCE.

1. Affidavits for a continuance should show due diligence in endeavoring to procure the attendance of witnesses, and in preparing for trial. *People v. Baker*, 1 Cal. 404.

2. A refusal to grant a continuance for the absence of witnesses, or counsel, under circumstances showing that the party, or his counsel, was surprised as to the time or place of holding court, is error. *Ross v. Austill*, 2 Cal. 191.

3. A defendant applied for a continuance to enable him to take the deposition of a witness whose evidence would be of no avail in his defense, and in which he showed no diligence: held, that the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 473.

4. In an application for a continuance to take testimony by commission, the defendant allowed a month to pass without making the motion; there was not sufficient diligence to entitle the party to his application. *Pierson v. Holbrook*, 2 Cal. 598.

5. An agreement of counsel for the continuance of a cause, not reduced to writing, will not be regarded by the court. *Peralta v. Marica*, 3 Cal. 187.

6. The absence of counsel for the defense on account of sickness is a sufficient ground of continuance in a criminal case. *People v. Logan*, 4 Cal. 189.

7. Under any circumstances, the withdrawal of a juror and the continuance of a cause thereby is no ground for reversing a judgment subsequently obtained. *Benedict v. Cozzens*, 4 Cal. 382.

8. In criminal cases, on a motion for continuance by defendant, on the ground of the absence of a material witness, based



## Continuance.—Contract.

on a sufficient affidavit, the agreement of the district attorney that the witness, if present, would have deposed as averred in defendant's affidavit, is not sufficient to warrant the overruling of the motion. *People v. Diaz*, 6 Cal. 249.

9. Under our statute, motions for continuance in criminal cases, are subject to review upon appeal. *Id.*

10. The supreme court will not review an order denying a continuance, except where there has been an abuse of the discretion vested in them by the court below. *Frank v. Brady*, 8 Cal. 48; *Musgrove v. Perkins*, 9 Cal. 212; *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

11. An affidavit for a continuance on the ground of absence of a witness should state that the testimony wanted is not simply cumulative, and cannot be proven by others, and that the application is not made for delay; the character of the diligence used in trying to obtain the attendance of the witness—whether by exhausting the process of the law or otherwise—should also be stated. *People v. Thompson*, 4 Cal. 240; *People v. Quincy*, 8 Cal. 89; *Pierce v. Payne*, 14 Cal. 420.

12. If defendants are surprised by an amendment, and found it necessary to assume a different line of defense in consequence of it, they would have been entitled to a continuance, to prepare for their defense. *Polk v. Coffin*, 9 Cal. 58.

13. The mistaken advice of counsel to his clients, not to prepare for trial, is no ground for continuance. *Musgrove v. Perkins*, 9 Cal. 212.

14. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this, he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

15. When a continuance is refused on the ground of absent witnesses, that action will not be renewed unless there has been a motion for a new trial, and the application supported by the affidavits of the absent witnesses—if such affidavits can be obtained; or if not, then it should be shown to the court that they cannot be obtained. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

16. Pending a motion for a new trial, taken under advisement for decision in vacation by consent of parties, another term of the court intervenes, when, upon some incidental motion, the cause was continued and the court adjourned: held, that the continuance was only a continuance of the motion for a new trial, and did not affect in the least the power of the court to act on the motion at its convenience. *Hutchinson v. Bours*, 13 Cal. 52.

17. Where it is admitted, for the purpose of preventing a continuance, that the several witnesses named would, if present, respectively testify as stated in the affidavit, and that their testimony should be considered as actually given on the trial or as offered and overruled by the court as improper; the testimony thus assumed was offered, and for all the purposes of this case must be deemed as actually before the court. *Boggs v. Merced Min. Co.*, 14 Cal. 358.

18. An affidavit for continuance on the ground that a witness is absent from the State, must aver that the party cannot to his knowledge prove the same facts by any other witness. *Pierce v. Payne*, 14 Cal. 420.

19. The plaintiff, to avoid the continuance, admitted that a witness would testify to certain facts set up in the affidavit, and the trial proceeded. This affidavit, therefore, became evidence, but not conclusive proof of its contents. *Blankman v. Vallejo*, 15 Cal. 645.

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 CONTRACT.

- I. In general.
  - II. Verbal Contract.
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  - V. Entirety of Contract.
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  - IX. Impairing the obligation of Contracts.
  - X. Specific Performance.
  - XI. Assignment of a Contract.
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## In general.

## I. IN GENERAL.

1. Ship masters cannot require payment of freight unless ready to deliver the goods, and consignees cannot require a delivery of goods unless ready to pay the freight, and neither party can bring an action to compel the other to perform the correlative act. *Frothingham v. Jenkins*, 1 Cal. 44.

2. Delivery of goods by a master and payment of freight by the owner are concurrent acts, and neither party is bound to perform his part of the shipping contract unless the other is ready and willing to perform the correlative act. *Ib.* 44.

3. A contract to pay in cash cannot be fulfilled by a payment in gold dust at its market value, unless the parties agree so to receive; and when gold dust was paid by defendant at fifteen dollars and fifty cents per ounce, under protest—he claiming it was worth sixteen dollars per ounce—the court will not relieve him and decree the repayment of the alleged difference. *Gunter v. Sanchez*, 1 Cal. 49.

4. Where the delivery of an article and the payment of the purchase money are by the contract concurrent acts, neither party can maintain an action against the other for a nonperformance, without showing a readiness and willingness to perform his portion of the contract. *Cole v. Swanston*, 1 Cal. 54.

5. Contracts by which a forfeiture is claimed to have accrued should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not be left to inference and argument. *Von Schmidt v. Huntington*, 1 Cal. 71.

6. Where a special contract for the performance of work is proven, but it is also shown that the contract has been deviated from, the judgment will not be reversed on the ground that the court below admitted testimony as to the value of the plaintiff's services. *De Boom v. Priestly*, 1 Cal. 107.

7. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee. *Hoen v. Simmons*, 1 Cal. 121.

8. A contract must be construed so as

to give effect, if possible, to all parts of it. *Mickle v. Sanchez*, 1 Cal. 202.

9. Where one party has executed his part of the agreement in the confidence that the other party would do the same, it is obvious that if the latter should refuse, it would be a fraud upon the former to suffer this refusal to work to his prejudice. *Tohler v. Folsom*, 1 Cal. 211.

10. An attorney has power to bind his client by consenting to elect an order of court delivering the goods instead of a judgment for the price of the invoice, and the client cannot revoke it. *Hart v. Spalding*, 1 Cal. 214.

11. The union of man and wife without the sanction of the church is regarded as a mere civil contract, and as such falls within the legislative sphere of the ordinary jurisdiction of the court of first instance. *Harmon v. Harmon*, 1 Cal. 215.

12. A agreed to convey in his individual capacity a ship to B, and tendered him, in the performance of this condition, a deed made by A as the attorney of C, the owner of the vessel: held, it was not a compliance with his agreement. *Osborne v. Elliott*, 1 Cal. 338.

13. Where the vendor shipped goods to his own order that he might retain a lien on them until the price of the sale of them to the purchaser is paid, and the master of the ship delivers them nevertheless to the purchaser: held, that the vendor can recover of the master his interest in the goods—that is, the price for which they were sold, with interest. *Persse v. Cole*, 1 Cal. 370.

14. In an action to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to prove that the work was done in an unworkmanlike manner, unless he has set up that defense in his answer. *Kendall v. Vallejo*, 1 Cal. 372.

15. In an action to recover the contract price agreed to be paid for work and materials, the question is not whether the work would answer the purpose for which it was intended, but if it was done according to the terms of the contract. *Ib.*

16. A public officer who stands in the relation of agent of the government, or of the public, is not personally liable upon contract made by him as such officer and within the scope of his legitimate duties. *Dwinelle v. Henriquez*, 1 Cal. 292.

## In general.

17. A public administrator is personally liable upon contracts made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract. *Ib.*

18. But this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Ib.*

19. The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee, reduced to writing and executed by their mutual agent, who ceases to be such agent after the sale is closed. *Craig v. Godfroy*, 1 Cal. 415.

20. Where parties who submit a matter to arbitration agree as to who shall pay the arbitrator, if the latter be no party to the agreement, he will not be bound by it, but may look to all the parties for compensation for his services. *Young v. Starkey*, 1 Cal. 427.

21. The law of Louisiana requires a partnership contract to be in writing; the law of California does not. It is held that a verbal contract of copartnership entered into in Louisiana, to be executed in California, was valid. *Young v. Pearson*, 1 Cal. 450.

22. It is competent to show that one or both of the contracting parties were agents for other persons, and acted as such agents in making the contract on the one hand, so as to give the benefit of the contract, and on the other, to charge the unnamed principals with the liability. *Brooks v. Minturn*, 1 Cal. 482.

23. Where A and B enter into a written agreement, by which A was to provide lumber, and an invoice thereof at stated prices to be annexed to the agreement, and the lumber then to be shipped, consigned to C for sale, and the proceeds remitted to B, and B agreed of the proceeds to pay A the full amount of the invoice price, without any deduction whatever, and the remaining proceeds were then, after paying charges, to be equally divided between the parties, and the cargo was sold for less than the invoice price: it was held not to be a guarantee by B that the lumber should sell for the invoice price, but yet A was entitled to all the gross proceeds, and the expenses, etc., must fall on B. *Gibb v. Probst*, 2 Cal. 115.

24. Caveat emptor applies to sales of

real estate where there is no fraud or warranty. *Salmon v. Hoffman*, 2 Cal. 141.

25. A party cannot ask a court of equity to rescind a contract against the wishes of the respondents, when the only obstacle to its completion of fulfillment was caused by his own default, and the other party entirely without blame. *Ib.* 143.

26. Where testimony is offered in a case to prove compliance with a contract on the part of the plaintiff and fraudulent design to evade it on the part of the defendant, it should go to the jury. *Folgar v. Buckelew*, 2 Cal. 318.

27. The designation of a contract by an improper term cannot be allowed to take away a substantial right, where all the circumstances attending it are fully detailed. *Godeffroy v. Caldwell*, 2 Cal. 492.

28. All contracts made in this State prior to the act of April 22d, 1850, must have their effect and construction by the rules of the civil law. *Fowler v. Smith*, 2 Cal. 569.

29. Where no question is raised as to the validity of the contract or the effect of the statute of frauds, and where the question is as to the kind of delivery which effects a change of property, although the goods cannot be immediately delivered, the delay may be implied as one of the stipulations. *Stevens v. Stewart*, 3 Cal. 143.

30. A contract by defendant "to deliver to plaintiff as many grapes as he should wish" at a given price, is a mere offer, which the plaintiff had the right to accept or reject, and defendant to retract at any time before acceptance; but when the plaintiff named the quantity which he would take and offered the price thereof, the contract became complete and both parties were bound by it. *Keller v. Ybarra*, 3 Cal. 148.

31. The allegation that the use and occupation of the lot in question was at the request of the defendant and by the permission of plaintiff, was the allegation of a contract, and this the plaintiff is bound to establish to enable him to recover. *Sampson v. Shaeffer*, 3 Cal. 202; *O'Conner v. Corbitt*, 3 Cal. 373.

32. No action will lie for use and occupation when the possession is adverse and tortious, for such possession excludes the idea of a contract, which in all cases of this action must be either express or implied. *Sampson v. Shaeffer*, 3 Cal. 203.

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33. The remedy by attachment is given by the statute to those contracts for the direct payment of money which are made in or are payable in this State. *Dulton v. Shelton*, 3 Cal. 207.

34. Plaintiff and defendant took a joint lease for improving certain property; plaintiff, with consent of defendant, made in his own name a contract to make the improvements stipulated by the lease, which he performed and paid or advanced all the expenses out of his own funds. This contract was drawn by the defendant himself: held, that the plaintiff could recover equal contribution of the money advanced by him from the defendant at the current rate of interest. *Young v. Pollock*, 3 Cal. 211.

35. In an action for money had and received by the consignor, the amount of goods sold on credit by the consignee, having no authority to sell, can be recovered. *Johnson v. Totten*, 3 Cal. 347.

36. Such sale must be taken in reference to the rights of the plaintiff, to have been made for cash and the vendor is liable to the plaintiff for money had and received. *Id.*

37. If the plaintiff rely upon his contract made with several parties, they must all be joined in the action, unless there is an entirely new contract substituted, even when the several parties have been treated as separate individuals in the transaction: *Mc Gilvery v. Morehead*, 3 Cal. 370.

38. The use in a sale note of a given name for the goods sold is a warranty that they bear that name. *Flint v. Lyon*, 4 Cal. 21.

39. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. *Matthey v. Galley*, 4 Cal. 63.

40. Where, in a contract, a mistake occasions loss, it must be suffered by him who makes it. *Burgoyne v. Middleton*, 4 Cal. 66.

41. A joint contract cannot be given in evidence where the pleadings set up a several contract alone. *Stearns v. Martin*, 4 Cal. 229.

42. Where the contract declared on is joint, and there is no evidence showing that one of the parties sued was party to the contract, he cannot be made liable on the contract. His receipt on account of money for the work done is not enough to

fix his liability. This is a mere circumstance, to be left to the jury, on the question of his being a party to the contract. *Kritzner v. Warner*, 4 Cal. 232.

43. Where the contract was for the delivery of lumber on the payment of the price, the defendant is not required, in an action on breach of contract, to prove that the plaintiff was not ready to pay; the fact that he did not pay and the lumber therefore refused, is sufficient defense. *Fruit v. Phelps*, 4 Cal. 282.

44. A femme covert cannot contract under the laws of the State so as to render her liable in a suit at law. *Rowe v. Kohle*, 4 Cal. 285.

45. In an action upon a promise to pay money, if the complaint contains no averment of consideration or indebtedness, except by way of recital, it is insufficient. *Shafer v. Bear River and Auburn W. and M. Co.*, 4 Cal. 296.

46. The contract sued on required the lumber should be delivered from time to time at such wharf or place as the defendants should designate. The defendants refused not only to designate the place of delivery, but to accept the lumber: it was held that the plaintiffs were entitled to sue for a breach of the contract, although at the time of the refusal of the defendants, plaintiffs may not have been the owners of the lumber to be delivered. *Warner v. Wilson*, 4 Cal. 314.

47. A contract entered into by a number of individuals, describing themselves in the contract as "directors of the Placer Hotel Company," and signed by them individually, is their individual contract, and not that of the company. *Whiting v. Heslep*, 4 Cal. 330.

48. In an action on a written contract to deliver a certain quantity of "sound rice," the plaintiffs are bound to show that the rice was "sound;" and failing to do so, they ought not to be allowed to recover on the contract. *Ruiz v. Norton*, 4 Cal. 357.

49. In the case of a sale and delivery of a special cargo, with warranty, the plaintiffs might recover on the contract, and the defendants would be obliged to sue on the warranty, or in the same action, to recover the damages under proper averments in the pleadings. *Id.*

50. A principal may sue on a contract in writing, in his own name, though made



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and signed by his agent without disclosing his principal; but in order to maintain the action, the principal must show the agency and the power of the agent to bind him at the time. But the defendant may make the same defenses against the newly discovered principal as he could against the agent. *Ib.* 358.

51. Where the vendors cannot recover on their written contract, and there has been a partial delivery of the goods sold under it, they may recover the value of the goods so delivered on a quantum val-e-bant. *Ib.*

52. A covenant "to let the lessor have what land he and his brothers might want for cultivation" cannot be enforced for uncertainty. *Chipman v. Aughinbaugh*, 5 Cal. 51.

53. A contract made during the Mexican dominion must have its effect and construction according to the laws then prevailing. *Hames v. Castro*, 5 Cal. 110.

54. By the Mexican law all property acquired during marriage was common property, and the wife could neither be bound as security for her husband, nor liable as a joint contractor, except where it was shown that the contract was to the wife's advantage—that is, accrued to the benefit of her separate estate. *Ib.*

55. In cases of joint several contracts, an administrator cannot be joined with the survivor, for one is charged de bonis testatoris, and the other de bonis propriis. *Humphreys v. Crane*, 5 Cal. 176; *May v. Hanson*, 6 Cal. 643.

56. Where a contract stipulated for the delivery of a vessel, but designated no particular place for such delivery: held, that a notice of a readiness to deliver must be treated under the contract as an actual delivery. *Albretson v. Hooker*, 5 Cal. 178.

57. When courts are called upon to set aside contracts, there must be some substantial reason shown, and a court of chancery particularly will not act when it is kept in the dark as to the reasons and purposes of a transaction for which relief is sought. *Scanlan v. Gillan*, 5 Cal. 183.

58. A contract should be enforced in every case where the subject of it is something susceptible of substantial enjoyment, provided always, that the circumstances surrounding and connected with the contract, bring it within the equitable rules which entitle it to the relief sought, and

where the remedy at law is uncertain and insufficient. *Johnson v. Rickett*, 5 Cal. 220.

59. To entitle a material man to enforce a lien upon a building for material furnished, it must be alleged and proven not only that the materials have been used in the construction of the building, but they must have been by the express terms of the contract furnished for the particular building on which the lien may be claimed. *Houghton v. Blake*, 5 Cal. 240.

60. In reference to all transactions in the nature of a contract a corporation must be looked upon and treated as a private person, and its contracts construed in the same manner and with the like effects as those of natural persons. *Touchard v. Touchard*, 5 Cal. 307.

61. In such an action tender of the unpaid purchase money must be proven, as it is the essence of the contract, and the party must have performed on his part every essential of the agreement. *Goodale v. West*, 5 Cal. 341.

62. It is not alone the influence of liquor which avoids a contract, but it must be shown to exist to such an extent as to seriously impair the reasoning faculties at the time of the contract. *Pickett v. Sutter*, 5 Cal. 412.

63. Where a person hired continues in employment without any new contract, the fair presumption is that both parties understood that the same salary is to be paid. *Nicholson v. Patchin*, 5 Cal. 475.

64. That a femme covert has no power to make a contract, is a doctrine of the law, which a court has no power to disturb. *Simpers v. Sloan*, 5 Cal. 458.

65. A covenant not to sue for five years is no bar to the action, but the defendant must rely on the covenant for his remedy. *Howland v. Marvin*, 5 Cal. 501.

66. Plaintiff cannot recover against the "corporation of Bradley, Berdan & Co.," upon a written contract entered into between himself and "Bradley & Co.," as this contract was not made by the corporation; but if they were cognizant of the deceit, they could be made liable for work and labor. *Morrisson v. Bradley*, 5 Cal. 504.

67. The policy of this State has altered the rigidity of the common law, which disabled a corporation from making a contract, except under its corporate seal. *Smith v. Eureka Flour Mills*, 6 Cal. 6.



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68. Where money is paid by one person in consideration of a contract to be performed by another, and the contract is not performed, the money so paid may be recovered back. *Reina v. Cross*, 6 Cal. 31.

69. In ordinary cases bail are only bound by the conditions of the bond, but the principle is now familiar, that where parties contract in respect of a law, the law itself becomes a part of the contract, and they are bound thereby. *Mattoon v. Eder*, 6 Cal. 59.

70. There can scarcely be any obligation of honor or honesty moving between parties who contract in the very teeth of the statute prohibiting the act, and who must be supposed to have understood their exact relations to one another. *People v. Kent*, 6 Cal. 91.

71. A guaranty not under seal, nor expressing consideration made contemporaneously with the contract guaranteed, is a part of that contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds. *Jones v. Post*, 6 Cal. 104.

72. Where a sale or mortgage of personal property was void for want of immediate delivery, subsequent advances after delivery cannot be recovered, when it appears that they were paid under the general contract. The contract being void, all subsequent acts relate to its inception, and are alike tainted with fraud. *Chenery v. Palmer*, 6 Cal. 122.

73. In an action brought jointly against two defendants on a joint and several obligation, the entry of final judgment on default against one of the defendants is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 180.

74. In all cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demand as joint for the purposes of the action, he must be governed by the same rules which would have applied had his contract originally have been joint, and not joint and several, and it is clearly error to enter several judgments against the defendants. *Ib.* 181.

75. Where a city ordinance authorizes the making of a contract by certain committees on behalf of the city, subject to confirmation by the common council for

said city, a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co. v. City of San Francisco*, 6 Cal. 191.

76. A contract not to run boats on a certain line of travel, and on failure to comply with such contract to pay \$15,000, is an instrument in writing for the payment of money, and assignable by our laws. *Cal. Steam Nav. Co. v. Wright*, 6 Cal. 261; 8 Cal. 590.

77. At common law, all contracts by which one obliged himself to do an act or omission tending to injure the public, were void, and the general rule is, that contracts in restraint of trade are contrary to public policy. The stringency of this rule has been gradually relaxed as the reason for it—the security of mechanics and tradesmen—ceased. *Ib.*

78. Such a contract gives no monopoly—giving an exclusive enjoyment of the business only as against a single individual—while all the world besides is left at full liberty to enter upon the same enterprise. *Ib.* 6 Cal. 262; 8 Cal. 590.

79. It is a well established rule that where in contracts a several interest is alone expressed and referred to, no general terms will allow the meaning to be extended to a joint interest. *Johnston v. Wright*, 6 Cal. 376.

80. The mere nonperformance alone, within the stipulated time, does not annul a contract ipso facto, unless, indeed, the time is of the very nature and essence of the contract. *Holliday v. West*, 6 Cal. 527.

81. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as for the time render them impassable or dangerous. *James v. City of San Francisco*, 6 Cal. 530.

82. Any contract on behalf of a county made by the court of sessions, not incident to their judicial functions, is a nullity, as the court has constitutionally none but judicial powers. *Phelan v. San Francisco County*, 6 Cal. 540.

83. Time is not the essence of a contract for the sale of real estate, unless made so by some express agreement of the parties. *Brown v. Covillaud*, 6 Cal. 571.

84. In actions upon joint and several contracts, an administrator cannot be join-

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ed with the survivor, because the one is joined de bonis testatoris, and the other de bonis propriis. *May v. Hanson*, 6 Cal. 643; *Humphreys v. Crane*, 5 Cal. 176.

85. Contracts for the sale of land, by the custom of California previous to the conquest, were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid. *Hayes v. Bona*, 7 Cal. 159.

86. We have been willing to extend the greatest liberality to contracts executed before the acquisition of California by the United States, and to uphold them, if possible, where there were any equities existing. *Ib.* 159.

87. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento v. Kirk*, 7 Cal. 420.

88. As the owner of property, a city has a right to make contracts for its sale, lease or improvement; and these contracts, even if informal at the time, may afterwards be ratified by ordinance, provided the vested rights of others are not impaired. *Lucas v. City of San Francisco*, 7 Cal. 469.

89. Where the right of the plaintiff to recover rests upon an implied contract, all the circumstances of the case must be considered to ascertain what were the expectations of both the parties existing while the relation continued. *Murdock v. Murdock*, 7 Cal. 514.

90. Where an insolvent, after his discharge, expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the new promise. *Feeny v. Daly*, 8 Cal. 85.

91. As a general rule, a vendor of goods is not a competent witness to impeach a sale made by himself. *Howe v. Scannell*, 8 Cal. 327.

92. But where evidence is introduced showing a collusion between vendor and vendee to defraud the creditors of the former, the declarations of the vendor are admissible, and a fortiori his sworn statement. *Ib.*

93. Where the owner of a mining claim contracts verbally with J. for working it, and agrees to pay him out of the proceeds

of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes notice of J.'s contract: held, that his claim is not subject or liable to J.'s contract. *Jenkins v. Redding*, 8 Cal. 603.

94. Where the defendant employed the plaintiffs to superintend the erection of a building of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews*, 9 Cal. 74.

95. A contract is a voluntary and lawful agreement by competent parties for a good consideration to do or not to do a specified thing. *Robinson v. Magee*, 9 Cal. 83.

96. A part payment made before a contract has expired by limitation is insufficient to take the case out of the statute. *Fairbanks v. Dawson*, 9 Cal. 92.

97. A substitution of one bidder for another at executor's sale, who failed to comply with the terms of the sale, cannot affect the validity of the sale. The order directing the sale, and the order confirming it, give vitality to the purchase. *Halleck v. Guy*, 9 Cal. 197.

98. Where a party employed receives a regular, specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of regular duties, are paid for by his salary. To overcome this presumption he must show an express agreement for extra pay, otherwise he cannot recover. *Cany v. Halleck*, 9 Cal. 201.

99. A kept a ferry across the Sacramento river under a license which had expired. Having lost his boat, he contracted with B to furnish, rig and run another under the license to A, which he was to renew, until the profits should repay B's advances and interest. A neglected to renew his license; B, after waiting four months, applied for and obtained a license in his own name, and ran the ferry. A brought suit against B for an accounting and return of the ferry: held, that A had failed to carry out his agreement, and could not recover. *Tartar v. Finch*, 9 Cal. 276.

100. Where the contract is executory,

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the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed and the corporation has enjoyed the benefits of the consideration, an implied assumpsit arises against it. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 472.

101. A conveyance of land on the part of the husband to a trustee, securing the payment of an annuity to the wife upon separation, in consideration of an indemnity by the trustee against all debts of the wife, for maintenance, or other account, is valid, and supported by a sufficient consideration. *Wells v. Stout*, 9 Cal. 494.

102. Such a person as a trustee is unknown to the civil law, and contracts are termed onerous; such as contracts of sale, exchange and lease can be made directly between husband and wife, and, of course, between husband and a third party. *Ib.* 496.

103. The first step in a construction of a deed is to ascertain the understanding and intention of the parties at the time of contracting; and to do this, the whole deed should be taken together, and, if possible, effect should be given to all its parts. *Brannan v. Mesick*, 10 Cal. 105.

104. It is a general principle of the common law that whoever seeks redress for the violation of a contract resting upon mutual and dependent covenants, to obtain success must himself have performed the obligations on his part. *Conant v. Conant*, 10 Cal. 254.

105. It is a well settled rule that a judgment rendered in one State and upon which suit is instituted in another, is a contract in the sense of the constitution. *Scarborough v. Dugan*, 10 Cal. 308.

106. That time is not in some instances of the essence of the contract may be very true; but the idea that in California in 1851, or even later, either the period of the conveyance of land or of the payment of the price was immaterial, or not an important element of the contract, seems to us plainly opposed to common sense. *Green v. Covillaud*, 10 Cal. 330.

107. In California, where such rapid and sudden fluctuations in the affairs and fortunes of men occurred as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element

of past contracts, should be measured by the standards which obtain in old and settled States, where everything is comparatively stable and permanent, where capital is abundant, titles ascertained and interest is low. *Ib.* 331.

108. An injunction bond, though given to all the obligees by name and using no words directly expressing a several obligation, yet necessarily creates a several liability; the design of it being to secure each and all of the obligees from damage or injury. *Summers v. Farish*, 10 Cal. 351.

109. An agreement to surrender property on the failure of the party of the first part to be sold by them to pay the debts of the firm outstanding, and then to pay the balance over to the party of the second part, is at best only a trust retained upon the property sold; which may be enforced like any other trust. *Cayton v. Walker*, 10 Cal. 455.

110. In an action for the breach of a contract, the want of an averment of special damages cannot be reached by demurrer. Such averment is only necessary where the right of action depends itself upon the special injury received. For the breach of a contract an action lies, though no actual damages be sustained. *McCarty v. Beach*, 10 Cal. 464.

111. Courts will give a reasonable interpretation to contracts when the words justify it. *Beem v. Kusick*, 10 Cal. 540.

112. A court cannot judicially know that any article, much less water, contracted for at twenty-five cents per inch and proved on a certain day or at certain times to be worth a dollar an inch, is always, or is at any other time than that proved, worth the sum proved at the given time. *Myers v. South Feather W. Co.*, 10 Cal. 582.

113. A party having possession of land cannot retain that possession and refuse compliance with their agreement made in consideration of such possession and right to it. *Hitchens v. Nougues*, 11 Cal. 36.

114. A surety has the right to stand upon the precise terms of his contract. He can be held to no other or different contract. *People v. Buster*, 11 Cal. 220.

115. There is no necessity that a contract must state the precise consideration of the agreement, especially if the contract be under seal. *Farley v. Vaughn*, 11 Cal. 235.

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116. Where a sale of a vessel is made part cash, and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of the vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. *Fowler v. Fisk*, 12 Cal. 112.

117. Where a man agrees, in consideration of a future event or act, to do or not to do a thing, the happening of the event is usually a condition precedent to the enforcement of the obligation. *Bensley v. Atwill*, 12 Cal. 240.

118. In a court of law effect is to be given to the bargain according to its terms; and courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. *Ib.*

119. A contract to cancel the lease of a ditch and surrender possession to the lessor is sufficient evidence of the surrender of such possession, although it does not appear that there was a consideration expressed in such instrument of cancellation or surrender. *Burke v. Table Mountain Co.*, 12 Cal. 407.

120. The term "ratified," when used in reference to a contract, is applicable only to contracts made by a party acting or assuming to act for another. The latter may adopt and ratify the act of the former however unauthorized. To adoption and ratification there must be some relation, actual or presumed, of principal and agent. *Ellison v. Jackson W. Co.*, 12 Cal. 551.

121. Contingent and contemplated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall v. Blen*, 13 Cal. 23.

122. Where a contract is joint and not joint and several, the entire cause of action is merged in the judgment. *Brady v. Reynolds*, 13 Cal. 33.

123. A judgment against one on a joint contract of several bars the action against the others, even though the latter were dormant partners unknown to the plaintiff when the original action was brought. *Ib.*

124. Any executed contract which passed the equitable right to a ditch and the use of the water as the property of the grantee, is enough to assure to him the right for which he stipulated as against an adverse claimant. *Ortman v. Dixon*, 13 Cal. 36.

125. Rights of property acquired by contract valid in the place where made, will be protected in this State. *Forbes v. Scannell*, 13 Cal. 276.

126. A party seeking to rescind a contract must restore the other party to the condition in which he was before the contract was made. *Watts v. White*, 13 Cal. 323.

127. If one man contracts with another for land, the latter claiming the title and the right to sell it, and this is done in the presence and at the instigation of a third party who has the title, the third party is estopped from setting up the title as against the purchaser, and all persons in privity with such third person are likewise estopped, unless they are purchasers for valuable consideration without notice. *Snodgrass v. Ricketts*, 13 Cal. 362.

128. A specific allegation of a contract, in a verified complaint, is not sufficiently controverted by the answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same, and no evidence of the contract would be necessary. *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

129. Paying part of a note is no consideration for an agreement to extend the time of payment. *Liening v. Gould*, 13 Cal. 599.

130. A contract by one who lost property by fire or theft to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a nude pact, but may be enforced by a person performing the service. *Ryer v. Stockwell*, 14 Cal. 135.

131. In such cases the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise, and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. *Ib.* 137.



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132. Advertisements of rewards, upon acceptance of their terms and performance of the service, become written contracts. *Ib.*

133. Interest follows a contract according to the law in existence at the time and place of the contract, or of the performance of it. A subsequent change in the legal rate of interest does not affect the contract. *Aguirre v. Packard*, 14 Cal. 172.

134. A tax collector has power to contract for publishing the delinquent list of tax payers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of that agency the county is responsible. *Randall v. Yuba County*, 14 Cal. 222.

135. Plaintiff contracts to dig a certain ditch for a water company, and agrees to be paid three dollars per rod; one-third of it in money on the completion of each mile, the other two-thirds to be paid in water at the rate of twenty-five cents per square inch, delivered through an orifice under six inches of pressure anywhere along and at the main ditch, the company having the right of paying the two-thirds in cash instead of water if they so elect: held, that said two-thirds, if elected to be paid in cash, need not be paid as the other third on the completion of each mile, and if the payment be made in water it could not be claimed before the completion of the ditch, and the cash cannot be required sooner. *Myers v. South Feather River Water Co.*, 14 Cal. 275.

136. Plaintiff having assigned this contract to L. & Co. as security for a debt due them by plaintiff, they demanded of the company payment of whatever was coming to plaintiff. The company elected to pay and did pay in cash on a statement of so much due in money: held, that even if L. & Co. had no right to receive money instead of water, yet the payment binds plaintiff, for they were acting ostensibly for him or by his authority; that if he denied their authority the payment would not discharge his debt to L. & Co., the assignment would remain in force and the plaintiff would have no cause of action here; that if he affirmed the arrangement made with L. & Co. in part, he must give full effect to it and thus confirm the settlement as the liquidation of a money demand. *Ib.*

137. In suit by a female against two partners in a ranch for services as servant to the firm under an implied contract, or on a quantum meruit proof that plaintiff is the wife of one defendant, is good under the general issue as showing that there was no implied contract to pay for the services. *Angulo v. Sunol*, 14 Cal. 402.

138. From domestic services rendered in such case by the wife of one partner, all living in the same house, the law does not imply a contract to pay for the service. *Ib.*

139. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

140. Clear distinction between an office constituted by legislative act and a contract made with a party to render for a stated period certain services, though these services are to be rendered in a certain capacity in the nature of a public office or employment. *Ib.*

141. If, after such a contract, which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary. The board could not abrogate the contract by rescinding the order under which plaintiff was appointed, or abolishing the office. *Ib.*

142. A county is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. *People v. Myers*, 15 Cal. 34.

143. Plaintiff entered into a contract with defendants, by which the latter purchased of the former certain ditches for \$14,500, payable \$5,000 cash, and \$12,000 as follows, to wit: the expenses of keeping said ditches in good order, of employing agents to attend to the same, being first deducted from the proceeds of the sale of water, the balance of the proceeds was to be applied to the liquidation of said \$12,000, until the whole was paid, "and to hasten and make certain the timely and early payment of said sum of money, by the sales as aforesaid, said



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company promise to furnish from their ditch, to be used in the above named ditches, so much water, which, added to the water supplied to said ditches from their other sources, shall be sufficient to effect sales to the amount of \$1,000 per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen interest at the rate of ten per cent per annum on the said monthly deficiency, until met by receipts from sales over and above the said \$1,000 per month:" held, that this contract is not an agreement on the part of defendants to pay the balance over the \$2,000 only from the proceeds of the ditches named therein; but that it is a guarantee on their part that the mode of payment prescribed shall be effectual to pay the debt within a given time. *Blen v. Bear River and Auburn W. and M. Co.*, 15 Cal. 99.

144. The last clause in the contract does not give defendants a right to refuse to supply this water, but simply provides a measure of damages for the breach of it. *Ib.*

145. The company were bound by the contract to furnish and sell the stipulated quantity of water, and apply the proceeds monthly to the payment of plaintiff's claim, and failing to do this, were responsible in damages. *Ib.*

146. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weight. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled up in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon, and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nineteen dollars, balance due on the hay.

The court instructed the jury that if they believed from the evidence it was the understanding of the parties, that upon the payment of the two hundred dollars by defendant, the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff made no difference; if defendant agreed to accept it in that condition, and to consider it as delivered, the contract for delivery would be fully executed. *Smith v. Friend*, 15 Cal. 126.

147. Under the mechanic's lien act of 1858, material men, subcontractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the subcontractor, material men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin v. Duncan*, 16 Cal. 127.

148. A bill of sale of "all the goods and merchandise and property we own, have or have an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in the possession of the sheriff of Nevada county; said goods forwarded by us to Bailey Gatzert, Nevada," contains a sufficient description of the goods. *Coghill v. Boring*, 15 Cal. 218.

149. To enable a vendor of goods to rescind the sale, he must offer to return the notes given for the goods; but this offer can be made at or any time before the trial. *Ib.*

150. Where, in a bill of sale of all the cattle of a certain estate, estimated at seven thousand head, a total price being

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fixed, it was stipulated that the vendee, on arriving in Texas, where the cattle were, might choose to take all the cattle of the estate without counting them, in which event he was to notify the agents of the vendors of his choice, and pay an additional \$4,000; but if a count was had, and the cattle exceeded or fell short of the estimated number, the excess or deficiency should be paid for at the rate of eight dollars per head; and no count was ever made, and no notification ever given by the vendee, that he took the cattle without a count: held, that the vendor, on the facts, cannot recover the \$4,000; that the only obligation of the vendee, in the first instance, was to receive the cattle and pay for any excess over the estimated number, if counted; that his liability for the \$4,000 depended entirely on his choice to take the cattle without a count, and that this choice was a mere privilege, to be exercised or not, at his option. *Norris v. Harris*, 15 Cal. 257.

151. An ostensible partner retiring from the firm must give notice of his retirement, or he will be liable to creditors of the continuing firm on contracts made by them after his retirement. *Williams v. Bowers*, 15 Cal. 321.

152. In this action, the complaint contained two counts; one upon a special contract for the sale and delivery of the goods, the other for a claim upon goods sold and delivered. Answer denied the contract and the other allegations of the complaint; but set up a contract between the parties somewhat different, containing a guarantee as to quality, and alleging that the quality of the goods was not in accordance with the contract, and the breach was relied on as a complete defense. Evidence was introduced upon all the issues made by the pleadings. The court instructed the jury that "if the plaintiffs, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." Plaintiffs had verdict and judgment for the price: held, that in a subsequent action by the defendants against plaintiffs, on the breach

of the warrantee, for the difference in value between the goods delivered and those contracted for, the former suit is no bar; that the matter in dispute, to wit: this breach of warrantee, was not adjudged; that the instruction of the court took that question from the jury, and directed them to decide the rights of the parties upon other considerations. *Earl v. Bull*, 15 Cal. 425.

153. The act of March 21st, 1856, creating a board of State prison commissioners, and defining their duties, is constitutional. It does not create a debt or liability against the people of the State, in contravention of the eighth article of the constitution, and the contract made with Estill under the act is valid and binding upon the State. *State v. McCauley*, 15 Cal. 454; *People v. Brooks*, 16 Cal. 28.

154. Under the contract made with Estill for the payment to him of \$10,000 per month on his lease of the prison and convicts, that sum per month is appropriated by the act; but these appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered, there is no debt on the part of the State. The State became indebted only as the services were each month performed. The lessee could not have claimed, at any time after the contract was made, all the monthly installments, as the State never owed him the amount. *State v. McCauley*, 15 Cal. 454.

155. The support of convicts is as much the duty of the State as to provide for the salaries of her officers. It constitutes one of the ordinary sources of the State's expenditures; and a law authorizing a contract for keeping the prisoners at a fixed price—the payment and service being future acts—is not in conflict with the constitution. *Ib.* 455.

156. The fact that the contract with Estill was signed by the commissioners with their individual names, and not with the name of the State, does not make it defectively executed. The contract purports in its body to be between the State, acting by the commissioners under the act of March 21st, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "board of State prison commissioners." This makes it the contract of the State and not of the commissioners. *Ib.* 457.

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157. The State cannot rescind the contract made with Estill for breaches of the covenants of the lease by him and his assignee, so long as she herself is in default. *Ib.* 458.

158. The objection to the contract with Estill, under the act of the twenty-first of March, 1856, that it contained stipulations for the release of claims held by Estill against the State, thereby increasing the amount of the monthly payments, cannot be raised at this late day—three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. *Ib.*

159. In this case, the State, being in default in making the monthly payments under the contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee, or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill & McCauley to their original position, they having been in possession of the prison for nearly three years, and having performed valuable services; cannot claim in equity a rescission of the contract. *Ib.*

160. Upon this point, the rule applicable to contracts of a private character differs from the rule governing contracts made by agents of the government. Such public agents are presumed to contract, not personally, but officially, within the sphere of their duties. *Ib.*

161. One party cannot violate a contract himself, and then seek to rescind it on the ground that the other party has followed his example. *Ib.*

162. Nor, when the contract has been in part performed, and the parties cannot be restored to their original position, can the right of rescission exist. *Ib.*

163. Proof as follows: "I am superintendent of the California State Telegraph Company, and operator in their office at San Francisco. July 2d, plaintiff came to our office, and delivered a message to be transmitted to Jackson, and paid for transmitting it there. The message was: 'Alta Express Co., Jackson—If you have package for me, forward immediately.' Signed 'C. Thurn.' In the margin of the

message sent, were the words 'F., July 2d.' Few words passed when the message was delivered; no express agreement that the California State Telegraph Company should forward the message to Sacramento, and employ the Alta California Telegraph Company to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendant's line from Sacramento." C. Thurn, the plaintiff, sues the Alta Telegraph Company for the penalty, under the one hundred and fifty-fourth section of the act of 1850, p. 370: held, that under these facts, he is not the person making or offering to make the contract, within the meaning of the act, and cannot recover; that the only contract proven is a contract by the State Telegraph Company to send the message or have it sent; and a contract, on its part, to contract on its own account with the Alta Telegraph Company to send the message. *Thurn v. Alta Telegraph Co.*, 15 Cal. 475.

164. The right to redeem land is no part of the contract of indebtedness. It is a new privilege given by statute. It is a provision made by statute for a future contract, by pursuing which a purchase of land may be made. But as this provision is only a matter *out of which rights may grow*, the provision may be repealed at any time before a party avails himself of it. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 522.

165. The legislature may give a particular privilege, or a right to contract on certain terms or in certain circumstances; but it may repeal the provision, or deny the right, as a general rule, as fully and completely as it can give them; or it may alter the terms at its pleasure, subject only to this: that it cannot repeal or alter so as to affect those contracts which have been made during the existence of the act authorizing them. *Ib.*

166. The statutory regulations as to redemption, are mere provisions of sale, governing the course of the process and its effects. They do not touch the contract of indebtedness, which stands, as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. And a sale without any right of redemption is a valid and

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sufficient remedy for the enforcement of the contract. *Ib.* 523.

167. A contract entered into by the agents of the State upon a subject within the constitutional control of the legislature, may be affirmed by the State by legislation indirectly referring to the contract, or proceeding upon its assumed validity. Direct legislative action in terms designating and affirming the contract, is not necessary. *People v. Brooks*, 16 Cal. 38.

168. The third section of the act "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee, until performance of the conditions annexed—that is, until the reclamation of the lands. This grant is a contract between the State and the grantees, by which the State grants certain lands, upon condition of work to be performed; the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely, upon performance of the acts specified as the consideration moving to the State. *Montgomery v. Kasson*, 16 Cal. 194.

169. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys, and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury, to be used as the city sees fit. *Argenti v. City of San Francisco*, 16 Cal. 263.

170. As to the contracts of corporations, the rule is, that when the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private. *Ib.* 264.

171. Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner, and to the same extent, as the latter. *Ib.* 265.

172. As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. *Ib.* 273.

173. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him, on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.



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174. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent \* \* the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed, by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for the money received by defendant to his use: held, that as, under the charter, the city had authority to order the improvements

in question, the acceptance of the proposals of B. by the street commissioner and the committees of the two boards, converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor: held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contract; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. *Id.* 277.

175. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as, for instance, upon the issuance of bills of credit. *Id.* 283.

176. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in the place of the one employed by Y. Court refused to grant the motion—the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may inter-



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vene, if a proper case be made, or prosecute his rights independently, or wait until a recovery, and then claim his rights under the contract with relator. *People v. Norton*, 16 Cal. 440.

177. Where a lease of a lot in San Francisco, for ten years, stipulated that the lessee should place "on said premises a building thirty by eighty feet, which has been shipped from the port of New York, to be put up immediately on arrival; or if lost, a similar one is to be ordered, got up, and put up in the shortest possible time," and also, in a final clause, that if no agreement was made between the parties for a renewal of the lease for a further period, "then the valuation of the *buildings* is to be made by three disinterested persons," etc., and the lessor was to pay to the lessee the amount agreed on; and the lessee erected a building worth about \$1,000, which was burned, and then another similar one, and subsequently sub-let the premises to plaintiff, who put up a valuable building, costing \$5,000—defendants, who had bought the lot, notifying him, before he erected his building, that they would not pay for it: held, that at the expiration of the term, defendants were not bound to pay plaintiff for his improvements; that the term "buildings," though in the plural, refers to the building mentioned in the fore part of the lease, and not to any buildings the lessee might erect—especially when the conduct of the parties, the nature of the transaction, and the surrounding circumstances are considered. The terms of this lease so construed as to give completeness to the agreement, and to make it a just, fair and equal contract, mutually obligatory in its essential provisions, instead of a one-sided and unreasonable contract. *Woodward v. Payne*, 16 Cal. 450.

178. A man may as well agree to sell property upon the condition that another will consent to buy, as upon any other condition, or absolutely. The agreement is no less a contract, because it merely provides for, or is in advance of another contract, than if it were incorporated in the ultimate contract: or, in other words, a man may as well bind himself to make a contract, as to bind himself by contract, and the first as well partakes of the nature and essentials of a valid agreement as the last. *De Rutte v. Muldrow*, 16 Cal. 513.

179. The cases where possession must be surrendered before action can be brought for the purchase money are those where a contract has been made and possession has been taken thereunder, and the vendee seeks to rescind the contract on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases the vendee must first offer to restore whatever he has received, before he can call upon the vendor to refund the purchase money. *McCracken v. City of San Francisco*, 16 Cal. 628.

II. VERBAL CONTRACT.

180. A verbal contract for the sale of land was not valid under Mexican law. *Hoen v. Simmons*, 1 Cal. 122; *Hayes v. Bona*, 7 Cal. 158; *Stafford v. Lick*, 10 Cal. 17.

181. Under the Mexican as well as the American law, a verbal contract was of itself insufficient to transfer the title to real estate. *Tohler v. Folsom*, 1 Cal. 210.

182. Under a verbal contract of sale of real estate, the delivery of the deed is equivalent to a symbolical delivery of and admission in its possession of the property as between vendor and vendee, whatever might be its effect as to third persons. *Ib.* 212.

183. Where there has been such a part performance of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him unless the verbal agreement should be enforced, equity will decree a specific performance of the contract. *Ib.*

184. A parol agreement to rescind a contract under seal is good if such parol agreement is executed; and such agreement may be presumed from the acts of the parties. *Green v. Wells*, 2 Cal. 585.

185. An executed parol agreement is a good defense against an action upon a specialty. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach v. Covillaud*, 4 Cal. 315; *Whiting v. Heslep*, 4 Cal. 330; *McDonald v. Mountain Lake W. Co.*, 4 Cal. 336.

## Verbal Contract.—Executory Contract.

186. Where a verbal contract was alleged in the bill, and admitted in the answer without the defendant's insisting upon the statute of frauds, a specific performance was decreed upon the obvious grounds that the admission of the contract took the case out of the mischief against which the statute was intended to guard; and a failure to insist upon the statute was a waiver of its protection. *Arguello v. Edinger*, 10 Cal. 158.

187. Where a verbal contract had been so far performed by one of the parties, relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, courts of equity decreed its execution upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute having for its object the prevention of fraud could not be used as an instrument for its perpetration. *Ib.*

188. Nothing can be regarded as a part performance to take the case out of the operation of the statute of frauds which does not place the party in a situation which is a fraud upon him, unless the contract be executed. *Ib.* 159.

189. If upon the faith of the contract the purchaser should proceed to make valuable improvements, the most palpable fraud would be perpetrated if the vendor were permitted to withdraw from its execution. *Ib.* 159.

190. The defense arising from a verbal contract for the sale of land accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our system of practice, to an action of ejectment for the recovery of the premises. *Ib.* 160.

191. Where the answer disclosed the fact that a contract was not in writing, but it also averred acts of part performance, which took the contract out of the operation of the statute, it is not demurrable. *Ib.*

192. E. contracted with J. W. to construct an extension to a ditch, and after the ditch was completed, was to be paid out of the sales of water. At the time of the execution of the contract, B. held a mortgage upon the ditch. After E. had partly completed his work B.'s mortgage fell due, and he brought an action to foreclose it, and had a receiver appointed to

receive the water rents of the ditch. E. refused to go on and complete the work. B. agreed with E. that if he would go on and complete the work he should be paid out of the receipts from the sale of water by the receiver. Under this proviso E. completed the work: held, that this is an undertaking to answer for the debt, default or miscarriage of another, and is, therefore, within the statute of frauds. *Ellison v. Jackson W. Co.*, 12 Cal. 552.

193. It is essential to the validity of a contract to answer for the debt of another that some note or memorandum thereof be made in writing; that it expresses the consideration; and that it be subscribed by the party to be charged thereby. *Ib.*

## III. EXECUTORY CONTRACT.

194. Where it appears clearly from a charter party that the intention of the owner of a ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo and can look only to the personal responsibility of the charterer for payment of the hire of the vessel. *Brown v. Howard*, 1 Cal. 424.

195. An agreement to sell merchandise, and that the contract shall be considered as binding until the vessel arrived, was held to be an executory contract and depended on the contingency of the ship's arrival, and the arrival of the ship must be shown as a condition precedent. *Middleton v. Ballingall*, 1 Cal. 446.

196. A contracted with B, the owner of a ranch, to take the ranch under his charge, and for compensation to receive one-fourth part of all the increase of the cattle, etc., upon the ranch, when parted at the end of five years; it was held that this contract gave no present interest in the live stock, but only to acquire a determinate part, and these could not be completed until the expiration of five years from the execution of the contract. *Fitch v. Brockman*, 3 Cal. 362.

197. An executory contract between a landlord and tenant, that after the title to the premises is settled by a suit to be prosecuted by the former against third persons, the tenant may purchase, does not destroy

Executory Contract.—Parol Evidence to explain a Contract.

the relation of landlord and tenant. *Smith v. Brannan*, 13 Cal. 114.

198. Where the deed of land bought for a married woman is taken in the name of a third person, under an executory agreement on his part to convey to her on the payment of a certain sum, and she goes into possession, she enters under claim of right with a vested equitable interest in the land, which, on payment of the sum agreed, becomes a perfect equity. *Morrison v. Wilson*, 13 Cal. 499.

199. If on an executory contract for the purchase of land made by plaintiff with the agent during the life of the principal, money due by the principal was paid after his death to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled in equity to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers v. Crane*, 15 Cal. 20.

200. Z., the owner of land, contracts in writing to sell it to K., nothing being said as to the possession. K. is to give three notes, falling due at different periods, for the purchase money. The first two notes become due at very short dates, and after they are paid, Z. is to make a deed to K. with covenants against his own acts. First note is paid before the second falls due; Z. deeds the land to plaintiff, subject to the contract with K., the deed containing covenants of warranty against acts of the grantor. Later, and on the day the second note is due, K. sells the land to McE., one of the defendants. K. took possession under the contract. Shortly after plaintiff demanded of K. payment of the second note, and tendered him a deed from himself (plaintiff) to K., with the covenants mentioned in Z.'s contract. K. said he could do nothing. Plaintiff then formally demanded payment and execution of the mortgage. K. wished to see his attorney. After the third note fell due, plaintiff demanded of McE. payment of the two notes, tendering the deed from Z. to him (plaintiff) and also a deed from himself to McE., offering also a mortgage to be executed by McE. to secure the third note, and demanding possession. McE. refused: held, that under the contract the purchaser was not entitled to possession at once; that payment of the first two notes, or tender, was a condition

precedent to his right of possession; that until then the vendor Z., or his assignee, had the legal title, and could maintain ejectment against the vendee. *Gaven v. Hagen*, 15 Cal. 210.

IV. PAROL EVIDENCE TO EXPLAIN A CONTRACT.

201. Parol evidence is inadmissible to vary the terms of a written contract. *Lennard v. Vischer*, 2 Cal. 38; *Conner v. Clark*, 12 Cal. 170.

202. Parol evidence cannot be admitted to alter or vary the terms of a written contract, nor to explain its terms, if the contract itself seems to express the intention of the parties with sufficient certainty. *Johnson v. Carry*, 2 Cal. 38.

203. The custom of merchants is not admissible in evidence to vary the plain meaning of a written contract. *Corwin v. Patch*, 4 Cal. 204.

204. In an action on quantum meruit testimony is inadmissible to prove that the original contract has been changed at the request of the defendant, and the value of the extra work performed. *Mowry v. Starbuck*, 4 Cal. 275.

205. In the absence of any ambiguity on the face of the contract, parol evidence is inadmissible for the purpose of varying its terms, or of altering the liability created by it. *Ruiz v. Norton*, 4 Cal. 358.

206. Where in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract, which the court refused to allow: held, not to be error, as the change in the contract could only be by ordinance. *City of Sacramento v. Kirk*, 7 Cal. 420.

207. Parol evidence is inadmissible to vary the terms of a written contract so as to make it embrace property not described therein. *Osborn v. Hendrickson*, 7 Cal. 285.

208. Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage, is inadmissible, except after due notice to produce the contract and refusal to do so, but it is admissible simply to prove the fact that a writing was made in reference to the matter in controversy

## Parol Evidence to explain a Contract.—Entirety of Contract.

without stating the contents of the same. *Poole v. Gerrard*, 9 Cal. 594.

209. Parol evidence is sometimes admissible to explain, but not to contradict or vary the terms of a written contract; then if words be ambiguous, its meaning may be gathered from contemporaneous facts which intrinsic testimony establishes. *Brannan v. Mesick*, 10 Cal. 106; *Jenny Lind Co. v. Bower*, 11 Cal. 198.

210. A court of equity will release against mistake as well as fraud in a deed or contract in writing, and parol evidence is admissible to show it if denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

211. Parol proof of a written contract and assignment thereof in writing, is not admissible so as to charge the assignee without notice to produce the original and accounting for its loss. *Grimes v. Fall*, 15 Cal. 65.

212. Parol evidence is admissible to establish a new and distinct agreement upon a new consideration, which takes the place of and is a substitute for the old. In the latter case, however, it must appear that the old agreement is rescinded and abandoned, and it is not competent to show by parol the incorporation of new terms and conditions. It is obvious, too, that the new agreement must be valid in itself, and such as may be made the basis of an action. *Adler v. Friedman*, 16 Cal. 140.

## V. ENTIRETY OF CONTRACT.

213. A merchant in Boston shipped by one bill of lading merchandise to his agent at San Francisco. On arrival, part of the goods were delivered, and part of the freight paid; but the agent, unable to pay the balance, offered security for its payment to the master, which he refused: held, that the master had a lien on the entire goods for his freight, and that a part delivery was no waiver of his lien, and that the consignee could not sue for the delivery. *Frothingham v. Jenkins*, 1 Cal. 44.

214. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading, until the whole freight is paid; and an offer to give

good security for the payment of the freight is not sufficient to compel him to deliver the goods. *Ib.*

215. Where the contract of sale was for a greater quantity of an article than the vendor by the evidence was proven to have, and the vendee had received a portion of what he had, but refused to receive the remainder, because it was not delivered in time: held, that the vendor could not maintain an action to recover the price of the entire contract, which he was unable to fulfill, but may recover the stipulated price for the quantity actually delivered, deducting therefrom the damages sustained by the vendee, by reason of the nondelivery. *Cole v. Swanston*, 1 Cal. 54.

216. Where there has been a contract to erect a building at a specified price, and the contract is deviated from by consent, the plaintiff must recover upon a quantum meruit, and not upon the express contract; but at the trial the measure of compensation must be graduated by the terms of the contract, so far as the work can be traced under it. *DeBoom v. Priestly*, 1 Cal. 207.

217. Where a person agrees to work for a certain period at a fixed price, and to perform certain services for a fixed amount, he cannot break off at his own pleasure and maintain an action for the work done. *Hutchinson v. Whetmore*, 2 Cal. 312.

218. Where the contract is not entire, when by the terms payment may be demanded for part performance, an action lies for money due for such part performance. *Ib.*

219. Where the contracts are entire, the covenants dependent, and the plaintiff had declared his inability to keep it, and afterwards actually abandoned it: held, that these facts formed a defense to his action for a claim under the contract. *Green v. Wells*, 2 Cal. 585.

220. An acceptance of goods bearing a name different from the one used in the sale note, by a sub-vendee, of part of goods sold, does not conclude the vendee as to the whole contract. *Flint v. Lyon*, 4 Cal. 21.

221. Where an auctioneer sells a balance of goods, without specifying their quantity, he has a reasonable time to ascertain it; when this is done, and a bill of particulars is made out and delivered to the



Entirety of Contract.—Damages for Nonperformance.

purchaser, who pays the purchase money, or a portion of it, the contract became executed, and the auctioneer will not afterwards be permitted to allege a mistake or quantity. *Burgoyne v. Middleton*, 4 Cal. 66.

222. Where one of two innocent parties must suffer, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed. *Ruiz v. Norton*, 4 Cal. 358.

223. Where the contract is entire, a breach of part is a breach of the whole, and discharges the party complaining of it from the performance of any of the conditions on his part, and gives him a complete right of action. *Haskell v. McHenry*, 4 Cal. 411.

224. Where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon contract. *Reynolds v. Jourdan*, 6 Cal. 111; *Adams v. Pugh*, 7 Cal. 151.

225. In such case the contract may be introduced by either party, as an admission of the standard of value, or as of proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. *Reynolds v. Jourdan*, 6 Cal. 111.

226. Where a lease contained the usual covenants to pay rent, and reëntury for nonpayment, and provided for the appraisement of improvements erected by the lessee, and payment of their value by the lessor at the expiration of the term, and the lessor reëntered for nonpayment of rent: held, that the lessee must wait till the expiration of his term as fixed by contract, before he can recover for his improvements. *Laurence v. Knight*, 11 Cal. 303.

227. A contract for the transportation of passengers from San Francisco to New York is an entirety, whether the entire voyage is to be performed in one vessel or not. *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

228. A breach of such contract at any point, as leaving the passenger on the Isthmus, renders the vessel liable. *Ib.* 372.

229. In suit to recover for services for

half a year, under a contract to work a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract, and allow the plaintiff to recover. *Hogan v. Titlow*, 14 Cal. 256.

230. An entire contract is indivisible—the whole must stand or fall together. But a contract, made at the same time for different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated. *Norris v. Harris*, 15 Cal. 255.

231. A sale of nine slaves for a gross sum is an entire contract. There being no means afforded for determining the price of each one, the agreement is implied that the whole are to be taken, or none. *Ib.*

VI. DAMAGES FOR NONPERFORMANCE.

232. Damages on the resale of an article not delivered according to contract do not legally result from the breach of the contract, and if not specially alleged in the pleading cannot be allowed. *Cole v. Swanston*, 1 Cal. 54.

233. In an action against a common carrier, the rule of damages is the value of the goods at the port of delivery, and not the invoice price or the value at the port of shipment. *Ringgold v. Haven*, 1 Cal. 118.

234. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

235. Loss of time, value of services, and wages of employees caused by the failure of a party to perform his contract are not remote, but strictly proximate and immediate damages, and ought to be allowed. *Kenyon v. Goodall*, 3 Cal. 259.

236. If a contract contained a covenant for stipulated damages, and by the same contract parties were constituted partners, it was held that in an action on said contract the legal demand for damages could



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 Damages for Nonperformance.—Want of Consideration.
 

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be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

237. The general rule as to the measure of damages in an action for breach of contract is the actual loss sustained; but where, from the nature of the contract, no possible mode is left for ascertaining the damage, we adopt the only measure of damage which remains, and that is the price agreed to be paid. *Baldwin v. Bennett*, 4 Cal. 393; *Coffee v. Meiggs*, 9 Cal. 364.

238. The rule of damages against a purchaser for not receiving goods according to contract is the difference between the contract price and the market value at the time of the breach of the contract. *Haskell v. McHenry*, 4 Cal. 411.

239. In an action for breach of contract and for hindering the plaintiff from completing his part thereof, the true measure of damages is the value of the labor performed by plaintiff, and the profit he could fairly have derived from the labor he was prevented from performing. *Cunningham v. Dorsey*, 6 Cal. 21.

240. Where A has made payment in advance on a contract to purchase stock of B, which B refuses or fails to deliver, and A thereupon notifies B that he claims the right to rescind the contract, and claims repayment of the money paid, the notice does not affect or impair the right of A to maintain an action for damages on the contract. *Jones v. Post*, 6 Cal. 104.

241. As to contracts under seal generally, the American rule seems to be that the consideration clause in a deed can be explained by parol proof where the consideration proven is of the same species as that mentioned in the instrument. *Bennett v. Solomon*, 6 Cal. 138.

242. A complaint alleging that the defendant sold to the plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 212; 12 Cal. 179.

243. Where A had agreed with his tenant who was occupying a wooden building, that if he would give up his lease, A would erect a brick building to cover such portion of the lot as would be satisfactory to

the tenant, and would give him possession within three weeks, and a lease of the premises for six months, with the privilege of twelve months, or on failure to do so would pay the tenant five hundred dollars: held, on breach of the contract on the part of A, that the sum named was a penalty, and not liquidated damages. *Nash v. Hermosilla*, 9 Cal. 588.

244. In an action for nondelivery, the buyer need only aver that he was ready and willing to receive and pay for them, and a refusal to deliver, without averring an actual tender; and the measure of damages is the difference between the contract price and the actual value of the article sold. *Crosby v. Watkins*, 12 Cal. 88.

245. If a man sells his property or contracts with another, on good consideration, that the latter shall pay his debt, for a breach of the obligation the measure of damages would be the amount. The law supposes in such a case that the payment of the debt is equivalent in value to the debtor to so much money in hand. *White v. Fratt*, 13 Cal. 523.

246. In an action of damages for violation of a contract to grind wheat and deliver the flour on demand upon payment of the price agreed upon for grinding, tender of payment is necessary to maintain the action. *Vance v. Dingley*, 14 Cal. 53.

247. Nominal damages are presumed to follow, as conclusion of law, from proof of the breach of a contract. *Browner v. Davis*, 15 Cal. 11.

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 VII. WANT OF CONSIDERATION.
 

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248. A certificate in writing in these words: "And I did at the time of the said agreement (to convey land) consent and agree that A should have possession of the lot forthwith," executed long after the agreement, forms no part of the original contract, and wants consideration. No action can be maintained for damages because a third person is in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

249. Where there is no note or memorandum of the contract in writing, and no part of the purchase money paid, without an acceptance or receipt of the goods the contract is void, and cannot be enforced. *Gardet v. Belknap*, 1 Cal. 400.

Want of Consideration.

250. Wagers which tend to excite a breach of the peace or are against good morals, or which are against the principles of sound policy, are illegal, and no contract arising therefrom can be enforced. *Bryant v. Mead*, 1 Cal. 444.

251. A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defense in an action upon contract. *Flint v. Lyon*, 4 Cal. 20.

252. In order to rescind a contract for the sale of land on the ground that the vendor cannot perform it because he has no title to the land, it is necessary for the vendor to aver and show an outstanding paramount title in another. *Riddell v. Blake*, 4 Cal. 262.

253. Equity can relieve by granting a rescission of the contract upon the allegation of the insolvency of the grantor and his inability to respond in damages to an action upon the covenant, a paramount outstanding title in another, and a offer to redeliver possession and account for the rents and profits. *Norton v. Jackson*, 5 Cal. 265.

254. A written contract to pay more than ten per cent. per annum as interest on an indebtedness incurred prior to the contract, is void for want of consideration as to the excess of interest up to the date of the contract. *Adams v. Hastings*, 6 Cal. 130.

255. Where a purchaser of land does not obtain the title which the deed purported to convey and the covenants embrace, and he goes upon it and retains possession under the deed, and the failure of the title goes to the entire consideration paid or to be paid for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to redeliver possession, and account for the rents and profits. *Walker v. Sedgwick*, 8 Cal. 402.

256. Where a party contracts to have certain work performed, and states to third parties furnishing labor or materials that he will see these paid for: held, that the promise is without consideration, and is within the statute of frauds. *Clay v. Walton*, 9 Cal. 333; *Ellison v. Jackson W. Co.*, 12 Cal. 533.

257. Plaintiff having bought certain horses of defendant, as also the "good will" of a mercantile house in the matter

of drayage, cannot sue to recover back the purchase money paid on the ground that such "good will" is not vendable. *Buckingham v. Waters*, 14 Cal. 147.

258. There were pending before the board of U. S. land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case, No. 558, and on file therein; and to use their "best endeavors to procure the confirmation of said claim No. 558." B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558 he acted for the U. S. law agent, in taking said depositions, which were important to the government in defeating claim No. 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement: held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine v. Stewart*, 15 Cal. 397.

259. An attorney, after once acting as such in the prosecution of a suit, and having opportunities for knowing the facts of his client's case, cannot go over and render assistance to the adverse side, and then enforce, in a court of equity, a contract based on such assistance. *Ib.* 401.

260. There is no difference, in principle, between a contract to keep a witness out of the way, and an agreement to suppress and get from the archives or offices of the government a deposition—a knowledge of which may be important to the government. *Ib.* 404.

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 Fraudulent Consideration.—Impairing the obligation of Contracts.
 

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261. If any part of the consideration of an agreement be void, as against public policy, the whole contract fails. *Ib.*

262. Where one of the grantees under the act of 1857 enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant, upon payment of the several notes given as the consideration; will complete the canals within the five years allowed; and that by means thereof and the operation of the statute, they will have a good and valid title to the premises: held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the State with the vendor and his associates—the agreement itself providing for a surrender of the unpaid notes, and a return of the moneys paid, in case of future failure of title, and the rights of the grantees of the State being fully known to defendant. *Montgomery v. Kason*, 16 Cal. 194.

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 VIII. FRAUDULENT CONSIDERATION.

263. A contract, however fraudulent as to creditors, is good as between the contracting parties. *Montgomery v. Hunt*, 5 Cal. 368.

264. If any part of an entire consideration of a contract is illegal, the whole contract is void. *Taaffe v. Josephson*, 7 Cal. 355; *Swartz v. Hazlett*, 8 Cal. 129.

265. If a purchaser is not only insolvent, and knew the fact, but performed an open and notorious act of insolvency, it was his duty, arising out of his previous dealing with the vendors, to disclose the fact before the sale; and a violation of that duty amounted to a fraud, which avoided the contract. *Seligman v. Kalkman*, 8 Cal. 214.

266. It is fully established that where a purchase of goods is made with the pre-conceived design of not paying for them, it is such a fraud as will vitiate the sale. *Ib.*

267. A purchaser must be held to know the true state of his own business; and if he does not, the consequence should not

be visited upon the party who had not the means of knowing. *Ib.*

268. The ownership of goods is not changed when the claim to such ownership is based on a fraudulent contract. *Butler v. Collins*, 12 Cal. 466.

269. Suit on a note for the purchase of land. Answer sets up that the note was given for the land, fencing and building materials; that plaintiffs falsely represented that there was building material for building a barn; that this material was so insufficient in quantity, that it cost defendant six hundred dollars to buy more: held, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to the fences, they being part of the freehold: held, further, that a special demurrer being put in to the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible, not for what defendant paid for lumber, but for the value of lumber contracted for and not delivered; and this at the time of contracting. *Kinney v. Osborne*, 14 Cal. 113.

270. Plaintiff and defendant were partners in the purchase of a mining claim. Defendant was the active partner and acquainted with the value of a certain claim, while plaintiff was ignorant. Plaintiff sold his interest in this claim to defendant for greatly less than its value: held, in an action by plaintiff against defendant to set aside this sale, for fraud, and for an account in a sum greater than that paid by defendant for the mining claim, is in effect an offer to place defendant in statu quo, as per rule of law. *Watts v. White*, 13 Cal. 323.

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 IX. IMPAIRING THE OBLIGATION OF CONTRACTS.

271. The legislature may, from time to time, alter or change the remedy, provided they do not impair the right; but whenever they so far alter the remedy as to impair, destroy, change, or render the right scarcely worth pursuing, they impair the obligation of the contract upon which the right is founded. *Smith v. Morse*, 2 Cal. 552.

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Impairing the obligation of Contracts.—Specific Performance.

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272. An act which divests the creditor of his lien, exempts the property of the judgment debtor from execution, and puts it in the hands of trustees with power to sell if they think proper, and compels the creditor to submit to a delay of twenty years with no security, impairs the obligation of the contract, and is unconstitutional and void. *Ib.* 553.

273. The suspension, by statute, of remedies, or any part thereof, existing when the contract was made, is more or less impairing the obligation of the contract, and therefore is unconstitutional. *Thorne v. City of San Francisco*, 4 Cal. 131.

274. It is difficult to see how an act to fund a debt of the county is impairing the obligation of the contract; on the contrary, the obligation to pay is fully acknowledged, and the plaintiff's right to secure the whole amount of his debt is unaffected. *Hunsacker v. Borden*, 5 Cal. 289.

275. The rejection of plaintiff's claim against the city by the board of examiners, only denies him the privilege of funding it, but does not impair the obligation of the contract, or plaintiff's right to prosecute it. *San Francisco Gas Co., v. City of San Francisco*, 6 Cal. 192.

276. While the legislature has power to direct in what manner county revenues shall be disposed of, still they cannot divest the right of a party which is complete, vested and determined. *Lafarge v. Magee*, 6 Cal. 651.

277. The legislature is without power to affect past contracts, or to alter or destroy the nature or tenure of estates. *Dewey v. Lambier*, 7 Cal. 348.

278. The forty-first section of the recording act, requiring conveyances made before the passage of the act to be recorded, is neither in violation of the federal or State constitutions, as it does not impair the obligation of contracts, but simply establishes what shall be constructive notice to third parties. *Stafford v. Lick*, 7 Cal. 487.

279. The federal and State constitutions provide that no State shall pass any law impairing the obligation of contracts. *Robinson v. Magee*, 9 Cal. 82.

280. The obligation of a contract may be impaired without being entirely destroyed. The last must include the first, but the first does not necessarily include

the last. The act can no more destroy, than it can impair, the obligation of a contract. *Ib.* 84.

281. Whatever provisions of a statute substantially defeat the end contemplated by the parties in making the contract, must impair its obligation, and to ascertain the end contemplated by them, we must look to the law as it existed at the time when the contract was made. *Ib.*

282. A contract being complete and operative, the legislature cannot, by a subsequent act, impair its obligation by requiring the performance of other conditions not required by the law of the contract itself. *Ib.*

283. The provision of the constitution which prohibits the passage of any law impairing the obligation of contracts, relates solely to contracts between individuals, and not to contracts between individuals and the State. *Myers v. English*, 9 Cal. 349.

284. The act of 1851, authorizing the "funding of the floating debt of the city of San Francisco, and to provide for the payment of the same," is a law as well as a contract; and those provisions which are mere modes of giving effect to the substantial purposes of the act, may be revised and altered. The constitution forbids impairing the obligation of contracts, but does not inhibit legislation respecting them. *Thornton v. Hooper*, 14 Cal. 11.

285. Rights of property once vested under contracts, whether between individuals or between the State and individuals, cannot be frittered away by legislation. *People v. Brooks*, 16 Cal. 47.

286. With the contract and the rights of the grantees thereunder, acquired by this part performance of its consideration, the legislature cannot interfere. They are protected by both the federal and the State constitutions. *Montgomery v. Kason*, 16 Cal. 194.

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X. SPECIFIC PERFORMANCE.

287. A court of equity is always chary of its power to decree a specific performance, and will withhold the exercise of its jurisdiction in this respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view



## Specific Performance.—Assignment of a Contract.

to do complete equity. *Morrisson v. Rosignol*, 5 Cal. 65.

288. On an action for specific performance against a vendor who refuses to make a title, it is not necessary that a deed should be tendered him for his execution. *Goodale v. West*, 5 Cal. 341.

289. A bill quia timet, and to enforce the specific execution of a contract, lies only where there is no adequate remedy at law; but where damages resulting from the breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances. *White v. Fratt*, 13 Cal. 523.

# XI. ASSIGNMENT OF A CONTRACT.

290. Where a party alleges an assignment to him of a contract made with another, he must aver a positive transfer and the character of it. *Stearns v. Martin*, 4 Cal. 229.

291. An assignment of a contract as security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue in his own name. *Warner v. Wilson*, 4 Cal. 314.

292. A plaintiff, the assignee in good faith for a valuable consideration of an invoice of goods, who demanded the same and tendered the balance of the purchase money in a reasonable time, can recover the value of the goods and need not notify the vendor of the assignment. *Morgan v. Lowe*, 5 Cal. 326.

293. A contract not to run boats on a certain line of travel, and on failure to comply with such contract to pay \$15,000, is an instrument in writing and assignable by our laws. *California Steam Nav. Co. v. Wright*, 6 Cal. 261; 8 Cal. 592.

294. A principal would be responsible for everything that an agent was permitted to do in his own name before the assignment of a contract; provided, the defendant was ignorant of the fact that the contract was made for the benefit of the principal. *Osborn v. Hendrickson*, 7 Cal. 285; *Cal. Steam Nav. Co. v. Wright*, 8 Cal. 591.

295. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assigna-

ble, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 328.

296. Plaintiff made a written contract with the defendants to dig for them a certain mining ditch, to be paid for by the defendants in a specified manner. Plaintiff dug the ditch and subsequently assigned his interest in the contract to L. & Co., to secure them certain payments due, and authorized them to receive the amounts due on the contract until their debt was paid. L. & Co. gave defendants notice of this assignment, and the defendants made several payments thereon: held, that plaintiff had no right to demand payment himself or sue upon the contract, while this assignment was outstanding. *Myers v. South Feather Water Co.*, 10 Cal. 582.

297. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no actual existence, but vest in possibility; provided they are fairly made and are not against public policy; and a contract for such interest will take effect as an assignment when the subjects to which they refer have ceased to vest in possibility and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123.

298. B. & D. contracted to furnish G. & S.—also defendants—twenty-five thousand gallons of turpentine, to be distilled by the latter. The contract was to end April 1st, 1857. B. & D. were not bound to deliver all the turpentine at once, nor any given quantity per day. Damages for nondelivery of turpentine fixed at \$3,750, or fifteen cents per gallon. For accident to distillery, reasonable time to be allowed G. & S. for repairs. Distillery burned last of January, 1857, requiring eighteen days to rebuild. In January and March, 1857, G. & S. respectively assigned their interest in the contract to plaintiff: held, that the benefit of the suspension of the works by the fire inured to B. & D. as well as to G. & S.; that the time for performance of the contract was extended for the eighteen days; that up to April 18th, 1857, G. & S. would be bound to receive turpentine, and even if the assignment before this time did not put it out of their power to comply with their contract, at least the assignee could not sue before the expiration of the extended time. *Jackson v. Beers*, 14 Cal. 193.



## CONTRIBUTION.

1. Plaintiff and defendant took a joint lease for improving certain property; plaintiff, with consent of defendant, made in his own name a contract to make the improvements stipulated by the lease, which he performed and paid or advanced all the expenses out of his own funds. This contract was drawn by the defendant himself: held, that the plaintiff could recover equal contribution of the money advanced by him from the defendant at the current rate of interest. *Young v. Pollock*, 3 Cal. 211.

2. In an action for contribution between joint obligors, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff. *Sherwood v. Dunbar*, 6 Cal. 54.

3. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand, but ask that a certain sum be retained in the hands of the court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in the hands of the court. *Bell v. Walsh*, 7 Cal. 87.

4. Before a liability of plaintiff for contribution is fixed, the defendants must satisfy the judgment and establish the claim against the plaintiff by action. *Ib.*



## CONTROLLER.

1. Where the legislature appointed a board of examiners, consisting of three executive State officers, to perform the duty of auditing accounts, which theretofore had been performed by the controller of State, but which is not prescribed by the constitution as the peculiar duty of that officer: held, that the act is valid and binding, the power of the legislature being supreme, except when expressly restricted. *Ross v. Whitman*, 6 Cal. 365.

2. A mandamus will lie to the controller to compel him to issue a warrant for a proper purpose upon his refusal so to do. *People v. Whitman*, 6 Cal. 659; *Price v. Whitman*, 8 Cal. 415; *People v. Brooks*, 16 Cal. 47.

3. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler v. Bates*, 7 Cal. 137.

4. By the provisions of the constitution, the manner of electing and the term of the office of controller are the same as that of the governor, and if the controller elect fails to qualify, the incumbent holds on until his successor is elected and qualified. *People v. Whitman*, 10 Cal. 35; doubted in *People v. Melony*, 15 Cal. 62.

5. A controller may be elected biennially, at the same time and place and in the same manner with the governor and lieutenant governor, and an appointment of a controller by the governor before this biennial general election, whatever its effect otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *Ib.*

6. And when the act of April 13th, 1854, provides that no warrants shall be drawn, except there be "an unexhausted specific appropriation" to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object. *People v. Brooks*, 16 Cal. 28.

7. The controller and treasurer of State are no more officers of that department than the sheriffs and tax collectors of each county. *Ib.* 40.

8. The controller of the State is an officer of the executive department, but the greater part of the duties devolved upon him by the law are of a ministerial character. The constitution does not define his duties. It only provides that there shall be such an officer, declares that he shall be subject to impeachment, the mode of his election, and that his compensation shall not be increased or diminished during his term of office. He does not hold his appointment of the governor, is not responsible to him, and acts entirely independent of him. *Ib.* 55.

## Conversion.

## CONVERSION.

1. An auctioneer, who, in the regular course of his business, receives and sells stolen goods, and pays over the proceeds of the goods to the felon, without notice that the goods were stolen, is not liable to the true owner, as for a conversion. *Rogers v. Huie*, 2 Cal. 572; overruling *Rogers v. Huie*, 1 Cal. 433.

2. Conversion is the gist of the action of trevor, and without conversion, neither possession of the property, negligence or misfortune, will enable the action to be maintained. *Rogers v. Huie*, 2 Cal. 573.

3. Where the sheriff had an execution against C., and levied and sold the property of F., who sued him for the trespass and conversion; proof that C., the defendant in the execution, had made a settlement with F., raises no presumption that the settlement included the claim of F. upon the sheriff for the trespass, or operated as a satisfaction of it. *Fitch v. Brockmon*, 2 Cal. 578.

4. After a voluntary assignment for the benefit of creditors, in order to enable the assignee to recover goods belonging to the assignor from consignees holding the same under a claim for advances and commissions, the demand must be made in the name and by the authority of the assignee, accompanied by notice and evidence of such authority. A demand by the assignor, and a refusal by the consignee, will not enable the assignee to maintain his suit for a conversion. *Griffin v. Alsop*, 4 Cal. 408.

5. Warehousemen who give their receipt for goods on storage are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them by the holder of the receipt, for a conversion of the goods by a seizure, in action against a vendor of the plaintiff. *Goodwin v. Scannell*, 6 Cal. 543.

6. All conversions of money or property by a bailee, are not, "ipso facto, unlawful or felonious under our statute. The word bailee, under our statute, must be construed in a limited sense, as designating 'bailees,' to keep, transport and deliver." *People v. Cohen*, 7 Cal. 43.

7. An indictment which charges defendant with converting monies, goods and

chattels, of the value of four hundred thousand dollars, without any particular specification of the different articles, is bad. *Ib.* 44.

8. A complaint alleging that the defendant, as the agent or attorney in fact of the plaintiff, had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, is bad, as the allegation is in the disjunctive form. *Porter v. Hermann*, 7 Cal. 623.

9. The rule is, that when property converted has a fixed value, the measure of damages is that value with legal interest from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Kraft*, 9 Cal. 563; *Phelps v. Owens*, 11 Cal. 25.

10. Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another; his taking such portion was an unlawful assumption of ownership, and a conversion of his property. *Scriber v. Masten*, 11 Cal. 306.

11. An action brought by an agent in his own name for a trespass, in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

12. If a confidential agent, trusted by a principal with money used in trade, appropriate the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money. *Wells v. Robinson*, 13 Cal. 139.

13. Where a broker buys wheat for E. & H., with their funds, and the defendants, warehousemen, deliver the wheat to third persons, who bought from the broker for his own debt, on the ground that they held the storage receipt of defendants to one S., who had loaned money to E. & H. on the wheat, as collateral, and had indorsed the receipt, "deliver to bearer, or E. & H.," the defendants knowing at the time of said delivery that E. & H. claimed the wheat as their property, they are lia-

## Conversion.—Conveyance in general.

ble to E. & H. for a conversion. *Hanna v. Flint*, 14 Cal. 75.

14. In a suit by an administrator against defendant, for conversion of the property of the estate, under the hundred and sixteenth section of the statute to regulate the settlement of estates, the proof as to the right or title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Beckman v. McKay*, 14 Cal. 252.

15. If the defendant came into possession innocently or for a lawful purpose, or under a bona fide claim or color of right, or in ignorance of the title, the statute, which is penal in its character, would not be so construed as by mere force of a demand and refusal, or inability of compliance, to bring the defendant within the penalty. *Ib.* 253.

16. In an action for the seizure and conversion of a bag of gold coin, the complaint, after the usual averments, went on to detail the manner of the seizure, with the incidents occurring on the street at the time, and everything done by defendants, plaintiff and the "crowd," relating to, or constituting the evidence of the wrongful conversion: held, that this narration should have been stricken out, on motion, as irrelevant and redundant matter. *Green v. Palmer*, 15 Cal. 414.

17. Plaintiff was walking along the street with a bag of gold coin in his hand; two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. Plaintiff sues for the seizure and conversion of the coin. Defendants gave in evidence three judgments and executions, in favor of three of their number, and against Alfred A. Green, brother of plaintiff, and offered to prove that the bag of coin was the property of Alfred, and was seized under these executions, and applied to their satisfaction. The court excluded the proof: held, that such exclusion was erroneous; that plaintiff could claim no exemption from the seizure of coin held, as this was, in his hand, as he might, perhaps, in reference to money upon his person. The coin in the hand was, like a horse held by a bridle, subject to seizure on execution against its owner. *Ib.*

18. In a suit against an agent for fraudulently appropriating money of plaintiff, defendant cannot, on the trial, object that the person making the demand on him before suit did not exhibit his authority so to do, unless defendant questioned his authority at the time of demand. *Baxter v. McKinlay*, 16 Cal. 77.

See AGENCY, BAILMENT, FRAUD.

## CONVEYANCE.

- I. In general.
- II. By Husband and Wife.
- III. Requisites of a Conveyance.
  - 1. Delivery of a Conveyance.
  - 2. The seal.
- IV. Effect of a Conveyance.
- V. Void Conveyance.
- VI. Evidence.
  - 1. Parol evidence to explain a Conveyance.
  - 2. Conveyance as Evidence.
- VII. Notice to third persons.
- VIII. Trust Conveyance.

## I. IN GENERAL.

1. Where a contract is made to convey land at a future time by a quit claim deed, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land and the vendee cannot obtain possession. *Tewksbury v. Laffan*, 1 Cal. 130.

2. A agreed to convey in his individual capacity a ship to B, and tendered him in performance of this condition a deed made by A as the attorney of C, the owner: held, not a compliance with his agreement. *Osborne v. Elliott*, 1 Cal. 338.

3. Where by an agreement for the sale or purchase of land the price is payable in installments, for which the purchaser executes his notes payable at certain times, and the vendor agrees to convey on payment of the last installment, and suit is brought on the notes after all the installments have become due, the tender of a conveyance by the vendor is a condition precedent to the right to sue, and the pur-

## In general.

chaser may insist on the want of such tender against an endorsee after maturity. *Folsom v. Bartling*, 2 Cal. 164.

4. Much of the severity which formerly governed the construction of a conveyance in presenti has been relaxed, the modern doctrine being, so far as possible, to ascertain the intention of the parties by taking the instrument as a whole. *Mesick v. Sunderland*, 6 Cal. 311.

5. The law does not enjoin on the defendants, if they wish to avoid a contract for the sale of land, to tender a deed and demand the purchase money. In this State there is no settled rule on this subject, though in England it is the duty of the vendee and not the vendor to tender a deed. *Brown v. Covillaud*, 6 Cal. 574.

6. The condition of California, its illiterate population, together with the fact that there were no escribanos or judges of the first instance residing in San Francisco, warrants the presumption that the law was never regarded which required a conveyance to be made by the escribano. *Hayes v. Bona*, 7 Cal. 159.

7. Where there is no fraud, and the vendor binds himself to convey a certain title, and afterwards discovers a defect which he can cure, and thus conveys to the purchaser all the latter bargained for, it is obviously just that the vendor should be allowed to do so. *Alvarez v. Brannan*, 7 Cal. 509.

8. On the election of a new sheriff, the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office, and may execute all the conveyances required by law to the completion of the final process. *People v. Boring*, 8 Cal. 411; *Anthony v. Wessell*, 9 Cal. 104.

9. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants his remedy, upon failure of title, is confined to them. *Peabody v. Phelps*, 9 Cal. 228.

10. The first step in the construction of a conveyance is to ascertain the understanding and intention of the parties at the time of the contract. *Brannan v. Mesick*, 10 Cal. 105.

11. A conveyance giving a preference is not fraudulent though the debtor be insolvent, and the creditor be aware at the

time that it will have the effect of defeating the collection of the other debts. To avoid the conveyance there must be a real design on the part of the debtor to present the application of his property, in whole or in part, to the satisfaction of his debts. *Dana v. Stanfords*, 10 Cal. 274; *Wellington v. Sedgwick*, 12 Cal. 474.

12. If the proof of the execution of a conveyance and of its accidental destruction be full and satisfactory, a court of equity has jurisdiction to decree a reëxecution of the deed, is unquestionable. *Cummings v. Coe*, 10 Cal. 530.

13. A deed of release, conveyance and partition, providing for the appointment of commissioners to make partition of the land therein described, according to certain terms set forth in the deed, and also by its terms providing that the release shall take effect upon the making the partition and report by the commissioners of a map of the partition, which, together with the deed, is to be handed over to one F., who is to file the same for record in the proper office, is sufficient to estop a party thereto from controverting the deed. *Tewksbury v. Provizzo*, 12 Cal. 24.

14. A party in taking a conveyance in the name of his associates, must be considered as having acted as their agent, and notice to him was equally notice to them. *Stanley v. Green*, 12 Cal. 168.

15. It is scarcely to be presumed that one man will execute to another a deed without the assent of the other. *Bensley v. Atwill*, 12 Cal. 236.

16. A deed made under and in pursuance of a general power of attorney, which authorized the attorney "to make and execute conveyances," and where the purchase money was received by the principal, cannot be assailed for want of authority to execute it. *Hunter v. Watson*, 12 Cal. 376.

17. Where several papers concerning the same subject matter are executed by or between the same parties at the same time, they are all to be construed together as one instrument. *Ingoldsby v. Juan*, 12 Cal. 577.

18. A bill of sale of a mining claim is sufficiently proved when the hand writing of the subscribing witness, who is absent from the State, and the execution by the vendor, are proven; and this, though the subscribing witness was in the State after



In general.—By Husband and Wife.

suit brought and near the time of trial, and plaintiff used no efforts to get the testimony of the witness before he left the State. *Jackson v. Feather River Water Co.*, 14 Cal. 22.

19. If the grantor in a conveyance would be estopped from asserting against his own deed a title subsequently acquired, the mortgagor would be equally estopped from asserting such title against the force of the lien created by his mortgage. If the grantor could not deny that the title passed, the mortgagor could not that the lien was created. *Clark v. Baker*, 14 Cal. 626.

20. Although in this country conveyances by feoffment, fine or common recovery are not in use, no greater effort is given to a grant or a conveyance by bargain and sale or lease and release, unaccompanied with covenants of warranty, than at the common law under statute of uses. *Ib.*

21. By common law there were only two classes of conveyances which were held to operate upon the after acquired title—those by feoffment, by fine or by common recovery, and this from their solemnity and publicity; and those by indenture of lease, from the implied covenants arising upon such indentures. *Ib.*

22. A deed with a covenant of warranty operates upon future acquired interest, not as in fact passing such interest, but by way of estoppel upon the grantor against its assertion. *Ib.* 630.

23. The doctrine that the vendor of real property, after an absolute conveyance, retains a lien for the unpaid purchase money, is well established in England, and prevails with some exception in the several States of the Union. *Sparks v. Hess*, 15 Cal. 192.

24. So the sale of a "bridge" across a certain stream, "together with the toll houses, stables and outhouses of every description," and "all the privileges and appurtenances appertaining or in anywise belonging to said bridge," passes the land upon which the bridge rested and the other buildings were erected. *Ib.* 195.

25. The rule is, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee. *Ib.*

26. The doctrine that land may often pass by conveyance as essential to the enjoyment of, or as parcel of buildings, etc., erected thereon, is consistent with the doctrine that the ownership of the land may be in one person, and the ownership of the structures thereon in another—as in these latter cases the buildings are erected by permission of the owner of the land, for the use of the builder, and generally under mutual expectation by the parties of their removal, or of compensation being made for them to the builder, or of the latter ultimately acquiring title to the land. *Ib.* 197.

27. A conveyance, however fraudulent as to creditors, is valid as between the parties; and no one can impeach it without showing that he has been injured by it. *Harris v. Taylor*, 15 Cal. 349.

28. Where all the conveyances under which the plaintiff claimed were executed previous to the issuance of the patent by the United States for the land, they passed only the right of the grantors under the grant; but the patent, in recognizing the validity of the grant, necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest. *Stark v. Barrett*, 15 Cal. 366.

29. One joint tenant, or tenant in common of land, may convey his interest in a particular portion of the land, described by specific metes and bounds; but the grantee takes subject to the cotenant's right of partition of the whole tract. The grantee's title is good against his grantor, and all persons except his cotenant. *Ib.* 368.

II. BY HUSBAND AND WIFE.

30. Where a husband and wife each make a separate deed of the homestead, both are invalid. *Poole v. Gerrard*, 6 Cal. 73.

31. To make a valid sale of the homestead requires the joint deed of the husband and wife. This is the mode pointed out by the statute, and must be strictly pursued. *Ib.*

32. A deed properly executed and acknowledged by the wife, of her separate property, with the assent of her husband underwritten, not under seal, but properly



## By Husband and Wife.—Requisites of a Conveyance.

acknowledged; is sufficient to pass a title. *Ingoldsby v. Juan*, 12 Cal. 576.

33. A deed by a husband of his separate real estate to a trustee for the benefit of his wife, whether executed in compliance with an antenuptial contract or by way of settlement upon his wife independent of any previous contract, the husband being at the time solvent, is valid. *Barker v. Koneman*, 13 Cal. 10.

34. The wife cannot convey her separate estate, acquired before the act of 1850, whether legal or equitable, except by the joint deed of herself and husband. *Morrison v. Wilson*, 13 Cal. 497.

35. Generally, a conveyance by a feme covert, not executed according to the forms prescribed by statute, is invalid. *Ib.* 498.

36. A conveyance by the husband and wife of the homestead does not transfer the homestead rights. Such rights may be released and abandoned; but are, in their nature, incapable of sale and transfer. The exemption from forced sale is the personal right of both husband and wife, and the restraint upon the husband's power of alienation is the personal right of the wife alone, and they cannot be assigned to others. *Bowman v. Norton*, 16 Cal. 217.

37. The wife cannot mortgage her separate real estate, unless her husband unites in the conveyance in the mode prescribed by our statutes—at least, as to property acquired after the passage of the statutes; and these statutes, when operating in futuro, are constitutional. *Harrison v. Brown*, 16 Cal. 290.

38. A married woman cannot invest another with power to sell any interest she may possess in real estate, in the absence of statute to that effect, and there is no such statute in this State. *Mott v. Smith*, 16 Cal. 557.

39. To the efficacy of a conveyance of her real estate by a married woman, it is essential that she join with her husband in its execution, and state, on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him, or compulsion, or undue influence from him, and that she does not wish to retract its execution. This private examination—this determination of the will as to the retraction of the execu-

tion—are not matters which can be delegated to another. *Ib.*

## III. REQUISITES OF A CONVEYANCE.

40. Contracts for the sale of land by the custom of California were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer and the price paid. *Harris v. Brown*, 1 Cal. 100; *Tohler v. Folsom*, 1 Cal. 210; *Hayes v. Bona*, 7 Cal. 159; *Stafford v. Lick*, 10 Cal. 17.

41. Such importance was attached to the formalities prescribed by the Spanish law for the execution of deeds, that if an instrument was defective in form—as if it lacked the signature of the judge, notary or witnesses—the instrument should be void. *Hoen v. Simmons*, 1 Cal. 122.

42. It is essential to the validity of a deed that there should be a legal capacity in the grantor to convey and in the grantee to receive; if either be wanting the instrument is invalid. *Sunol v. Hepburn*, 1 Cal. 285.

43. A deed purporting to convey real estate, executed by an agent or attorney in his own name, instead of the name of his principal, is not binding upon the latter, and does not transfer the title to the property. *Fisher v. Salmon*, 1 Cal. 413.

44. A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but that lot, though not void for uncertainty, is only a deed for an undivided half, and the grantee becomes a tenant in common. *Lick v. O'Donnell*, 3 Cal. 63.

45. A certificate of acknowledgment to a conveyance in the words: "Before me, etc., personally appeared A B C, the individual described in, etc.," is bad, and the record of the conveyance on such a certificate imparts no notice to third parties, as it does not show the party to be "known" or "proven" to be the individual. *Wolf v. Fogarty*, 6 Cal. 225; *Kelsey v. Dunlap*, 7 Cal. 162.

46. The words "good and sufficient deed" only refer to the form of the conveyance and not the interest intended to be conveyed; or in other words, the de-

Requisites of a Conveyance.—Effect of a Conveyance.

fendants obligated themselves to make a conveyance sufficient to pass their title, whatever it might be, to the plaintiffs. *Brown v. Covillaud*, 6 Cal. 573.

47. Where a charter of a corporation points out a particular mode of conveyance for its property, it can only be conveyed in the mode prescribed. *Holland v. City of San Francisco*, 7 Cal. 375.

48. Although the word *sold*, used in a conveyance, is positive and in the present tense, yet it must be construed with reference to the whole instrument. *Ellis v. Jeans*, 7 Cal. 414.

49. Where a sheriff's deed is executed by a deputy in the name of the sheriff, whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read in evidence in an action of ejectment. *Cloud v. El Dorado County*, 12 Cal. 134.

50. It is undoubtedly essential to the validity of a conveyance that the thing conveyed must be described so as to be capable of identification; but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence. *Stanley v. Green*, 12 Cal. 166.

51. There is no peculiar form for the signing of a deed. It takes effect upon delivery. Any writing which clearly shows that a party has adopted a sealed instrument as his own, intending to be bound by the contents of it, is, if not a formal, at least a sufficient execution to satisfy the same. *Ingoldsby v. Juan*, 12 Cal. 578.

52. The word "absolute" adds nothing to the force of the preceding terms "fee simple," which of themselves express the highest interest one can possess in land. *Clark v. Baker*, 14 Cal. 631.

53. Land will sometimes pass without any specific designation of it as land. Thus the grant of a messuage or a messuage with the appurtenances will pass the dwelling house and adjoining buildings; and also its curtilage, garden and orchard, together with the close in which the house is built. *Sparks v. Hess*, 15 Cal. 195.

1. *Delivery of a Conveyance.*

54. Delivery of a conveyance is a question of fact to be determined by the jury, and depends more upon the intention of the parties than upon the mode of fulfilling the intention. *Hastings v. Vaughn*, 5 Cal. 318.

2. *Seal to a Conveyance.*

55. The objection to the want of a seal to the Mexican conveyance is not tenable. No seal was requisite under the civil law. *Stanley v. Green*, 12 Cal. 166.

56. There is no authority which holds that a conveyance of interest in land must necessarily be under seal; and if it were so at common law, it does not follow that it is so required by our statute. *Ingoldsby v. Juan*, 12 Cal. 577.

57. It is no objection to such bill of sale of a mining claim that it is not under seal, whatever may be the effect of it as evidence. *Jackson v. Feather River Water Co.*, 14 Cal. 22.

IV. EFFECTS OF A CONVEYANCE.

58. A transfer of property cannot defeat a lien which had already accrued upon the property. *Hotaling v. Cronise*, 2 Cal. 64.

59. Recitals in a deed bind all persons who are parties or privies thereto; but this rule does not extend to that which is mere description, or an averment which is not essential. *Osborne v. Endicott*, 6 Cal. 153.

60. A party who makes a deed is bound to know its contents, except when obtained by fraud or force; and once knowing its contents, he is bound to remember them at his own peril. *Alvarez v. Bran-nan*, 7 Cal. 508.

61. A conveyance on condition precedent vests the title in the grantee on the performance of the condition, without any further act on the part of the grantor; and being "an instrument in writing affecting real estate, not within the exception mentioned in the thirty-sixth section of the registration act, its record imparts

## Void Conveyance.—Evidence.

notice of its contents to all persons. *Bran-nan v. Mesick*, 10 Cal. 108.

chaser for a valuable consideration. *Paige v. O'Neal*, 12 Cal. 497.

## V. VOID CONVEYANCE.

62. A deed of conveyance from an Indian to a white man is a nullity on its face, and no one can derive title from it. Such conveyance is contrary to the policy of Spanish and Mexican, as well as American law, and is strictly forbidden. *Sunol v. Hepburn*, 1 Cal. 274.

63. Where a deed of conveyance is void upon its face, as being in violation of law, the party claiming it is chargeable with knowledge of the law, and of the invalidity of the deed. He cannot, therefore, derive a color of title which will give him constructive possession of a tract of land beyond his actual occupation. *Ib.* 280.

64. A conveyance that would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction; and if void in the former case, would be void in the latter; and will not affect the lien of a judgment regularly obtained against the grantor. *Smith v. Morse*, 2 Cal. 539.

65. Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. Such a conveyance is void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz v. Hazlett*, 8 Cal. 126.

66. The mere fact that a deed to a son was voluntary, would not of itself constitute the conveyance fraudulent as to him. *Ib.* 128.

67. A conveyance to a man who is dead at the time of its execution is a nullity. *Hunter v. Watson*, 12 Cal. 376.

68. Conveyances of real and personal property made to hinder, delay and defraud creditors, are subject to the same defect, liable to be avoided at the suit of the creditors, but valid as between the parties, and vest a title which can be transferred perfect to a bona fide pur-

## VI. EVIDENCE.

## 1. Parol evidence to explain a Conveyance.

69. A deed is void on account of patent ambiguity which cannot be cured by parol evidence, where the land intended to be conveyed in the instrument is insufficiently described. *Mesick v. Sunderland*, 6 Cal. 312.

70. The law requires that the conveyance of land shall be in writing, but it is not guilty of the solecism of permitting or providing that the land, to which the title passed, may vest in parol, or need not be in writing. *Ib.* 312.

71. A court of equity will relieve against mistake as well as fraud in a deed or contract in writing; and parol evidence is admissible to show, if it be denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

72. The admissibility of parol evidence to show that a conveyance or assignment absolute on its face was intended as a mortgage, is no longer an open question in this State. *Johnson v. Sherman*, 15 Cal. 291.

73. If a conveyance from a son to his father did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Russ v. Mebius*, 16 Cal. 355.

## 2. Conveyance as evidence.

74. Our statutes make tax collectors' deeds prima facie evidence of title. *Norris v. Russell*, 5 Cal. 250; *Ford v. Holton*, 5 Cal. 321.

75. A deed defective in the acknowledgment should not be rejected as evidence for that reason, but should be admitted with instructions to the jury as to its effect in giving notice to third persons. *Hastings v. Vaughn*, 5 Cal. 319.

76. Evidence of a demand for a conveyance is not necessary where the party

## Notice to third persons.—Trust Conveyance.—Copartnership.

refuses to make title, and at the same time gives the reason for his refusal, which is other than that of requiring a deed to sign. *Goodale v. West*, 5 Cal. 341.

77. Exceptions to the admissibility of a deed in evidence, must be taken advantage of in the court below, and not on appeal for the first time. *Posten v. Rasette*, 5 Cal. 467; *Pearson v. Snodgrass*, 5 Cal. 479.

## VII. NOTICE TO THIRD PERSONS.

78. At common law, negligence in a prior purchaser or mortgagee, such as leads to imposition upon an innocent party, is regarded as a legal fraud. *Call v. Hastings*, 3 Cal. 183.

79. The evident intention of the statute providing for the registration and proof of conveyances, is to protect subsequent purchasers, without notice either actual or constructive. *Ib.*

80. The doctrine of constructive notice has always been regarded as a harsh necessity, and the statute which creates it has always been subject to the most rigid construction. *Ib.*; *Chamberlain v. Bell*, 7 Cal. 294.

81. Although a deed be defective in the acknowledgment so as not to entitle it to registration, it is not void, but is still good as between the parties, and as to all the world, except to subsequent purchasers without notice. *Hastings v. Vaughn*, 5 Cal. 319.

82. At common law, the registry of a conveyance is not even prima facie evidence of title, and imparts no notice whatever, and the purchaser is put upon inquiry in every case. *Mesick v. Sunderland*, 6 Cal. 315.

83. The twenty-fifth section of the act concerning conveyances, making the record of conveyances notice, is limited by its terms in its operation to subsequent purchasers and mortgagees. *Dennis v. Burritt*, 6 Cal. 673.

84. To secure the first object, the acknowledgment before the proper officer and in the proper form is necessary; while to give notice of the contents of the deed itself, the acknowledgment is not in the nature of the case so much required. *Bird v. Dennison*, 7 Cal. 305.

85. A conveyance recorded January

30th, 1850, by a person acting as recorder, by virtue of an election by the people, without authority of law, is not properly recorded. *Smith v. Brannan*, 13 Cal. 114.

## VIII. TRUST CONVEYANCE.

86. Where upon the purchase of real property, the conveyance of the legal estate is taken in the name of a third person, and the consideration is paid by another, a trust immediately arises, and the person in whose name the conveyance is taken, is deemed in law to hold as the trustee for the one furnishing the money. *Osborne v. Endicott*, 6 Cal. 153.

87. In order to create a trust, it is not necessary in all cases that it should appear affirmatively upon the face of the deed, that the money was not furnished by the nominal purchaser. *Ib.* 154.

88. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement—the agreement is void, the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property—it being shown that the transaction was not a gift. *Russ v. Mebius*, 16 Cal. 355.

89. The doctrine of resulting uses and trusts is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumption arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Ib.* 356.

See DEED, LEASE, MORTGAGE, TRUST.

## COPARTNERSHIP.

I. In general.

II. Evidence of Copartnership.

## In general.

## III. Dissolution of a Copartnership.

1. Notice required.

## IV. Liability of a Copartnership.

## V. Actions.

1. By a Copartnership.

2. Against a Copartnership.

3. Among Copartners.

## VI. Surviving Copartners.

## VII. Dormant Copartners.

## I. IN GENERAL.

1. The law of Louisiana requires a partnership contract to be in writing; the law of California does not. It was held that a verbal contract of copartnership entered into in Louisiana, to be executed in California, was valid. *Young v. Pearson*, 1 Cal. 450.

2. A contracted with the owner of a ranch to take the ranch under his charge, and to take care of it to the best of his ability; and the owner stipulated in recompense for his services, to give him one-fourth part of all the increase of the cattle upon the ranch, when parted at the end of five years. It was held, that the true construction of the contract gave no present interest in the live stock to A, but only to acquire a determinate interest, after the performance of all the stipulations on his part, and that these could not be completed until the expiration of five years from the execution of the contract. *Fitch v. Brockman*, 4 Cal. 362.

3. Tenants in common, or partners, have a right to acquire their cotenants, or copartners' interest, by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter v. Laffan*, 7 Cal. 593.

4. A executed a note and mortgage to B. Subsequently A and B entered into partnership in the livery business. A was to furnish the stable, hay and grain, and board B, and B was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of \$396, A's share of the profits of the business, and then, after maturity, assigned the note and mortgage to C. C brought suit against A for the whole amount. A plead payment and set off: held, that A was entitled to the credit of the payment. *Mount v. Chapman*, 9 Cal. 296.

5. A partnership as between the partners themselves may be defined to be a contract of two or more persons to unite their property, labor and skill, or some of them, in the prosecution of some joint and lawful business, and to share the profits in certain proportions. *Gray v. Palmer*, 9 Cal. 638.

6. A partnership may exist in purchase and sale of lands. But such a partnership can only exist where the contract is reduced to writing. And it is not necessary that the partners should be jointly concerned in the original purchase, where the interests of the partners are afterwards mingled. But the partners must, by the contract, be jointly concerned in the future sale. *Gray v. Palmer*, 9 Cal. 639; *Laffan v. Naglee*, 9 Cal. 678.

7. It does not matter in whose name the real estate is held; he is only a trustee for the partnership, and for the purpose of disposal and distribution, it is to be treated as personal estate. *Gray v. Palmer*, 9 Cal. 639.

8. Where one of the two holders of the leasehold, holding in partnership, purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled, on payment of his proportion of the purchase money. *Laffan v. Naglee*, 9 Cal. 682.

9. A and B entered into an agreement, in which it was stipulated that A should advance \$12,000 for the purpose of putting up a brick house on property of B, held by lease; and B was to convey to A one-half interest in the leased premises; the balance of the cost of the building was to be borne in equal proportion. When completed, B was to rent the same, and pay over to A one-half of the rents. Buildings were erected at a cost of \$48,000—\$30,000 paid by A, and \$18,000 by B—B conveyed one-half of the premises to A: held, that A and B were partners. *Ib.*

10. The interest of one partner in the partnership chattels is the subject of levy and sale of the sheriff on an execution against one of the partners. *Waldman v. Broder*, 10 Cal. 380; *Jones v. Thompson*, 12 Cal. 198.

11. Where C., T., S. P., J. P. and W. were partners in the ownership of a saw-mill, and carrying on the mill business, and subsequently they executed an instru-



## In general.

ment, C., T. and W. of the first part, and S. P. and J. H. P. of the second part, which ran as follows: "The party of the first part have bargained, sold, and by these presents do convey unto the party of the second part all their right, title and interest in and to a certain saw-mill," etc., and this was followed with certain stipulations as to the manner of payment of the consideration money, with a condition that if the party of the second part fail to comply, then the property to be delivered up to the party of the first part, to be used and disposed of to pay the consideration: held, that the conveyance of the property is not in any degree dependent upon the performance of the conditions. The transfer is in presenti. *Cayton v. Walker*, 10 Cal. 455.

12. Such an agreement as that here set out is a bar to an action by bill of one of the partners against the others for an account and dissolution and sale of the partnership property. *Ib.* 456.

13. When plaintiff did not contribute anything as partner, or claim to be such, and apparently, both by words and acts, abandoned the concern and all participation therein, he cannot claim to be a partner in the profits of the adventure, when he could not have been held responsible to defendants for losses. *Ib.*

14. Where mining claims were held in possession by the partners and associates of the plaintiff, they, as such partners, were tenants in common, and it is well settled that the possession of one partner, or tenant in common, is the possession of all. *Waring v. Crow*, 11 Cal. 371.

15. Where the tenant in common, or partner, goes away, and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment; nor does his refusal to pay or delay in paying the expenses of the business or the assessments create of itself a forfeiture. *Ib.*

16. The mere passive acquiescence of the other partners, or tenants in common, in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Ib.* 372.

17. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the partners in the ditch was taken by the plaintiff; and subsequently, and before the trial,

the witness conveyed by deed his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball v. Gearhart*, 12 Cal. 46.

18. The failure of one partner in a ditch to pay his proportion of the expenses of the concern, does not forfeit his right in the common property. *Ib.* 47.

19. The sheriff can only seize and sell the interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones v. Thompson*, 12 Cal. 198.

20. J. filed his bill in the district court against T., alleging a partnership between them, and praying for an account of the partnership property. Subsequently, J. filed a petition in the same court, setting forth the bill, and also that L. T. B. and H. B. had obtained judgment against T., the defendant, and that execution had issued on the judgment, and was levied on the partnership property of the plaintiff and defendant, and that the sheriff was about to sell the property. The petition prayed that L. T. B. and H. B. might be made parties, and that an injunction might issue against L. T. B. and H. B. and the sheriff: held, that on the appeal of the case to this court, it does not lie in the mouth of J. and T. to say that L. T. B. and H. B. are not parties to the suit and have no right of appeal. *Ib.*

21. In such case, the decree should not order a private sale of the firm property. *Ib.* 200.

22. Plaintiffs and one C., partners in the mercantile business, purchased of defendant goods on credit, which were shortly afterwards sold by plaintiff and his co-partner at a sacrifice, and the proceeds immediately invested in a homestead in the name of C., who was the brother-in-law of plaintiff. Defendant subsequently caused plaintiffs to be arrested upon the charge of cheating, from which arrest they were discharged. Afterwards, defendant caused plaintiff and C. to be arrested on a charge of concealing property with intent to defraud and delay their creditors. The charge was dismissed as to plaintiff, and C. was sent up to the criminal court to answer. Plaintiff thereupon brought his action against defendant for malicious

## In general.

prosecution: held, that if plaintiff was entitled to any damage, he could recover only the actual damage which he sustained by the arrest. *Sears v. Hathaway*, 12 Cal. 278.

23. If in any case one partner can assign to another partner his interest in a firm claim, and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the code. *Cravens v. Dewey*, 13 Cal. 42.

24. Plaintiff and defendant were partners in the purchase of mining claims. Defendant was the active partner, and acquainted with the value of a certain claim owned by the firm, plaintiff being ignorant of its value. Plaintiff sold his interest in this claim to defendant for greatly less than its value: held, that in a suit by plaintiff against defendant to set aside this sale for fraud, and for an account, etc., an averment that defendant is indebted to plaintiff on the account in a sum greater than that paid by defendant for the mining claim, is in effect an offer to place defendant in statu quo as per rule of law. *Watts v. White*, 13 Cal. 325.

25. If a party fails to pay taxes, permits the premises to be sold, and buys them in, he can derive no benefit from the sale; except that, in equity, the amount paid would probably be considered an advance to the judgment debtor, and this though the premises were bid in by one of two partners, while the possession, under the sheriff's sale, was by both partners. The duty to pay the tax was several as well as joint. *Kelsey v. Abbott*, 13 Cal. 619.

26. Where a broker buys wheat for E. and H. with their funds, and an agreement is made between the three that the broker shall dispose of the wheat, and that the profits shall be equally divided, the broker is neither partner nor joint owner of the wheat. *Hanna v. Flint*, 14 Cal. 75.

27. M. and B., the plaintiff, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back, B. agreeing to pay certain firm debts. This sale and agreement were afterwards canceled, and B. sold M. one-half the ranch. Defendant, Myers, agrees to buy of B. his half

of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase O. and M. knew of B.'s title: held, that a bill in equity by B. against M., O. and Myers for an account of the partnership between M. and B., and for a decree establishing plaintiff's right to the ranch, does not lie; that his remedy at law for his half of the ranch against M. or any one claiming under him, with notice of his title, is clear; and that M. would be estopped from disputing the title. *Brush v. Maydwell*, 14 Cal. 209.

28. In such case, the claim of plaintiff to the ranch does not depend at all on the settlement of the partnership. The sale by M. to plaintiff divested the ranch of its character as partnership property, and the reconveyance by plaintiff to M. of one-half made them tenants in common. As A makes no defense to the bill, it is good as against him for an account. *Ib.*

29. The defendant in such case cannot afterwards in equity enjoin the collection of this judgment, and set off against it a claim against one of the partners, on the ground that in fact this partner was the sole owner of the property, and alone entitled to damages. The judgment is conclusive as to the joint ownership. *Collins v. Butler*, 14 Cal. 229.

30. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Ib.* 230.

31. Among the powers most ordinarily exercised by partners is the jus disponendi, or the power which each partner has, individually, of disposing of the joint stock or merchandise. When the assignment is bona fide, the power of one partner to transfer the whole as well as a part of the partnership effects cannot be doubted. *Forbes v. Scannell*, 13 Cal. 289.

32. Where the trustees of an assignment employ the partner assigning to aid them in winding up the concern, and pay him, and allow his wife some furniture, etc., it is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. *Ib.*

In general.—Evidence of Copartnership.—Dissolution of Copartnership.

33. Each corporator is a principal debtor, and not a mere surety for the corporation, and in relation to the creditors of the corporation stand on the same footing as if it were an ordinary partnership. *Mokelumne Hill Canal Co. v. Woodbury*, 14 Cal. 267.

34. Voluntary associations for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, etc., are partnerships, and may be dissolved by a court of equity if they improperly exclude a member. *Gorman v. Russell*, 14 Cal. 535.

35. If such an association exclude a member from its meetings because he refuses to take an oath to be administered by the president, which oath was not required by the constitution and by-laws, and is foreign to the object of the association, it is ground for a dissolution. *Ib.* 536.

36. In ejectment for an interest in a mining claim, the answer being a general denial, defendant cannot defeat the action by showing the claim to be partnership property. Any rights defendants may have in the premises, growing out of the partnership, must be asserted in equity; particularly as the legal title in this case is in the plaintiff. *Lowe v. Alexander*, 15 Cal. 302.

37. In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to the said Teal: held, that evidence tending to prove that it was the partnership property of Teal and plaintiff was proper; and that if they were partners, and as such owned the property, plaintiff could not recover. *Hughes v. Boring*, 16 Cal. 82.

## II. EVIDENCE OF COPARTNERSHIP.

38. It is error to admit evidence to prove copartnership by general reputation. *Sinclair v. Wood*, 3 Cal. 100.

39. Partnership must be proved like any other fact, and cannot be established by mere surmise or innuendo. *Hudson v. Simon*, 6 Cal. 455.

40. In an action against a partnership and in order to prove that one of the de-

fendants was a partner, it is incompetent to ask a witness, whether from what he saw while working for the firm, and from the acts of the particular defendant during that time, he was a partner. *Turner v. McIlhaney*, 8 Cal. 579.

41. Common report can only be admissible to prove a partnership first in corroboration, and second to prove knowledge of it on the part of the plaintiff. *Ib.*

42. Parties may form a universal partnership, but the same would not be held to exist unless the intention was clearly expressed. The evidence to establish such a partnership after the death of one of the alleged partners, should be clear and full and not subject to doubt. *Gray v. Palmer*, 9 Cal. 639.

43. As the relation sustained by the tenant purchasing the fee to his cotenant or partners is one of confidence, the proof that the latter had waived his right must be clear, and the burthen of proof rests upon the tenant purchasing. *Laffan v. Naglee*, 9 Cal. 682.

44. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership or the authority of the party making the note to bind all, and one of the parties is nonsuited, and judgment taken against the other two: held, that there is no error in such judgment. *Stoddard v. Van Dyke*, 12 Cal. 438.

## III. DISSOLUTION OF A COPARTNERSHIP.

45. Where on the settlement of a partnership a mistake occurs, and both parties were ignorant or had equal knowledge of or equal opportunities of knowing the mistake, and there had been no fraud or concealment, equity will not correct the mistake. *Belt v. Mehen*, 2 Cal. 159.

46. A contract contained a covenant for stipulated damages, and by the same contract the parties were constituted partners: it was held, that in an action on said contract, that the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

47. If damages accrue in an action on the dissolution of a copartnership, they can be settled by the court if liquidated,

## Dissolution of a Copartnership.—Notice required.—Liability of a Copartnership.

and if not, an issue can be framed to have them ascertained. *Ib.*

48. A consignment of merchandise was made to defendants as partners; after the dissolution of the partnership, two sales of a portion of the merchandise were made; one by each partner, who severally received the money: it was held, that the partnership continued for the purpose of fulfilling engagements, and that the defendants were jointly liable. *Johnson v. Totten*, 3 Cal. 346.

49. A bill being filed for the purpose of securing the assets of the partnership and having them distributed to the creditors, a court of chancery will carry it out without regard to any attempt on the part of the partners to evade or defeat it. *Adams v. Haskell*, 6 Cal. 116.

50. In a case where one partner has filed his bill, and a dissolution has been judicially declared, and a receiver ordered to make a pro rata distribution of the assets among the creditors, they are not prevented from resorting to adverse proceedings and thereby gaining a preference. *Adams v. Hackett*, 7 Cal. 199; *Adams v. Woods*, 9 Cal. 25.

51. Creditors of a partnership have no interest in a partnership suit or proceeding for account and dissolution, until after a decree of dissolution, and that in the mean time they may pursue their remedies at law, and thereby secure a preference or lien upon the partnership assets. *Adams v. Woods*, 8 Cal. 156; *Naglee v. Minturn*, 8 Cal. 544.

52. In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff, and so is the employment of counsel by the receiver. *Adams v. Woods*, 8 Cal. 316.

53. It is a very dangerous practice to go behind stated accounts, especially as between partners who alone understood their complicated affairs, and the mode in which their books are kept. If all partnership books were well and carefully kept upon the same system, then the practice of opening up accounts would not be so doubtful. *Branger v. Chevalier*, 9 Cal. 361.

#### 1. Notice required.

54. The question of notice of the dis-

solution of a partnership is a fact for the jury under the charge of the court. *Rabe v. Wells*, 3 Cal. 151.

55. To affect the rights of one dealing with a partnership firm, actual notice of its dissolution must be brought home to him. *Johnson v. Totten*, 3 Cal. 347.

56. Where proof has been given that a newspaper containing notice of a dissolution of a partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by them, by way of establishing the publication of the notice, and raising the presumption of their actual knowledge of the fact. *Treadwell v. Wells*, 4 Cal. 262.

57. The publication of dissolution in a paper taken by the plaintiffs, is a fact from which the jury may infer actual notice. The court has no right to charge the jury in regard to conclusions of fact. *Ib.* 263.

58. An ostensible partner retiring from the firm must give notice of his retirement, or he will be liable to creditors of the continuing firm on contracts made by them after his retirement. *Williams v. Bowers*, 15 Cal. 321.

#### IV. LIABILITY OF A COPARTNERSHIP.

59. Where a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines, which were the partnership's property: held, that the employer and not the partnership was liable for the tax. *Meyer v. Larkin*, 3 Cal. 405.

60. When a partner makes a note in the name of a copartnership, it will render all the partners liable to a bona fide holder, although it has no relation to the partnership business, and the other partners were wholly ignorant of the transaction, and were even intentionally defrauded by the copartner. *Rich v. Davis*, 4 Cal. 22; 6 Cal. 141.

61. It is not error to instruct a jury that if sufficient time had elapsed between the dealings of the plaintiffs with the old firm and their subsequent transactions with the new firm to put a reasonable man on inquiry, they might be treated as new dealers. *Treadwell v. Wells*, 4 Cal. 263.

62. One partner cannot bind his co-



## Liability of a Copartnership.—Actions.

partner by a submission of partnership matters to arbitration; it does not follow that such submission would not be good as against himself. *Jones v. Bailey*, 5 Cal. 346.

63. The authority to sign a name to partnership articles is not authority to sign a promissory note, where the money was used in carrying on the joint operations. *Washburn v. Alden*, 5 Cal. 464.

64. Where a mining company, not incorporated, forms a trading partnership with an individual under a firm name, each member of the company is a member of the firm. *Rich v. Davis*, 6 Cal. 163.

65. The obligation of the assignee of a bond for a title is not affected by the fact that the land was partnership property of the assignor and assignee, where it was not so held out to the world, and where the partnership was unknown to the creditors. *Connelly v. Peck*, 6 Cal. 353.

66. A power of attorney authorizing the agent "to settle all partnership debts, accounts and demands, and all other accounts and demands now subsisting, or which may hereafter subsist between me and any other person or persons whatever," and to execute releases for such purposes, does not confer upon the attorney a power to release a covenant of guarantee made to the principal and others jointly for the payment of rent and purchase money of property sold by them as tenants in common. *Johnson v. Wright*, 6 Cal. 375.

67. In such a case the debt guaranteed is not a partnership debt, nor does it fall within the provision of the power referring to demands subsisting "between me and any other person or persons," which is confined to demands in which the principal had a several and sole interest. *Ib.*

68. Where an order was drawn on a firm, not negotiable, and an endorsement of the amount due was made by one of the firm so as to render it negotiable, it operated as a release of the firm by the holder, and as an acceptance by the partner endorsing. *Garwood v. Simpson*, 8 Cal. 108.

69. Where an individual doing business under the firm name of "D. W. & Co." incurred obligations for professional services to the plaintiff, an attorney, and pending the litigation of his matters form-

ed a partnership with two others under the same firm name, and one of the new members of the firm thus formed subsequently dismissed the suit in the firm name, and when payment for the services was demanded did not deny the liability of the firm, but refused the payment and disputed the amount charged: held, that the firm was estopped from denying their liability. *Burritt v. Dickson*, 8 Cal. 115.

70. The debt of a partnership must be discharged from the joint property before any portion of it can be supplied to the individual debts of the partners. *Chase v. Steel*, 9 Cal. 66.

71. The fact that a partner's interest is mortgaged for his individual debt, for the purchase money of his share in the partnership, is immaterial. He can only mortgage that which he has, viz.: a share subject to partnership debts. *Ib.*

72. Partnership property is bound for partnership debts when the firm is in existence; and it continues to be bound for those debts after the sale of one partner, especially when he assumed as a part of the transaction of purchase the payment of those debts. *Conroy v. Woods*, 13 Cal. 631.

73. The lien of partnership creditors is paramount to the lien of individual creditors. *Ib.*

74. In such case of conflict between the individual and firm creditors, equity has jurisdiction. *Ib.* 634.

## V. ACTIONS.

1. *By a Copartnership.*

75. Where the tax collector levied on the property of the partnership for the tax due by the foreigner thus employed, and sold the whole claim, and dispossessed the plaintiff (one of the partners): held, that he was guilty of a trespass, for which this action was properly brought. *Meyer v. Larkin*, 3 Cal. 405.

76. Where the plaintiff sued Asa Hull & Co., the words "& Co." might well be treated as surplusage, and the action proceed as against Hull alone. No injury could occur from this course, as Hull, if he has copartners in the transaction, can force them to contribute their portion. *Mulliken v. Hull*, 5 Cal. 246.



By a Copartnership.—Against a Copartnership.—Among Copartners.

77. Where one partner sues for an injury to the partnership property, and makes his copartner a defendant for want of his consent to join as plaintiff, the recovery must be entire for the whole injury. *Nightingale v. Scannell*, 6 Cal. 509.

78. In such a case, the partner recovering is liable to account to his copartner defendant; and the latter being immediately interested in the event of the suit is not, therefore, a competent witness for the plaintiff. *Ib.*

79. Where a partnership exists between two persons in the purchase of goods, and they subsequently bring suit to recover their value from a trespasser who has seized them: held, that one partner is competent to execute a release in the name of himself and copartner. *Perlberg v. Gorham*, 10 Cal. 125.

80. Where two persons sue as partners in possession for a trespass on firm property, the judgment in their favor is firm assets. The fact is, joint title as partners to the damages is in issue and adjudicated. *Collins v. Butler*, 14 Cal. 228.

## 2. Against a Copartnership.

81. In an action against partners, judgment can only be had against those served with process. *Ingraham v. Gildemeester*, 2 Cal. 89.

82. Where a complaint in an action on a promissory note executed by two defendants averred that the defendants were partners, and that the note was executed by them, and the answer simply denied that the defendants were partners, and did not deny that they executed the note: held, that the averment of partnership was immaterial, and that plaintiff was entitled to judgment on the pleadings. *Whitwell v. Thomas*, 9 Cal. 500.

83. Where the defendant's partners employed defendant on an agreement that a portion of his wages should be retained by plaintiff until a certain sum had accumulated, when plaintiff should be admitted as a partner; and defendants subsequently, but before the sum had accumulated, dissolved partnership: held, that the defendants, by their own acts, having violated the special contract by dissolving their copartnership, the plaintiff was at

liberty to sue on the special contract for damages, or declare for the value of his work and labor. *Adams v. Pugh*, 7 Cal. 151.

## 3. Among Copartners.

84. The provision of the code which permits an arrest of a debtor in certain cases does not apply in the case of one partner suing to recover money received by another. *Soulé v. Hayward*, 1 Cal. 346.

85. A being the owner of an invoice of goods in the city of New York, sold one-half interest therein to B, with an arrangement that the latter should proceed to San Francisco, and there dispose of the same on joint account: held, that this constituted a partnership between them, and that B was not subject to arrest in an action by A to recover a part of the proceeds of the sales. *Ib.*

86. A complaint was filed to compel a copartnership account, and contained sufficient to call upon the defendants for an account as to a particular branch of their business, but was in other respects artificially drawn and insufficient, and a demurrer was filed to the whole complaint; it was held that the demurrer must be overruled. *Young v. Pearson*, 1 Cal. 448.

87. In an action by one partner for a dissolution of the partnership, and an account, etc., alleging that dividends of profits were to be made at stated periods, the court may decree the payment of the sum due for such dividends before final distribution of the assets. *O'Conner v. Stark*, 2 Cal. 155.

88. One partner cannot sustain an action against his copartner for the delivery of personal property belonging to the partnership. *Buckley v. Carlisle*, 2 Cal. 420.

89. A copartnership contract contained a covenant also for damages; it was held, that one partner could not sue the other for damages without seeking an account and dissolution. *Stone v. Fouse*, 3 Cal. 294.

90. Partners cannot sue one another at law for any of the business or undertakings of the partnership. This can only be done in chancery, by asking a dissolution and an account. *Stone v. Fouse*, 3 Cal. 294; *Nugent v. Locke*, 4 Cal. 320;

## Among Copartners.—Surviving Copartner.

*Wilson v. Lassen*, 5 Cal. 116; *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

91. A and B were in partnership; B took forcible possession of the property, and sold it to C and D. It was afterwards held that A cannot maintain an action for the partnership property and profits against B, C and D. *Mason v. Tipton*, 4 Cal. 276.

92. It is no defense to a note given by one partner to another for his interest in land held jointly by both, that the payee of the note had deceived his partner, the maker, in the division of the partnership stock, and was indebted therefor in an amount equal to or greater than the sum due on the note. *Case v. Maxey*, 6 Cal. 277.

93. Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a certain sum of money and materials for a saw mill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use: held, that the plaintiffs had a right to sue therefor at law, and for damages caused by defendants' violation of the partnership agreement. *Crosby v. McDermitt*, 7 Cal. 148.

94. A decree adjudging that a partnership existed between two of the parties to the action, and that another partnership existed between one of them and another party to the action, each partnership embracing all business and property, both real and personal, of the parties, and deciding that the one partnership is subject to the other, and directing an account to be taken, there being other parties to an action representing the interest of one of the partners in each partnership, is interlocutory, and not final. *Gray v. Palmer*, 9 Cal. 635.

95. Such a decree does not ascertain the specific sum due to any of the partners, nor direct the disposition of the partnership property. It does not settle the present condition of the partners, but only the original terms of their partnership. *Ib.*

96. Where two shareholders in a company sold to the company goods to a large amount, and afterwards, during the existence of the company, sold their stock to A, and assigned their account for such

goods to B, who sued such company on said account by attachment: held, that such action could not be maintained, there having been no final settlement of the partnership accounts, no balance struck, and no express promise on the part of the individual members to pay their ascertained proportion. *Bullard v. Kinney*, 10 Cal. 63.

97. The superior court of San Francisco had jurisdiction of a suit to settle the accounts of a partnership formed for the purchase of mining claims, where both parties resided in said city, but could not, by its decree, affect the title to or any interest on the claims themselves. *Watts v. White*, 13 Cal. 325.

## VI. SURVIVING COPARTNER.

98. Where the surviving partners were entitled to the possession and management of the partnership effects, the only interest that the heirs could have in the partnership assets was the net interest of their ancestor, after the partnership debts were all paid. *Gray v. Palmer*, 9 Cal. 637.

99. A surviving partner being entitled to the possession and control of the partnership effects, can proceed directly in the district court to obtain the control, and to have a partition of the real estate belonging to the partnership, but standing in the name of his deceased partner. *Ib.*

100. This being the true character of partnership real estate, the surviving partner has an equitable lien upon it for his indemnity against the debts of the firm, and for the balance due him. *Ib.* 639.

101. A surviving partner has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons, section one hundred and ninety-eight, the exclusive right of possession, and the absolute power of disposition of the assets of the partnership. *People v. Hill*, 16 Cal. 118.

102. A surviving partner has a right to vote, at an election for officers of a corporation formed under the general incorporation act of this State, of 1853, the stock in his hands as assets of the partnership—the business of the firm being unsettled. *Ib.*

## Dormant Copartners.—Coroner.—Corporation.

103. The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation, at the time of the election, in the name of the deceased partner alone, does not affect the right to vote, if in fact the stock belonged to the partnership. *Ib.* 119.

104. The proviso in the fifty-second section of the act to regulate the settlement of the estates of deceased persons, as amended by the act of April 23d, 1855, extends to all the classes of persons designated in the section, and is not limited to persons embraced within the tenth class; and a surviving partner, though a brother, where the partnership existed at the time of the death of the intestate, cannot be administrator of the estate. *Cornell v. Gallagher*, 16 Cal. 367.

## VII. DORMANT COPARTNERS.

105. Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner, whose acts would not bind the firm. *Rich v. Davis*, 6 Cal. 163.

106. There may be a dormant partnership, in the purchase and sale of real estate, as between the partners themselves; but as between the partners and third persons, the law in regard to dormant partners will not apply. *Gray v. Palmer*, 9 Cal. 639.

## CORONER.

1. Where an elizor was appointed, and the pleadings did not show that there was no sheriff or coroner, or that these officers were disqualified: held, that the appointment being made by a judge having competent jurisdiction, the presumption of law is that he faithfully performed his duty. *Turner v. Billagram*, 2 Cal. 522.

2. In the event of the disqualification of the sheriff and coroner, a district court has the right to appoint an elizor. Even if such authority was not conferred by statute, the court, by virtue of its original

jurisdiction, has the power to appoint a special officer to execute its process. *Wilson v. Roach*, 4 Cal. 367.

3. Strictly speaking, there can be no vacancy in the office of sheriff, caused by the death, removal, or resignation of the incumbent; for, upon the happening of such an event, the coroner, by operation of law, becomes sheriff. *People v. Phaenix*, 6 Cal. 93.

4. The coroner only holds the office of sheriff, ex officio, until the appointment of a new sheriff by the board of supervisors. *Ib.*

5. In trespass against a sheriff, the court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The sheriff being interested, ought not to summon a jury; and there being no coroner, an elizor may be appointed to summon the jury. *Pacheco v. Hunsacker*, 14 Cal. 124.

6. Defendant, as coroner and acting sheriff, levied on, and advertised for sale, all the right, title and interest of T. in certain horses and cattle in the hands of a receiver, appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and that this must appear by a clear showing of plaintiff's right to the property, and defendant's insolvency. *Moore v. Ord*, 15 Cal. 206.

## CORPORATION.

- I. In general.
- II. Certificate of Incorporation.
- III. Acts of the Corporation.
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- VI. Dissolution of a Corporation.
- VII. Stock.
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In general.—Certificate of Incorporation.—Acts of the Corporation.

### I. IN GENERAL.

1. Corporations can possess or exercise such corporate powers only as are expressly given by statutes, or by the charters, and such as shall be necessary to the exercise of the powers enumerated and given. *Dunbar v. City of San Francisco*, 1 Cal. 356; *Correas v. City of San Francisco*, 1 Cal. 452.

2. Two corporations cannot hold as joint tenants, but may as tenants in common. *Dewitt v. City of San Francisco*, 2 Cal. 297.

3. Corporations are bound to follow strictly the letter of their charter, and can exercise no power unless granted to them or absolutely necessary to carry out the power so granted. *Smith v. Morse*, 2 Cal. 538.

4. The word person, in its legal signification, is a generic term, and was intended to include artificial as well as natural persons. *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 306.

5. In reference to all transactions in the nature of a contract, a corporation must be looked upon and treated as a private person and its contracts construed in the same manner and with the like effect as those of natural persons. *Touchard v. Touchard*, 5 Cal. 307.

6. Counties are quasi corporations and can sue and be sued. *Price v. Sacramento County*, 6 Cal. 255.

7. The incorporation act of 1853 does not substantially alter the incorporation law of 1850. *Weston v. Bear River and Auburn W. & M. Co.*, 6 Cal. 429.

8. If a charter confers upon a corporation a given power, and at the same time prescribes the mode of its exercise, the provisions must be held as dependent and must be construed accordingly. *Holland v. City of San Francisco*, 7 Cal. 375.

9. Neither the general incorporation act, nor the act concerning plank roads and turnpikes, gives any exclusive privileges to the corporation first established. Others may build a road on or near the same line of travel. *Indian Canon Road Co. v. Robinson*, 13 Cal. 520.

10. Charters of corporations are special grants of power emanating from the paramount authority. The corporation owing its existence to the law, is precisely

what the law makes it. *City of Oakland v. Carpentier*, 13 Cal. 545.

### II. CERTIFICATE OF INCORPORATION.

11. The existence of a corporation formed under a general statute requiring certain acts to be done before the corporation can be considered in esse, or its transactions be valid, must be proved by showing at least a substantial compliance with the requirements of the statute. *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 426.

12. The omission of such acts as are declared necessary steps in the process of incorporation, will be fatal even collaterally, when the fact of incorporation can be questioned. *Ib.*

13. But as to such other acts required of the persons seeking to become incorporated, but not made prerequisites to the assumption of corporate powers, the corporation is responsible only to the government in a direct action of forfeiture. *Ib.*

14. That a duplicate certificate is not filed in the office of the secretary of State, is matter between the corporation and the State, and not necessary to be shown on the issue of corporation or no corporation, in suits against third persons. *Ib.* 427.

15. Under our laws, corporations have a legal existence from the date of filing the certificate of incorporation in the county clerk's office. *Ib.*

### III. ACTS OF THE CORPORATION.

#### 1. Powers.

16. A conveyance that would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction, and if void in the former case would be void in the latter, and will not affect the lien of a judgment regularly obtained against the grantor. *Smith v. Morse*, 2 Cal. 539.

17. The clear object of the restriction of issuing bills, notes, etc., by any corporation, is to prevent them by any device from carrying on the business of banking, or in other words, to prevent the formation

## Parties.—Liability.

of moneyed corporations; but it does not prevent them from issuing bills or evidences of indebtedness for moneys borrowed by them. *Magee v. Mokelumne Hill C. & M. Co.*, 5 Cal. 259.

18. A corporation may bind itself by a note and mortgage made by its president and secretary, and signed by them in their official capacity as such. *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

19. In suits for the possession of land by ditch companies, incorporated under the act of April 14th, 1853, by the fourth section of which they are authorized "to purchase, hold, sell and convey such real and personal estate as the purposes of the corporation shall require," the defendants cannot question the necessity of such land for the purposes of the corporation. This is matter between the government and the corporation. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 552.

## 2. Liability.

20. Where the charter of a hospital was repealed and a charter granted to the new one, and the officers of the former were directed to deliver to the trustees of the latter "all the property, real and personal, held by them in trust and for the old institution, and that the latter should pay out of the funds in its hands all the debts owing by the old one: held, that the new corporation was bound to pay all such debts, without regard to the sufficiency of the fund derived from the corporation. *Johnson v. State Marine Hospital*, 2 Cal. 319.

21. The policy of this State has altered the rigidity of the common law, which disabled a corporation from making a contract except under its corporate seal. *Smith v. Eureka Flour Mills*, 6 Cal. 6.

22. Under the laws of this State, the power of corporations to create debts is treated as an incident to the express powers, and not as in itself one of the express powers. *Ib.* 7.

23. All corporations by the general act have power to make by-laws for the "organization of the company," the "management of its property," the "regulation of its affairs, and for carrying on all kinds of business within the objects and purposes

of the company," in which there is no reason to exclude the right of making promissory notes. *Ib.*

24. Where the promissory note of a corporation, executed by its officers, provides that only the assets of the corporation, and none of the property of stockholders, shall be liable, the corporation cannot raise the objection as affecting its own liability. *Ib.*

25. An incorporated company is not bound by the acts or admissions of its members, unless acting by its express authority. *Shay v. Tuolumne County Water Co.*, 6 Cal. 74.

26. A corporate act is not essential in all cases to fasten a liability, and if it were necessary, the law would sometimes presume, in order to uphold fair dealing and prevent gross injustice, the existence of such act, and estop the corporation from denying it. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 472.

27. Where a contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter; but where the contract has been executed and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it. *Ib.*

28. Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and nonpayment is necessary to hold the corporation. The draft, in such case, is only an order of the corporation upon itself. *Dennis v. Table Mountain Water Co.*, 10 Cal. 370.

29. It does not follow because an agent purchases property which is not absolutely necessary for the purposes of the corporation, that the latter can, after receiving the property, avoid the payment of the purchase money. *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 400.

30. Where the president of a corporation has the alleged power to make a contract for the corporation, though his authority be doubtful, yet the subsequent acts of the company may amount to a ratification. *Ib.* 401.



## IV. CORPORATORS.

1. *Their Rights.*

31. A joint stock mining association was formed in New York for the purpose of mining in California, which company was to continue several years, with a prohibition against dissolution within one year after the arrival of the company in California, except on certain conditions, which had not been complied with: held, that a portion of the company could not dissolve the company at their will and pleasure, but it being found impracticable to keep the company together, the court decreed a dissolution and a distribution of the effects of the company. *Von Schmidt v. Huntington*, 1 Cal. 70.

32. The stock being divided into money shares and labor shares, the holders of the latter, who had contributed no capital towards the outfit of the company, had performed no labor beneficial to the company, and had their expenses to California paid out of the funds contributed by the holders of the money shares alone, and had abandoned the association, which fact, by the articles, worked a forfeiture of the labor shares: held, that the assets of the company should be distributed among the holders of the money shares alone, and that the court relieve them from the forfeiture. *Ib.*

33. When in a joint stock association certain parties contribute money, and hold therefor money shares, and that money is paid to defray the expenses of certain operators to California, who contribute no money, but who, after laboring for the corporation one year, shall receive certain labor shares, and the corporation is dissolved by reason of its impracticability, before operation: held, that the assets should be distributed among the money shares alone. *Ib.*

34. The right of a member of an incorporated company to sue the corporation is undoubted. *Barnstead v. Empire Mining Co.*, 5 Cal. 299.

35. Where there is nothing in the constitution of a joint stock company which regulates the remedies of the shareholders as between themselves, the general law of partnership must govern them. *Bullard v. Kinney*, 10 Cal. 63.

36. A surviving partner has a right to vote at an election for officers of a corporation formed under the general incorporation act of this State of 1853, the stock in his hands as assets of the partnership—business of the firm being unsettled. *People v. Hill*, 16 Cal. 118.

37. The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation at the time of the election, in the name of the deceased partner alone, does not affect the right to vote, if in fact the stock belonged to the partnership. *Ib.*

38. Semble upon principle, that the real owner of stock in such corporations is entitled to represent it at the meetings of the corporation, and the mere fact that he does not appear as the owner upon the books of the company, should not absolutely exclude him from the privilege of so doing. *Ib.*

39. The New York cases, establishing a different doctrine, are based upon a statute making the books of the corporation the only evidence as to ownership of the stock. *Ib.*

40. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation, until the further order of the court; collect money due or to become due it; sell certain stock, and pay certain proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 148.

41. The aid of courts can be invoked only as against such officers as are intrusted by law with the management of the affairs of the corporation and as against these, the remedy is at law, and not in equity. *Ib.*

42. The power of removing the private or ministerial officers of a private corporation belongs to the corporation alone. Courts cannot remove such officers. *Ib.*

43. In suit by a stockholder in a private corporation, against the corporation and four of the trustees, who owned stock sufficient to enable them to control the

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Corporators.—Their Rights.—Their Liability.—When may be a Witness.

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business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business of the corporation: held, that this was error; that although such superintendent was also superintendent and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these officers, no attention had been paid to the by-laws and regulations of the corporation, yet as no fraud was shown, and as the superintendent had faithfully performed his duties as such, he was entitled to his salary. *Ib.* 149.

44. If in such case any loss was sustained by the corporation from disregard of its by-laws and regulations, the amount of such loss would seem to be the measure of relief. *Ib.*

45. Hence, in this case, it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. Such decree necessarily results in the dissolution of the corporation, and would be doing indirectly what the court has no power to do directly. *Ib.* 150.

46. To charge the officers of a corporation with a loss sustained by a stockholder, in a diminution of the value of the stock, alleged to have been caused by their mismanagement, it shall appear very clearly that the loss was occasioned by their gross negligence or willful misconduct. *Ib.*

47. A court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust; but the jurisdiction for this purpose is over the officers personally, and not over the corporation. *Ib.*

48. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account,

making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned. *Ib.* 151.

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2. *Their Liability.*

49. Each corporator is a principal debtor, and not a mere surety for the corporation; and in relation to the creditors of the corporation, stands on the same footing as if it were an ordinary partnership. *Mokelumne Hill C. and M. Co. v. Woodbury*, 14 Cal. 266.

50. Under the constitution and laws of this State, each member of a private incorporated company is answerable personally for his proportion of the debts and liabilities of the company. *Ib.*

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3. *When may be a Witness.*

51. In an action against a corporation, a witness who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold out before the commencement of the action, is incompetent for interest. *McAuley v. York Mining Co.*, 6 Cal. 81.

52. A member of the incorporation at the commencement of a suit brought by it, cannot become a witness for it on the trial by selling out his shares of stock after suit brought. He is personally liable for his proportion of the costs; and his competency as a witness can only be restored by actual payment of the entire costs of the case—those due and those to become due. *Mokelumne Hill C. and M. Co. v. Woodbury*, 14 Cal. 266.

53. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this State, as a stockholder, and holds the office of secretary—to which no person but a stockholder is eligible—is not a competent witness for the company in an action against it for overflowing plaintiffs' mining claim. He is liable for the debts of the company, and therefore interested. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

## Actions by and against Corporations.

54. The fact that the stock was held in his name in trust for another—the transfer having been made simply to enable him to become an officer of the company—does not relieve him from responsibility. The trust in such case is only implied; and the seventeenth section of the corporation act of 1853 applies only to the trustee of an express trust. *Ib.*

## V. ACTIONS.

1. *By a Corporation.*

55. The position of a priest who appears to have charge of church property coupled with an interest, seems to be nearly analogous to that of a sole corporation in England; and his power to sue is an inseparable incident to such corporation. *Santillan v. Moses*, 1 Cal. 93.

56. The allegation that plaintiff was a corporation under the laws of this State, is sufficient to establish the right to sue under the first section of the act concerning corporations. *California Steam Nav. Co. v. Wright*, 6 Cal. 261.

2. *Against a Corporation.*

57. The code imposes upon the defendant, if a corporation, by its officers and agents, the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

58. The code made no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *Ib.*

59. Where a decree rendered in a suit against a corporation contained a direction for the sale of the interest of individuals not parties to the suit, and from such decree the corporation alone appealed: held, that the corporation could not take advantage of the error in the decree in embracing individuals. *Dennis v. Table Mountain Water Co.*, 10 Cal. 370.

60. In an action to restrain the issuing of bonds by a corporation, the persons to

whom the bonds are to be issued are necessary parties to such action. *Hutchinson v. Burr*, 12 Cal. 103; *Patterson v. Supervisors of Yuba County*, 12 Cal. 106.

61. Where on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company as to plaintiff Parke, the finding supports a judgment for plaintiff. *Parke v. Hinds*, 14 Cal. 417.

62. The rule requiring all persons materially interested to be made parties to a suit is dispensed with, when it is impracticable or very inconvenient, as in cases of joint associations composed of numerous individuals. *Gorman v. Russell*, 14 Cal. 539.

3. *Service of Process.*

63. In an action against a corporation, the summons must be served on one of the officers or agents named in the practice act. *Aiken v. Quartz Rock Mariposa G. M. Co.*, 6 Cal. 186.

64. Where, in an action against a corporation, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:" held, that it was not sufficient evidence of service to give the court jurisdiction; it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien v. Shaw's Flat & Tuolumne Canal Co.*, 10 Cal. 343.

65. A sheriff's return on the summons against a corporation, that he served the same on the president and secretary of the company, is prima facie evidence that the persons named in the return were such officers. *Rowe v. Table Mountain W. Co.*, 10 Cal. 444; *Wilson v. Spring Hill Quartz M. Co.*, 10 Cal. 445.

## VI. DISSOLUTION OF A CORPORATION.

66. Voluntary associations for mutual relief in sickness or distress by funds

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 Stock.—When hypothecated.
 

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raised by initiation fees, fines, dues, etc., are partnerships, and may be dissolved by a court of equity, if they improperly exclude a member. *Gorman v. Russell*, 14 Cal. 535.

67. If an association excludes a member from its meetings because he refuses to take an oath, to be administered by the president, which oath was not required by the constitution and by-laws, and is foreign to the objects of the association, it is ground for a dissolution. *Ib.* 538.

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 VII. STOCK.

68. Under the twelfth section of the act concerning corporations, passed April 22d, 1850, no transfer of stock is good against third parties, unless the transfer be made on the books of the company. *Weston v. Bear River & Auburn W. & M. Co.*, 5 Cal. 189.

69. Where a femme sole became the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an endorsement on the certificate of stock, purporting to sell the same to A, without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record: held, that such sale was void, as against a subsequent purchaser, under an instrument duly signed and acknowledged. *Selover v. American Russian Com. Co.*, 7 Cal. 273.

70. Where A received an assignment of stock in a corporation, and the stock was subsequently attached under a judgment against a vendor, and afterwards the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached: held, that the assignment of the judgment at once merged the lien in the higher right; and that A, as regarded third parties, became the absolute owner of the stock. *Strout v. Natoma W. & M. Co.*, 9 Cal. 80.

71. A railroad company cannot refuse to enter the transfer of stock in said company on their books on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of its transfer. *People v. Crockett*, 9 Cal. 114.

## 1. When hypothecated.

72. A party who purchases at sheriff's sale stocks of an incorporation, knowing that the certificates of such stock have been previously hypothecated, is chargeable with notice of the fact, and takes subject to the claim of the pledgees. *Weston v. Bear River & Auburn W. & M. Co.*, 6 Cal. 429.

73. Where shares of stock in a corporation have been regularly transferred as security for a loan, the mortgagee is the only proper garnishee in a suit against the mortgagor, and attachment on his interest in the corporation. *Edwards v. Beugnot*, 7 Cal. 165.

74. A person who has been a stockholder in an incorporated company, but ceased to be such holder before suit was brought, is a competent witness in an action in the name of such company. *Tuolumne County W. Co. v. Columbia & Stanislaus W. Co.*, 10 Cal. 195.

75. Where from an instrument transferring shares of stock as security for a note, and from other circumstances, the transaction is clearly a loan, a clause of foreclosure on nonpayment, or a provision that the mortgagee may take the property for the debt, does not make the instrument any the less a mortgage. *Smith v. '49 & '56 Quartz M. Co.*, 14 Cal. 246.

76. Where stock is transferred to secure a debt, and is still in the hands of the transferee, and plaintiff avers that the stock is worth more than the debt, and that defendant has received from dividends more than enough to pay it, equity has jurisdiction to compel an account, prevent a transfer, and direct a retransfer and delivery of the stock. *Ib.* 247.

77. The clause in such instrument "I hereby sell, transfer and set over \* \* all my right, title and interest to the said \* \* stock, provided I fail to pay \* \* the above sum \* \* on the day the same becomes due and payable," does not make it a conditional sale, there being no money given or agreed to be given for the stock, and no agreement to take it at any price at the time of the contract. *Ib.*

78. A mortgagee of stock in such case does not get an absolute title to the stock by the mere default of payment of the mortgage debt. *Ib.*

## Dividends.—Costs in general.

79. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853 relative to pledges of stock by delivery of the certificates. The act of 1853 has no effect on the act of 1857. *Ede v. Johnson*, 15 Cal. 58.

80. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock: held, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

## 2. Dividends.

81. Plaintiff assigns to defendant, September 22d, two shares of stock in a mining company, stating in the assignment, "I authorize the transfer to him, (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second. The trustees did not, in fact, declare dividends until between noon and one o'clock on Tuesday: held, that the dividends belonged to plaintiff; and that parol evidence was admissible to explain the transaction, and point out its meaning. *Brewster v. Lathrop*, 15 Cal. 22.

See MUNICIPAL CORPORATIONS.

## COSTS.

- I. In general.
- II. On Appeal.

## I. IN GENERAL.

1. In an action brought for the distribution of the effects of a corporation, and it being for the interest of all parties that the company should be legally dissolved: held, that costs and a counsel fee on each side should be paid out of the fund. *Von Schmidt v. Huntington*, 1 Cal. 75.

2. An attorney only has a lien upon a judgment recovered by him for his client for the costs given by statute, and not for a quantum meruit compensation. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 11 Cal. 103.

3. Where a new trial was to be had on payment of costs: held, that the receipt of costs did not waive the right to appeal from the order granting a new trial. *Tyson v. Wells*, 1 Cal. 378.

4. Where an arbitrator refuses to deliver an award made by him, until his fees are paid, and a promise to pay him is made, and he delivers the award, it takes the case out of the statute of frauds, and the promise is supported by a consideration. *Young v. Starkey*, 1 Cal. 427.

5. Where parties who submit a matter to arbitration agree as to who shall pay the arbitrator; if the latter be no party to the agreement, he will not be bound by it, but may look to all the parties for compensation for his services. *Ib.*

6. Judgment may be affirmed as to a mandamus, but reversed as to costs. *McDougal v. Roman*, 2 Cal. 80.

7. A mandamus is not the proper remedy, when an inferior court refuses to enter a judgment for costs. The party should appeal or sue for his costs. *Peralta v. Adams*, 2 Cal. 595.

8. The court has power in the exercise of its discretion to allow the amendment of a bill of costs and the affidavit accompanying it. *Burnham v. Hays*, 3 Cal. 118.

9. Where the original bill of costs is filed within the time prescribed by statute, an amendment allowed after the time relates back to the time of filing the original, of which it forms merely a part. *Ib.*

10. The affidavit of an attorney of a party to the correctness of a bill of costs is good under the statute. *Ib.* 119.

11. If the original affidavit to a bill of



## In general.

costs is a nullity, the defendant should take proper steps to have it set aside, or appeal from the judgment, on the ground that the costs had been waived by operation of the statute; but having himself moved a retaxation of costs, it was proper for the court, in its discretion, to allow such amendments as were just and necessary. *Ib.*

12. Where a case is remitted from the supreme court to a district court, the clerk of the district court may issue an execution for the costs accrued thereon, without the order of the district court. *City of Marysville v. Buchanan*, 3 Cal. 213.

13. The notices and affidavits filed on an application to retax costs were not embodied in a bill of exceptions or statement: held, that the judgment must be affirmed upon the presumption that the court below decided properly upon all the evidence before it. *Gates v. Buckingham*, 4 Cal. 286.

14. Costs by way of indemnity ought not to be taxed in case of a nonsuit. *Rice v. Leonard*, 5 Cal. 61.

15. One of the conditions upon which an appeal is allowed from a justice's court, is the payment of the costs of the action. *McDermott v. Douglass*, 5 Cal. 89; *Bray v. Redman*, 6 Cal. 287.

16. A defendant in replevin who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is nevertheless entitled to his costs, when the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

17. Where costs are imposed as a condition for reopening a case after the adjournment of the term, the acceptance of the costs by the opposite party will not be construed into a consent to have the cause reinstated. *Carpentier v. Hart*, 5 Cal. 407.

18. A mistake in the computation of interest or taxation of costs cannot be attacked for the first time in an appellate court. The party complaining must move in the court below to correct the computation or retax the costs, and thus obtain the judgment of the court of original jurisdiction upon the disputed items, before resort can be had to a higher tribunal. *Guy v. Franklin*, 5 Cal. 417.

19. A mortgage contained a stipulation for all costs of foreclosure, including counsel fees not exceeding five per cent. of

the amount due: held, that the limitation of five per cent. is intended to apply to counsel fees alone; and that the complainant would be entitled to recover the whole of its costs by operation of the statute, and independent of any stipulation. *Gronfier v. Minturn*, 5 Cal. 492.

20. In foreclosing a mortgage containing a stipulation that the mortgagee should be entitled to all costs, including counsel fees not exceeding five per cent. of the amount due, it is not necessary to aver in the complaint that five per cent. was reasonable counsel fees, as the counsel fees thus stipulated to be paid were not the cause of action, but like costs, a mere incident to it, and might be fixed by the court, at its discretion, not exceeding five per cent. *Carriere v. Minturn*, 5 Cal. 435.

21. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102.

22. Executors and administrators are individually responsible for costs recovered against them in every case; but they shall be allowed them in their administration accounts, except when it appears that the action has been persecuted or resisted without just cause. *Hicox v. Graham*, 6 Cal. 169.

23. An execution for costs becomes a lien from the date of the levy. *Low v. Adams*, 6 Cal. 281.

24. The plaintiff can only be allowed costs when he recovers two hundred dollars in action for money or damages. Costs are incident to the judgment, and cannot be given by the jury in way of damages. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

25. The payment or tender of the fees to a justice does not strictly constitute a condition of appeal, but a condition precedent to sending up the papers; but this condition may be waived by the justice. *Bray v. Redman*, 6 Cal. 287; *People v. Harris*, 9 Cal. 573.

26. Where a party brought separate actions, first at law on the notes, and then at equity for a foreclosure, before the adoption of this rule uniting them in one action: held, that he be allowed both his legal equitable remedies, on payment of the costs of the latter suit. *Walker v. Sedgwick*, 8 Cal. 404.

27. An offer to pay a justice his costs

## In general.—On Appeal.

on appeal, so soon as the appeal papers are ready to transmit to the county court, is not a sufficient tender, under the statute. The fees must be tendered unconditionally. *People v. Harris*, 9 Cal. 572.

28. In an action to try the right to the use of water, and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Marius v. Bicknell*, 10 Cal. 224.

29. A person claiming an interest in mortgaged premises subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 267.

30. The allowance of costs in actions of equity rests in the discretion of the court of original jurisdiction. *Harvey v. Chilton*, 11 Cal. 120.

31. Costs of a suit form no part of the matter in dispute, and an appeal does not lie to the supreme court where the amount involved is less than two hundred dollars, although the costs added thereto may increase it beyond that sum. *Dumphy v. Guindon*, 13 Cal. 30; overruling *Gordon v. Ross*, 2 Cal. 157.

32. Defendant moved for a new trial, which was granted on the payment of costs as a condition precedent, and failed to except to this order, and then appealed: held, that he could only appeal from annexing the condition to the granting of his motion. *Rice v. Gashirie*, 13 Cal. 54.

33. Where the judgment below is reversed on appeal, and a new trial had, the costs of the first trial are part of the final bill of costs. *Visher v. Webster*, 13 Cal. 60.

34. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the prior attachments become liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. Plaintiff's costs, disbursements and counsel fees, however, should first be deducted from the fund, before distribution. *Patrick v. Montader*, 13 Cal. 444.

35. A party is not bound to tender costs before the nonsuit. The provision as to costs is simply that by the nonsuit plaintiff

becomes subject to costs. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

36. A member of the corporation at the commencement of a suit brought by it cannot become a witness for it on the trial by selling out his shares of stock after suit brought. He is personally liable for his proportion of the costs, and his competency as a witness can only be restored by actual payment of the entire costs of the case—those due and those to become due. *Mokelumne Hill Canal and M. Co. v. Woodbury*, 14 Cal. 268.

37. An act providing for the collection of delinquent taxes is not unconstitutional because it compels the delinquent, if sued, to pay costs and a percentage, by way of attorney's fees, in addition to the tax assessed. *People v. Seymour*, 16 Cal. 344.

38. Under the practice act, as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited waived his right to costs, whether they were clerk's and sheriff's fees or other costs; and in the absence of such memorandum the clerk had no power to include costs in the judgment. *Chapin v. Broder*, 16 Cal. 418.

39. After a judgment is entered and the record completed, the clerk has no power to fill up the blank left for costs. His authority terminates with the entry of the judgment, and the court alone, on motion to amend, is competent to relieve where costs are omitted. *Id.* 419.

## II. ON APPEAL.

40. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 54.

41. The clerk of the supreme court in entering up the judgment adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an execution. *City of Marysville v. Buchanan*, 3 Cal. 23.

42. The judgment of the supreme court on appeal and costs consequent thereon is final, and the district court has no authority to prevent immediate execution of the judgment of this court, so remitted. *Id.*

## On Appeal.—Counter Claim.

43. One of the conditions upon which an appeal is allowed from a justice's court, is the payment of the costs of the action, and where this is not done the justice need not certify the appeal. *McDermott v. Douglass*, 5 Cal. 89; *Bray v. Redman*, 6 Cal. 287.

44. In an action for a dissolution of a copartnership, on appeal the appellate court modified the decree, and under the circumstances of the case the costs of the appeal were equally divided between the plaintiff and the defendant. *Crosby v. McDermitt*, 7 Cal. 148.

45. Where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welch v. Sullivan*, 8 Cal. 512.

46. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. *Gray v. Gray*, 11 Cal. 341.

47. Where a case is remanded for further proceedings and costs awarded in this court, in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Ib.*

48. The costs upon the appeal are properly the costs of the supreme court, and the costs of making up the appeal in the court below, including the costs of making out the transcript. *Ib.*

49. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

50. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

51. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien until the levy of an execution. *Chapin v. Broder*, 16 Cal. 420.

52. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment, being for possession and damages, was affirmed in the supreme court, upon respondent's remitting the damages and paying the cost of appeal. *Doll v. Feller*, 16 Cal. 433.

See COMPENSATION, FEES.

## COUNSEL.

See ATTORNEY.

## COUNSEL FEES.

See ATTORNEY.

## COUNTER CLAIM.

1. A counter claim should be as distinctly stated as the plaintiff's demand. When promissory notes are set up as a counter claim they should be fully set up, so that the judgment would be a bar to a future recovery upon the same notes. *Bernard v. Mullott*, 1 Cal. 368.

2. The captain of a vessel drew on the owner for six hundred dollars to defray the expenses of the first mate, who was ill. In an action against the owner by the captain for wages, the owner endeavored to set off the draft: held, that this could not be done without producing the draft or showing payment of it. *Waterman v. Vanderbilt*, 3 Cal. 382.

3. When parties are sued as factors, it is not necessary for them to set forth in their answer their claim for disbursements, commissions, etc., by way of set off. *Lubert v. Chauviteau*, 3 Cal. 463.

## Counter Claim.

4. A joint claim by two persons cannot be pleaded as a counter claim by one defendant, but he may amend, and allege that the whole interest therein had been transferred to him. *Stearns v. Martin*, 4 Cal. 229.

5. In case of a sale and delivery of a special cargo with warranty, and a breach of the warranty, the plaintiffs might recover on the contract, and the defendants would be obliged to sue on the warranty, or in the same action, to recover the damages under proper averments in the pleadings. *Ruiz v. Norton*, 4 Cal. 357.

6. Plaintiffs filed a bill to foreclose a mortgage executed by defendants, who admit the demand, but ask that a certain sum be retained in the hands of the court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in the hands of the court. *Bell v. Walsh*, 7 Cal. 87.

7. The doctrine of set-off is said to have been borrowed from the doctrine of compensation in the civil law, and resembles it in many respects. *Naglee v. Palmer*, 7 Cal. 546.

8. The mere existence of cross demands will not justify a set-off in a court of chancery; there must be some peculiar circumstance based upon equitable grounds to warrant the court in interfering. *Ib.* 547.

9. Every man of good business sense would much prefer setting off his claim against that of another, rather than first pay the money out of his own pocket and then risk getting it again from the pocket of his adversary. *Walker v. Sedgwick*, 8 Cal. 405.

10. A debtor has a right to purchase cross demands against a partnership, and to set them up as a defense to the debt due by him to the partnership. *Naglee v. Minturn*, 8 Cal. 544.

11. Under a plea of general issue, evidence of a counter claim is not admissible but should be especially pleaded. *Hicks v. Green*, 9 Cal. 75.

12. A court of equity, upon bill filed, will compel an equitable set-off, when the parties have mutual demands against each other which are so situated that it is im-

possible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity. *Russell v. Conway*, 11 Cal. 101.

13. Demands being joint and several are not, strictly speaking, due in the same right; yet if the legal and equitable liabilities or claims of many become vested in or may be urged against one, they may be set off against separate demands, and vice versa. *Ib.* 102.

14. Where judgment obtained in different courts are to be set off, the moving party must go into the court in which the judgment against himself was recovered. *Ib.* 103.

15. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

16. Where two persons sue as partners in possession for a trespass on firm property, the judgment in their favor is from assets, and the defendant in such case cannot afterward, in equity, enjoin the collection of this judgment, and set off against it a claim against one of the partners, on the ground that in fact this partner was the sole owner of the property and alone entitled to the damages. The judgment is conclusive as to the joint ownership. *Collins v. Butler*, 14 Cal. 227.

17. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment; and if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Ib.* 230.

18. In an action of damages laid at two hundred dollars, defendants plead a general denial and offset of one hundred and twenty-five dollars: held, that the supreme court has no jurisdiction, the amount in dispute being less than two hundred dollars, and that the fact that an offset was plead did not alter the case. *Simmons v. Brainard*, 14 Cal. 278.

19. Plaintiff has judgment against defendant for six hundred dollars. Defendant has judgment in the same court, but in a different action, against plaintiff for one hundred and ten dollars costs. Plaintiff moves to set off defendant's judgment, and apply the same as a credit upon plaintiff's judgment. Motion denied, and plaintiff appeals from the order denying



County.—In general.—Revenue.—Indebtedness.

the motion: held, that the supreme court has no jurisdiction—the judgment sought to be set off being for less than two hundred dollars. *Crandall v. Blen*, 15 Cal. 408.

20. In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of *recoupment*, to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl v. Bull*, 15 Cal. 425.

## COUNTY.

- I. In general.
- II. Revenue.
- III. Indebtedness.
- IV. Actions by or against a County.

### I. IN GENERAL.

1. Where the southern line of a creek was the dividing line between the city of Oakland and the remainder of Contra Costa county, both the city and county have jurisdiction to build a bridge over the creek. *Gilman v. Contra Costa County*, 5 Cal. 428.

2. As a city may by legislative enactment spring from the body of a county, there is no reason in law why it may not be resolved back into its original elements, or why the power which called this political being into existence may not again destroy. *People v. Hill*, 7 Cal. 103; *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

3. The legislature can delegate the power to the voters of a county to select a county seat therein. *Upham v. Supervisors of Sutter County*, 8 Cal. 382.

4. There is no difference between a municipal corporation and a county in the political and geographical divisions of the State. They are both the subjects of its political dominion. *Pattison v. Supervisors of Yuba County*, 13 Cal. 184.

5. The right to try particular cases in particular counties is a mere privilege,

which may be waived. It is not a matter of abatement in the writ. The privilege must be claimed by motion to change the venue, at the proper time and place. *Watts v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 3 Cal. 462.

6. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy; and in such case, there is no discretion in the court, the change being matter of right. *Watts v. White*, 13 Cal. 324.

### II. REVENUE.

7. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses. *Laforge v. Magee*, 6 Cal. 285.

8. While the legislature has power to direct in what manner county revenues shall be disposed of, still they cannot divest a right of a party which is complete, vested and determined. *Ib.* 651.

9. The levy upon county revenues in the hands of the treasurer is illegal and void. These revenues are authorized by law, and appropriated to distinct purposes, and are not the subject of seizure upon execution. *Gilman v. Contra Costa County*, 7 Cal. 58.

10. Where the sheriff, as ex officio tax collector, received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant, being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

### III. INDEBTEDNESS.

11. The appointment by the county judges of two counties of commissioners to ascertain and settle the proportionate amount of indebtedness to be assumed by each, under a law authorizing such an appointment on the division of said counties, is the proper exercise of functions incident to their judicial position. *Tuol-*



## Indebtedness.—Actions by or against a County.

*umne County v. Stanislaus County*, 6 Cal. 442.

12. Where the right of a holder of county scrip to the payment thereof had become fixed by presentation, there being money for such payment then in the treasury, a subsequent act of the legislature cannot intervene to divest rights already acquired. *Laforge v. Magee*, 6 Cal. 650.

13. A county may assign and transfer a warrant drawn in its favor by another county on its treasurer, so as to invest the holder with the right to demand payment thereon. There is no restriction on the power of a county to exchange its credits for its debts, or for money, if it so desires, and can find any one to contract with it on these terms. *Beals v. Evans*, 10 Cal. 460.

14. County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time. *People v. El Dorado County*, 11 Cal. 175.

15. The eighth article of the constitution, prohibiting the State from creating debts over \$300,000, or loaning its credit, only applies to the State as a corporation, as a political sovereign, represented by her law-making power; and does not prevent the State authorizing counties or municipal corporations to create debts, when the debt of the State itself is up to the constitutional limit. *Pattison v. Supervisors of Yuba County*, 13 Cal. 183.

16. The legislature may authorize a county to pay claims invalid in law, but equitable and just in themselves. *People v. Burr*, 13 Cal. 351.

17. Where a county is already in possession of a set of weights and measures according to law, it cannot be held liable for a new set purchased by the deputy sealer of weights and measures. *Levy v. Supervisors Yuba County*, 14 Cal. 636.

18. A tax collector has power to contract for publishing the delinquent list of tax payers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of that agency the county is responsible. *Randall v. Yuba County*, 14 Cal. 222.

19. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector had assented to a contract previously made—or attempted to be made—by the supervisors with another party for publishing the list, is not enough to affect plaintiffs, if they had no notice of it; and evidence of such assent was properly ruled out. *Ib.*

20. An objection that an account presented to the supervisors of a county was not “authenticated” as required by the statute, cannot be taken in the supreme court for the first time. *Ib.*

21. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

## IV. ACTIONS BY OR AGAINST A COUNTY.

22. A county government is a portion of the State government, and as there is no remedy against the State there can be none against the county.\* *Hunsacker v. Borden*, 5 Cal. 290.

23. A county is not a person in any sense; it is not a corporation. It cannot sue or be sued except where specially permitted by statute, and such permission can be withdrawn or denied at any time the legislature may think proper. *Ib.*

24. Counties are quasi corporations, and can sue and be sued. The right to sue a county is not limited by the act of May 11th, 1854, to cases of tort, malfeasance, &c., but is given to every case of account after presentation to and rejection by the board of supervisors. *Price v. Sacramento County*, 6 Cal. 255; *Tuolumne County v. Stanislaus County*, 6 Cal. 442; *Gilman v. Contra Costa County*, 6 Cal. 677; 8 Cal. 57; *Placer County v. Astin*, 8 Cal. 305.

25. The act providing the manner of commencing and maintaining suits by or against counties, passed May 11th, 1854,

\* The act of May 11th, 1854, permits counties to sue and to be sued.

## Actions by or against a County.—Jurisdiction.

is retrospective. *Gilman v. Contra Costa County*, 6 Cal. 677.

26. The statute providing that no person shall sue a county for any demand, unless the claim has first been presented to the board of supervisors, and been by them rejected, applies as well to actions arising out of tort as upon contract. *McCann v. Sierra County*, 7 Cal. 124.

27. The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against a county. *Emeric v. Gilman*, 10 Cal. 408.

28. No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county it is the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated to its payment. *Ib.* 410.

29. Where the compensation for land taken by a county for public use, as for a road, does not precede or accompany the taking, the entire action of the county authorities is void. *Johnson v. Alameda County*, 14 Cal. 107.

30. A suit in such case against the county for the compensation does not lie. *Ib.*

31. The people of a county are not a corporation, nor can they sue or be sued. *Smith v. Myers*, 15 Cal. 34.

32. A county is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. *Ib.*

## COUNTY COURT.

## I. Jurisdiction.

## II. Appeals.

1. From Justices' Courts.
2. To the Supreme Court.

## I. JURISDICTION.

1. The district courts have constitutional jurisdiction in cases of nuisance. The grant of such to the county court by statute cannot take away the constitutional

jurisdiction of the district court. *Fitzgerald v. Urton*, 4 Cal. 238.

2. An act conferring jurisdiction on the county courts in actions for which courts of general jurisdiction have always supplied a remedy as "special cases," is unconstitutional and void. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

3. Causes may be transferred from one county court to another according to statute. *Reyes v. Sanford*, 5 Cal. 117.

4. A county court has no jurisdiction to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars. *Brock v. Bruce*, 5 Cal. 280.

5. The power of the county court to treble damages by way of penalty in actions of forcible entry results, by necessary implication, from its power to try de novo. *O'Callaghan v. Booth*, 6 Cal. 66.

6. The ninth section of article six of the constitution cannot be construed to confer exclusive original jurisdiction in all special cases upon the county courts. *Ib.* 67.

7. The legislature, in conferring jurisdiction in insolvency cases on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

8. The act of March 27th, 1850, conferring upon the county court the power of incorporating towns, is unconstitutional. *People v. Town of Nevada*, 6 Cal. 144.

9. Where parties stipulate to arbitrate, and that the award be entered as a judgment of the county court: held, that it was void in toto, if it exceeded two hundred dollars, as the court had no jurisdiction. *Williams v. Walton*, 9 Cal. 145.

10. The act giving jurisdiction over the subject of contested elections to the county court is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

11. County courts, under the statute, have jurisdiction in proceeding by mandamus, and the statute is constitutional. *People v. Day*, 15 Cal. 92.

12. Aside from previous decisions of this court, the true construction of our constitution is that the legislature has power to confer on county courts jurisdiction in such specially enumerated and defined cases as in its discretion should be confided to those tribunals. *Ib.*

## Appeal.

13. Where a special term of the county court was held on the first day of May, upon notice to that effect given on the twenty-fourth of April preceding, the proceedings of the court were irregular, if not void; the statute (Wood's Dig. 381) requiring a notice of not less than ten nor more than twenty days. *People v. Riley*, 16 Cal. 187.

## II. APPEALS.

## 1. From Justices' Courts.

14. County courts try cases anew on appeal by reason of their appellate jurisdiction, and not their original jurisdiction. *Townsend v. Brooks*, 5 Cal. 53.

15. The county court on appeal should proceed to try the case on its merits anew, and not dismiss the same if defendant had no notice of trial in the justice's court. *Coyle v. Baldwin*, 5 Cal. 75.

16. An objection that the county court had no jurisdiction because there was no appeal bond given should be raised in the county court and not in the supreme court for the first time. *Howard v. Harmon*, 5 Cal. 78.

17. One of the conditions upon which an appeal is allowed from a justice's court is the payment of the costs of the action. *McDermott v. Douglass*, 5 Cal. 89; *Bray v. Redman*, 6 Cal. 287.

18. A notice of appeal to a county court, stating that defendant appealed from the whole judgment, is a sufficient notice within the statute. *Price v. Van Caneghan*, 5 Cal. 124.

19. The payment or tender of fees to a justice does not strictly constitute a condition of appeal, but a condition precedent to sending up the papers; but this condition may be waived by the justice. *Bray v. Redman*, 6 Cal. 287; *People v. Harris*, 9 Cal. 573.

20. On appeal from a justice's court to a county court on questions of law alone, if a new trial be ordered, it should take place in the county court. *People v. Freelon*, 8 Cal. 518.

21. When a new trial is ordered in a county court on an appeal from a justice's court, the county court should try the cause, as it has all the judicial machinery

for such trial, and there can be no good reason for sending the case back to the justice. *Ib.* 519.

22. Where a party appealed from a justice's court to a county court, and the justice neglected to send up with the record the notice of appeal: held, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 9 Cal. 18.

23. The county court has the sole appellate jurisdiction in all cases, civil and criminal, arising in justices' courts, subject to such restrictions as the legislature may impose, by making the decisions of the justice final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 88.

24. An appeal does not lie to the county court from a justice's court upon the facts of the case, if there has been a default in the court below. *People v. County Court of El Dorado County*, 10 Cal. 20; *Funkenstein v. Elgutter*, 11 Cal. 328.

25. A refusal by the county court on appeal from a justice to permit an amendment of the complaint is matter of discretion, and there being no affidavit of materiality, nor any showing of the importance of the amendment, the supreme court will not interfere. *Canfield v. Bates*, 13 Cal. 608.

26. On appeal from a justice's court in forcible entry and detainer, the execution of the appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

27. In forcible entry and detainer tried in the county court, on appeal from a justice's court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied and judgment entered for one hundred and fifty dollars with restitution of the premises. Plaintiff applies to the supreme court for mandamus to compel the court below to render judgment for treble damages: held, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 150.

## Appeal from the County Court to the Supreme Court.—County Judge.

28. On appeal from a justice's to a county court—the record not showing that notice of appeal had been served on the adverse party—appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 Cal. 368.

## 2. To the Supreme Court.

29. The statute not having conferred upon the supreme court an appellate jurisdiction over judgments of the county courts, that constitutional power cannot be exercised until the mode is prescribed by statute.\* *Warner v. Hall*, 1 Cal. 91; *White v. Lighthall*, 1 Cal. 347; *Adams v. Town*, 3 Cal. 248.

30. No appeal was allowed by law from a county court to the supreme court prior to the first day of July, 1854. *Middleton v. Gould*, 5 Cal. 191.

31. A county court can grant a new trial, as the appellate power of the supreme court over the county court could not be properly and efficiently executed, unless the power to grant a new trial existed in the county court. *Dickinson v. Van Horn*, 9 Cal. 211.

32. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court on questions of fraud made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

## COUNTY JUDGE.

1. A county judge has no right to declare a convention of justices assembled to elect associate justices of the court of sessions adjourned. *People v. Campbell*, 2 Cal. 137.

2. The county judge and two associates compose the court of sessions, and the presence of all three is necessary to the transaction of any business. *People v.*

*Ah Chung*, 5 Cal. 105; *People v. Barbour*, 9 Cal. 234.

3. The legislature cannot confer upon a county judge the power of designating the place and manner of holding an election, as it is a ministerial and not a judicial act, and an election thus held will be void. *Dickey v. Hurlbut*, 5 Cal. 344.

4. An election which was ordered by the board of supervisors to fill a vacancy in the office of county judge, occasioned by the resignation of the incumbent without proclamation of the governor, is invalid, and the office being vacant can be properly filled by appointment of the governor. *People v. Porter*, 6 Cal. 28; *People v. Martin*, 12 Cal. 411.

5. The grant of authority to the county judge to award injunctions in cases brought in the district court is a mere power to issue mesne process auxiliary to the proper jurisdiction of the district court and is not trenching upon it. The county judge does not try or decide the case, nor does any court of which he is judge take jurisdiction of it; he only issues a mesne process. *Thompson v. Williams*, 6 Cal. 89; *Crandall v. Woods*, 6 Cal. 451.

6. A county judge has authority to award injunctions in cases brought in the district court; it is a mere power to issue mesne process auxiliary to the proper jurisdiction of the district court, and is not trenching upon it. *Thompson v. Williams*, 6 Cal. 89; *Crandall v. Woods*, 6 Cal. 451.

7. The appointment by the county judges of two counties of commissioners to ascertain and settle the proportionate amount of indebtedness to be assumed by each, under a law authorizing such an appointment on the division of said counties, is the proper exercise of functions incident to their judicial position. *Tuolumne County v. Stanislaus County*, 6 Cal. 442.

8. A district court may issue a certiorari to a county judge to review his excess of jurisdiction in granting a ferry license. *Chard v. Harrison*, 8 Cal. 116.

9. The exercise of power to grant a ferry license is not judicial, and cannot exist in a county judge. His excess of authority can be properly reviewed on certiorari. *Ib.*

10. It is not competent for the legislature to change the period of the tenure of the office of judge of county courts, any more than to change those of supreme and

\*This jurisdiction is conferred by the statute of May 15th, 1854.



district judges. *People v. Templeton*, 12 Cal. 401; *People v. Rosborough*, 14 Cal. 187.

11. The office of county judge is not a county office within the meaning of the "act to regulate elections," passed March 23d, 1850, consequently the supervisors cannot order a special election to fill a vacancy in that office. *People v. Martin*, 12 Cal. 411.

12. The appointee of the governor to the office of county judge will hold over a person elected to the same office at a special election ordered by the board of supervisors of the county. *Ib.*

13. Under the statute the county judge may grant an injunction in cases in the district court, but he cannot appoint a receiver, at least, not as a thing distinct from the injunction. *Ruthrauff v. Kresz*, 13 Cal. 639.

14. By the constitution county judges, when elected, hold their offices for the full period of four years. *People v. Templeton*, 12 Cal. 401; *People v. Rosborough*, 14 Cal. 187.

15. Where the convention of justices of the peace for electing two associate justices of the court of sessions was presided over by the then acting county judge, his official acts at such convention were legal and valid—although it was afterwards determined that another person had been legally elected to that office; and a court of sessions, composed of said other person as county judge, and of the two associates elected by such convention, was legally organized. *People v. Wyman*, 15 Cal. 74.

## COUNTY OFFICERS.

1. An act organizing a new county and fixing a special day for the first election of county officers, and providing that they shall hold office for two years and until their successors are elected and qualified, must be construed in connection with the general law requiring such officers to be elected on the same day throughout the State. *People v. Church*, 6 Cal. 78.

2. The officers first elected hold till the first general election for county officers

throughout the State, after the expiration of the term of two years fixed by the special act, and an election held before that time is void. *Ib.*

3. Where an act organizing a county provides for the term of office of the officers first elected, but makes no provisions as to their successors, the duration of the term of the latter is governed by the general law. *People v. Colton*, 6 Cal. 85.

4. In counties where the offices of county clerk and county recorder are united, the officer performs the functions of auditor or as recorder and not as clerk, and when these offices are separated the recorder becomes auditor. *People v. Darrach*, 9 Cal. 325.

5. It is in the power of the legislature, in organizing or after organizing a new county, to prescribe the time of elections for county officers, and also the period of the commencement of their terms. *People v. Templeton*, 12 Cal. 401.

See ASSESSOR, AUDITOR, CLERK OF THE COURT, COUNTY JUDGE, OFFICE, RECORDER, SHERIFF, SUPERVISORS, SURVEYOR, TAX COLLECTOR, TREASURER.

## COURTS.

1. Every court has, while engaged in the performance of its lawful functions, as an incident to its judicial character, the authority to preserve order, decency and silence in its presence, and in such case may apprehend and punish an offender without further examination or proof. *People v. Turner*, 1 Cal. 153.

2. Where an assessment is laid upon land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the land by a decree rendered in an injunction suit, instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. *Weber v. City of San Francisco*, 1 Cal. 456.

3. The agreement of parties cannot divest courts of their proper jurisdiction. *Muldrow v. Norris*, 2 Cal. 78.

4. A court may go behind the record evidence of a statute and inquire whether it was passed or approved in accordance



## Courts.

with the constitution. *Fowler v. Pierce*, 2 Cal. 168.

5. The time and place of holding courts should not be left in doubt. *Ross v. Austill*, 2 Cal. 191.

6. If a court, instead of having a verdict corrected by the jury, attempt to correct it by the judgment and go beyond the verdict, it is error. *Ib.*

7. Great latitude is given to the courts by our statute in amending and altering pleadings. *Pollock v. Hunt*, 2 Cal. 194; *Truebody v. Jacobson*, 2 Cal. 283; *Cooke v. Spears*, 2 Cal. 412.

8. A court sitting as a jury must find separately the facts and conclusions of law. A verdict insufficient in this particular will be reversed. *Brown v. Graves*, 3 Cal. 111; *Russel v. Armador*, 2 Cal. 305.

9. A court has no right to charge the jury in regard to conclusions of fact. *Treadwell v. Wells*, 4 Cal. 263.

10. Courts are bound to take notice of the political and social condition of the country which they judicially rule. *Irwin v. Philips*, 5 Cal. 146; *Merced Mining Co. v. Fremont*, 7 Cal. 325; *Wells v. Stout*, 9 Cal. 494.

11. The legislature cannot confer on one court the functions and powers which the constitution has conferred on another. *Zander v. Coe*, 5 Cal. 234.

12. Legislative functions cannot be exercised by the judiciary; nor can the legislature delegate such power to a court which is inhibited from the performance of any other than judicial acts. *People v. Town of Nevada*, 6 Cal. 144.

13. In all inferior courts, of the like kind, the law requires that they must strictly follow the rules which create and govern them; and that which in a court of general jurisdiction would be a mere irregularity, absolutely deprives the former of all jurisdiction. *Whitwell v. Barbier*, 7 Cal. 64; *Haynes v. Meeks*, 10 Cal. 118.

14. Every court empowered to punish for contempt, is not the sole and final judge in all cases of alleged contempt. *Ex parte Rowe*, 7 Cal. 178.

15. Courts are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners or surveyor general of the United States for California. *Hensley v. Tarpey*, 7 Cal. 289.

16. Courts have no power to interfere with the judgments and decrees of other courts of concurrent jurisdiction. *Anthony v. Dunlap*, 8 Cal. 27; *Rickett v. Johnson*, 8 Cal. 35; *Revalk v. Kraemer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; *Phelan v. Smith*, 8 Cal. 521; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 614.

17. A state court cannot enjoin the proceedings of a federal court. *Phelan v. Smith*, 8 Cal. 521.

18. A court is bound to take judicial notice of the general laws in force in this State, at the cession of California, which remained unrepealed, until the common law was adopted in April, 1850. *Wells v. Stout*, 9 Cal. 494.

19. An exception to the general rule that one court cannot enjoin the proceedings of another court of coördinate jurisdiction, arises when the court in which the action or proceeding should be had is unable, by reason of its jurisdiction, to afford the relief sought; as when several fraudulent judgments are confessed in several courts, a creditor may bring one action in any one of these courts to enjoin them all. *Uhlfelder v. Levy*, 9 Cal. 614.

20. Courts can ascertain and fix the boundaries which are designated, but cannot give boundaries to a specific quantity which has none and lies in a larger tract. *Waterman v. Smith*, 13 Cal. 418; *Moore v. Wilkinson*, 13 Cal. 486.

21. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *People v. Keenan*, 13 Cal. 584.

22. Courts grant divorces in cases of cruelty, not to punish an offense already committed, but to relieve the complaining party of apprehended danger; and the divorce may follow even in the absence of any actual violence. *Morris v. Morris*, 14 Cal. 79.

23. The court in which a void judgment is rendered, can, on motion, at any time, arrest all process issued by its clerk thereon. *Chipman v. Bowman*, 14 Cal. 158.

24. Courts take judicial notice of the official character of justices of the peace in their own States, and an affidavit in which the official character of the justice

before whom it is taken, does not appear, is good. *Ede v. Johnson*, 15 Cal. 57.

25. Courts should, of their own motion, dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not. *Valentine v. Stewart*, 15 Cal. 405.

26. San Francisco having been constituted, by a public, political act of the former government, a pueblo, courts must take judicial notice of its existence, powers and rights, and among these last, its general boundary and jurisdiction. Greenleaf (p. 8, sec. 6) states the rule thus: "Courts also take notice of the territorial extent of the jurisdiction and sovereignty, exercised de facto by their own government; and of the local divisions of the country, as into states, provinces, cities, towns, local parishes, or the like, so far as political government is concerned or affected; and of the relative positions of such local divisions, but not of their precise boundaries, farther than they may be described in public statutes." *Payne v. Treadwell*, 16 Cal. 231.

27. Courts are bound to take notice of matters of public history affecting the whole people. So of the laws and general acts of a public character, of judicial and political officers. Of such would be those acts creating and regulating pueblos; and this rule applies as well to the acts and officers of the former government as to those of its successor. *Ib.*

## COVENANT.

1. In an action for the purchase money of land conveyed by deed, without covenant, want of title in the vendor is no defense, unless the vendee has been evicted. *Fowler v. Smith*, 2 Cal. 44.

2. The law will not imply covenants of seizen in a conveyance of land by deed. *Ib.*

3. The lien which springs out of a title bond predicated upon the covenants for the purchase money, attaches upon the land, unless expressly reserved; and if such reservation be made, it lies upon the

purchaser to show it. *Truebody v. Jacobson*, 2 Cal. 287.

4. Where contracts are entire and the covenants dependent, and the plaintiff had declared his inability to keep it, and afterwards actually abandoned it: held, that these facts formed a defense to his action for a claim under the contract. *Green v. Wells*, 2 Cal. 585.

5. In a suit for the recovery of the purchase money of land, founded on a contract in which the plaintiff covenanted to deliver a warranty deed for the land, the defendant, in his answer, denied that the plaintiff was the lawful owner, or that he had any title to the land: held, that to have enabled him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that failing in this, his defense to the action was defective. *Thayer v. White*, 3 Cal. 229.

6. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. *Matthey v. Galley*, 4 Cal. 64.

7. An assignment of a contract as a security for a debt, and also in consideration of a covenant not to sue upon a debt, entitles the assignee to sue on the contract in his own name. *Warner v. Wilson*, 4 Cal. 313.

8. When a lease contains a covenant against assignment, and the restriction is once removed, it operates as a removal of the restriction forever. *Chipman v. Aughenbaugh*, 5 Cal. 51.

9. A covenant "to let the lessor have what land he and his brothers might want for cultivation," cannot be enforced for uncertainty. *Ib.*

10. A covenant for a lease to be renewed indefinitely, at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law. *Morrison v. Rossignol*, 5 Cal. 65.

11. Where land is sold with covenant of warrantee, accompanied with a delivery of possession, for which the purchaser gives a note for the purchase money, the promise to pay and the warrantee are independent covenants, and the enforcement of the one is not dependent upon the performance of the other. *Norton v. Jackson*, 5 Cal. 264.

12. A covenant not to sue for five years is no bar to the action; but the defendant

## Creditor's Bill.—Crimes and Criminal Law.

must rely upon the covenant for his remedy. *Howland v. Marvin*, 5 Cal. 501.

13. If a party takes a conveyance without covenants, he is without remedy in case of failure of title. If he takes a conveyance with covenants, his remedy upon failure of title is confined to them. *Peabody v. Phelps*, 9 Cal. 228.

14. A covenant in a lease to the lessee, "his heirs and assigns," for a term of eight years, that if the lessor shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land. *Laffan v. Naglee*, 9 Cal. 676.

15. Every covenant in the lease relating to the thing demised attaches to the land and runs with it. *Ib.*

16. In real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Blackwell v. Atkinson*, 14 Cal. 472.

See CONTRACT, WARRANTEE.

## CREDITOR.

See DEBTOR AND CREDITOR.

## CREDITOR'S BILL.

1. A bill filed by a creditor, asking relief against fraudulent transfers and concealment of his property by the debtor, is a substantial ground of equity jurisdiction. *Swift v. Arents*, 4 Cal. 391.

2. Every sale of property is good between the parties, and cannot be attacked for fraud, except by a creditor who has recovered judgment and taken out execution against the vendor, which has been returned unsatisfied in whole or in part, with the single statutory exception of an attaching creditor, and he must show affirmatively that his attachment has been properly issued under the statute before he can attack the sale. *Heyneman v. Dan-*

*nenberg*, 6 Cal. 380; *Thornburgh v. Hand*, 7 Cal. 565.

3. To maintain a creditor's bill in chancery, in order to reach equitable assets which are alleged to have been fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set forth which will reasonably sustain the theory of the bill. *Kinder v. Macy*, 7 Cal. 207.

## CRIMES AND CRIMINAL LAW.

## I. Crimes.

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## II. Criminal Law.

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## I. CRIMES.

1. *Assault.*

1. Where a defendant was indicted for an assault with intent to commit murder, and the jury found a verdict of guilty of "an assault with intent to do bodily injury:" held, that the verdict only found the prisoner guilty of an assault, and not of a felony. *People v. Vanard*, 6 Cal. 562.

2. The weapon or instrument with which the assault is committed constitutes the gist of the felony as distinguishing the act from an ordinary assault, and should therefore be alleged and found. *Ib.* 563.

3. In a prosecution for assault with intent to commit murder, where the prosecuting witness was asked if he did not, previous to the assault, buy a pistol to use on the defendant, to which he assented, it was competent for the State to prove by him that he bought it in self-defense, from what he was informed by a third person that the defendant had said. *People v. Shea*, 8 Cal. 539.

4. The drawing of a pistol on another, accompanied by a threat to use it unless the other immediately leave the spot, is an assault, although the pistol is not pointed at the person threatened. *People v. McMakin*, 8 Cal. 548; *People v. Honshell*, 10 Cal. 87.

5. Where the defendant was indicted for the crime of an "assault with a deadly weapon with the intent to inflict great bodily injury," and the jury found him "guilty of an assault with a deadly weapon:" held, that it was error to sentence the prisoner to two years confinement in the State prison. *People v. Wilson*, 9 Cal. 260.

See ASSAULT.

2. *Assault and Battery.*

6. The recorder of San Francisco has the right to punish for the crime of assault and battery as fixed by the act of April 18th, 1850. *People v. Ah King*, 4 Cal. 307.

7. An assault and battery is not a case of fraud, in the sense that that term is

employed in the constitution, nor can it be so made by the legislature. *Ex parte Prader*, 6 Cal. 240.

8. A party cannot be imprisoned, under a judgment for injury to person in a civil action, for assault and battery; a judgment for damages, in such a case, is as much a debt as though recovered in an action of assumpsit. *Ib.*

See ASSAULT AND BATTERY.

3. *Bribery.*

9. Defendant, a judge of the court of sessions, was charged with receiving money as a bribe not to forfeit a recognizance; there was no allegation that there was any proceeding commenced upon the recognizance, nor was there any; and the statute against bribery confines the offense to acting "more favorable to one side than another in any suit, matter, or cause pending or brought before him." Neither charge was sufficiently set out to warrant a conviction. *People v. Purley*, 2 Cal. 566.

4. *Burglary.*

10. An indictment for burglary, charging with intent to steal certain goods, must specify the value of the goods intended to be stolen, as burglary under our statute can only be committed with intent to commit a felony. *People v. Murray*, 8 Cal. 520.

11. On trial for burglary, the court instructed the jury that, if they found from the evidence that defendant entered a certain warehouse in the night-time, and took therefrom sundry goods and chattels, he was guilty as charged: held, that the instruction was wrong, because that it ignores the felonious intent of the entry, and the character of it. *People v. Jenkins*, 16 Cal. 431.

See BURGLARY.

5. *Conversion.*

12. All conversions of money or property by a bailee are not "ipso facto unlaw-

## Homicide.

ful or felonious" under our statute. The word bailee, under our statute, must be construed in a limited sense as designating bailees to keep, transport and deliver. *People v. Cohen*, 8 Cal. 43; *People v. Winkler*, 9 Cal. 236; *People v. Peterson*, 9 Cal. 315.

See CONVERSION.

## 6. Homicide.

13. The defendant was convicted of manslaughter upon an indictment charging the crime of murder. The verdict was, on his motion, set aside: held, that on the second trial for murder upon the same or a different indictment, the defendant can be convicted of manslaughter only, as the former verdict of manslaughter is an acquittal of the crime of murder. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

14. In a criminal case, it is wholly immaterial for what purpose a shot gun is loaded, with which the homicide was committed, if it was loaded, and a party takes the gun so loaded to protect himself against the deceased. *People v. Milgate*, 5 Cal. 128.

15. If a jury find that the prisoner made a felonious assault upon the deceased with an unlawful weapon, inflicting a mortal wound which produced instant death, and that there was some evidence tending to prove that such wound was given in the heat of blood, in sudden and mutual combat, but that the proof of such fact did not preponderate over the proof against it, though it raised some doubt in their minds that the matter of extenuation would not be sufficiently made out, the judgment of the court would be against the prisoner for the higher offense. *Ib.* 129.

16. Murder is a conclusion of law drawn from certain facts. *People v. Aro*, 6 Cal. 209.

17. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction on every material allegation in the indictment, and is therefore a conviction for murder. *People v. March*, 6 Cal. 546.

18. The crime of murder is committed at the time when the fatal blow is struck. *People v. Gill*, 6 Cal. 638.

19. On a trial for murder, weakness of mind, fear and excitement of the defendant, produced by the violence of the deceased, will not justify the homicide. *People v. Hurley*, 8 Cal. 390.

20. Words of reproach, how grievous soever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent, provoking actions or gestures expressive of contempt or reproach, without an assault upon the person. *People v. Butler*, 8 Cal. 441.

21. If A goes to the house of B, who has taken possession of his land and built a house thereon, for the purpose of forcibly putting him out and tearing down the house, it is an unlawful act; and if A kills B in pursuing that purpose, it is murder or manslaughter according to the facts of the case. *People v. Payne*, 8 Cal. 343; *People v. McMahon*, 8 Cal. 548; *People v. Honshell*, 10 Cal. 87.

22. The facts necessary to constitute murder are that a wound was inflicted with a felonious intent; that it was mortal; and that death ensued from the effects of the wound within a year and a day. *People v. Stevenson*, 9 Cal. 275.

23. Evidence of the dying declarations of a deceased person are admissible on a trial for murder, and it is placed upon the substantial ground of necessity. *People v. Glenn*, 10 Cal. 36.

24. Fighting a duel with fatal result is not murder within our statutes, but a special offense under the act of 1855; and over such offenses the courts of sessions have jurisdiction. *People v. Bartlett*, 14 Cal. 653.

25. Indictment for murder. Plea, self-defense. Testimony conflicting as to facts occurring at the time of homicide. M., a witness for prosecution, testified that he was present, August 24th, at a difficulty between defendant and deceased, in the course of which defendant discharged a double barreled shot gun at deceased, who fell forward; that immediately thereafter witness approached deceased, and saw lying on the ground, about six feet forward of him, a pistol, which witness had previously seen in deceased's possession. Witness then detailed the circumstances immediately connected with the difficulty, in which he himself, armed with a pistol, took part with the deceased against defendant; and then stated that the pistol



## Homicide.—Kidnapping.

he saw lying on the ground, deceased borrowed from C. some time before August 24th; that C. had given the pistol to deceased, who said he would clean it; and that he (witness) had often, since then, and before August 24th, seen the pistol in deceased's possession. Defendant's counsel then asked witness this question: "At the time C. gave the pistol to Sweeney (deceased) was anything said by S. with reference to using the pistol against the defendant?" Objected to and ruled out as irrelevant and incompetent, unless evidence was produced tending to show that the thing said had come to the knowledge of defendant: held, that the court erred; that the evidence was admissible; that the declaration of deceased made at the time of procuring the weapon was part of the *res gestæ*, and illustrative of the transaction; that it showed the purpose for which the weapon was procured; and that this purpose was an item of proof upon the question, which of the two parties first assaulted—this being the point to which the testimony was offered. *People v. Arnold*, 15 Cal. 480.

26. The mere fact that one man threatens to kill another does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused, before they are admissible as evidence for him for any purpose—and then the effect and bearing of the testimony should be explained by the judge to the jury, before the case is finally submitted to them. *Ib.*

27. But where a recounter occurs between two persons, one of whom is killed, and the witnesses as to the difficulty differ, or the circumstances are equivocal as to which one of the two commenced the affray, then the fact that one of the parties had previously procured a weapon for the avowed purpose of using it against the other—the weapon being found at the place of the affray—is a circumstance tending to show that the purpose was fulfilled, and hence is proper for the consideration of the jury. *Ib.* 481.

28. Generally, when the fact of a homicide is shown, defendant must show by a preponderance of testimony that the killing was justifiable; but this rule is subject to the qualification that where the testimony of the prosecution leaves a doubt as to the character of the homicide

—as whether justifiable or not—then the benefit of the doubt is given to the prisoner. *Ib.*

29. On an indictment for murder, the verdict must state whether it be murder in the first or second degree. If, on the return of the verdict, it does not specify the degree, the court should order the jury to retire, and return a specific finding of the degree. *People v. Marquis*, 14 Cal. 38.

30. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the *res gestæ*, and should have been admitted, subject to instruction of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People v. Costello*, 15 Cal. 353.

See MANSLAUGHTER, MURDER.

### 7. Kidnapping.

31. The fifty-fourth section of the act of April 16th, 1850, concerning crimes and punishments, is not repealed by the act of April 19th, 1856, (Statutes 1856, 131) amendatory of, and supplementary to the act of 1850. Section two of the act of 1856 does not conflict with section fifty-four of the act of 1850. These sections refer to a different class of offenses. Under the latter, the abduction must be accompanied with a removal into another county, State or territory, or a design to remove the party beyond the limits of the State. Under the former, the abduction need not be accompanied with any such removal or design—the intent to detain and conceal being the gist of the offense. *People v. Chu Quong*, 15 Cal. 333.

## Larceny.—Perjury.

8. *Larceny.*

32. A party cannot be convicted of larceny for taking his own property. *People v. McKinley*, 9 Cal. 250.

33. Defendant was indicted for stealing a steer. The court charged the jury, in effect, that though defendant killed the steer, believing it to be his own, yet when he appropriated it to his own use and benefit, it was evidence of a felonious intent, and the jury will so find: held, that charge was erroneous, because it assumes as a fact that defendant did appropriate the steer, which was for the jury, and thus makes the mere fact of appropriation conclusive proof of guilt. *People v. Carabin*, 14 Cal. 440.

34. To convict a defendant of larceny upon the testimony of an accomplice, together with corroborating evidence, the corroborating evidence must connect the defendant with the offense charged. It is not sufficient that it corroborate the accomplice as to the fact that a larceny was committed. *People v. Eckert*, 16 Cal. 112.

35. McB., the accomplice, swore to the larceny by the defendant. The court instructed the jury, "that though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony:" held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *Ib.*

36. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about \$1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento, instead of the mill. Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there,

he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been paid before L. took the property. Ruled out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness had been paid. *People v. Stone*, 16 Cal. 371.

37. Larceny is compounded of the taking and carrying away, and the felonious intent. Whatever has a legal tendency to show the intent is proper evidence. *Ib.*

38. A man may steal his own property, if by taking it his intent be to charge a bailee with the property, and thus impose a loss upon him. *Ib.*

See LARCENY, STOLEN GOODS.

9. *Perjury.*

39. An indictment for perjury, charging that the accused in a certain proceeding, describing it, "did willfully, corruptly, and falsely swear," etc., but not alleging that the perjury was committed "feloniously," is sufficient. *People v. Parsons*, 6 Cal. 488; *People v. Oliviera*, 7 Cal. 404.

40. A conviction for perjury cannot be sustained without the false oath be material to the issue, and therefore prejudicial to some one; otherwise, however willful, it cannot be perjury. *People v. McDermott*, 8 Cal. 290.

41. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appealed from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People v. Wooster*, 16 Cal. 435.

See PERJURY.

10. *Rape.*

42. On a trial for rape, where the prosecutrix is the only witness, evidence that she had committed acts of lewdness with other men is admissible, as tending to disprove the allegation of force, and total absence of assent on her part. *People v. Benson*, 6 Cal. 222.

See RAPE.

11. *Trespass.*

43. The owner of property, in the possession of the same, has a right to use so much force as is necessary to prevent a forcible trespass. *People v. Payne*, 8 Cal. 343; *People v. Honshell*, 10 Cal. 87.

See TRESPASS.

## II. CRIMINAL LAW.

1. *Jurisdiction of the Courts.*a. *Supreme Court.*

44. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony. *People v. Applegate*, 5 Cal. 295; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

b. *Court of Sessions.*

45. The court of sessions has no appellate jurisdiction in criminal cases. In all cases where an appeal lies from a justice's court it must be taken to the county court. *People v. Fowler*, 9 Cal. 87.

c. *Justices' Courts.*

46. Those portions of the law which confer criminal jurisdiction upon justices' courts are in strict conformity with the constitution. *People v. Fowler*, 9 Cal. 87.

d. *Recorders' Courts.*

47. The recorder of the city of San Francisco has the right to award the punishment for the crime of assault and battery affixed by the statute of crimes and punishments of April 18th, 1850. *People v. Ah King*, 4 Cal. 307.

2. *Pleadings.*a. *Affidavit for Arrest.*

48. The preliminary evidence upon an application for a warrant of arrest may be either by the affidavit of some person cognizant of the facts, or by his examination under oath, taken by the officer to satisfy the person to whom the application is made that there is reason to believe that a crime has been committed, and the probability of suspecting the party against whom the warrant is issued. *People v. Smith*, 1 Cal. 11.

49. An affidavit may set forth in positive terms, as within the knowledge of deponent, the commission of the offense charged therein, and proceed upon information as to the names only of the persons who are guilty of the perpetration of them. *Ib.*

50. An affidavit, in pursuance of which a warrant is issued, is defective which contains allegations upon information merely; and if it states no facts within the knowledge of the affiant it can be of little weight in any legal proceeding. *Ib.*

See ARREST.

b. *The Indictment.*

51. The criminal code has abolished the subtle distinctions and nice technicalities usually observed in an indictment. *People v. Thompson*, 4 Cal. 240.

52. The insufficiency of an indictment must be taken advantage of by demurrer. *People v. Josephs*, 7 Cal. 130; *People v. Apple*, 7 Cal. 290.

53. The definition of a crime being given by the statute, an indictment charging the offense in the words of the statute, and fully complying with the criminal code,

gives the defendant all the information necessary to enable him to answer the charge. *People v. Parsons*, 6 Cal. 488.

See INDICTMENT.

### c. The Commitment.

54. If in pursuance of preliminary proof charging a particular offense a warrant be issued and the accused brought before a magistrate, and upon examination it be found that he has been guilty of some felonious act, though different from that charged, the examining officer should commit him for trial for that act. *People v. Smith*, 7 Cal. 11.

55. If an order of commitment be sufficient in substance it will be held good on habeas corpus, although it contain more than is necessary to be stated therein. The unnecessary matter will be regarded as surplusage. *Ib.*

56. On finding a commitment illegal, if it appear that the party is guilty of an offense, the court will not discharge him without allowing time for his arrest by proper authority. *Ex parte Crandall*, 2 Cal. 145.

See COMMITMENT.

### d. Presentment.

57. Where the allegations in the body of the presentment do not sustain the charge, and where the facts as detailed do not lead to the inference assumed, and it is not said that the defendant acted willfully and corruptly, it cannot be sustained. *People v. Purley*, 2 Cal. 566.

### e. Acquittal.

58. Where a defendant is convicted of a crime less than that set forth in the indictment, and obtains a new trial, that conviction can be pleaded in bar of a conviction for a greater offense at the second trial. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

See ACQUITTAL.

### 3. Statement on Appeal.

59. On a motion for a new trial in a criminal case, on the ground that the verdict is against the evidence, it is usual to set out in the statement on which the motion is made all the material portions of the testimony; and as a general rule, this court will not review on appeal an order refusing a new trial on that ground, unless such testimony is contained in the record. *People v. York*, 9 Cal. 422.

60. In criminal cases the prisoner, on motion for a new trial, may bring up any ruling of the court which denies him the benefit of a statutory privilege, as a right to a written charge to the jury. *People v. Ah Tong*, 12 Cal. 348.

61. In criminal cases, the statute requiring a statement or bill of exceptions to be made within ten days after trial is directory; and the defendant is not precluded of his rights by failure of the judge to settle or sign the statement within the time. *People v. Woppner*, 14 Cal. 437; *People v. Lee*, 14 Cal. 511.

See APPEAL, STATEMENT.

### 4. Trial.

62. Proof beyond a reasonable doubt is necessary to establish a fact against a prisoner; but preponderating proof, necessary to satisfy a jury of the fact, is sufficient to establish a fact in his favor. *People v. Milgate*, 5 Cal. 129.

63. A temporary suspension of the trial of a criminal case, to dispose of a motion in another cause, is not an error, or even an irregularity, where the prisoner's rights do not appear to have been injuriously affected. *People v. Lafuente*, 6 Cal. 202.

64. Where a defendant was indicted and convicted of murder, and on appeal a new trial was ordered, on the ground of objection to a juror; whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling the grand jury, and subsequently a new indictment was found by another grand jury, under which the prisoner was convicted: held, that the second trial and conviction did

## Trial.—Recognizance.

not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not jeopardized by the first trial, which had been held to be erroneous. *People v. March*, 6 Cal. 546.

65. Where an act is passed between the time of the commission of the act and the death of the victim, defining the offense and providing for its punishment, and providing that upon trials for crimes committed previous to its enactment the party shall be tried by the laws in force at the time of the commission of the crime, the prisoner must be tried under the law in force when the violation of the law was committed. *People v. Gill*, 6 Cal. 638; 7 Cal. 357.

66. A defendant in a joint indictment has the right to demand a separate trial, or to waive this right and be tried jointly. *People v. McCalla*, 8 Cal. 303.

67. Prosecuting attorneys should do their duty faithfully, but no more. They should never act as employed counsel, nor take advantage of temporary public excitement against the prisoner, or of any prejudice against him arising from any cause whatever. *People v. Butler*, 8 Cal. 440.

68. To justify an interference with the verdict of a jury in a criminal action, there must be an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor. *People v. Ah Hoy*, 10 Cal. 301.

69. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time. But in capital cases this should be done, if it all, only in very extraordinary and peculiar circumstances. *People v. Keenan*, 13 Cal. 584.

70. Where defendant is held to answer before the finding of the indictment, an objection to the mode of drawing the names of grand jurors must be taken on their being empaneled. *People v. Beatty*, 15 Cal. 571; *People v. Arnold*, 15 Cal. 479.

71. The statutory provision that exception to the grand jury must be made at a particular time is constitutional. The legislature have the right to prescribe rules of practice in criminal or civil cases; and among such rules are provisions as to the time and mode of excepting to irregulari-

ties of proceeding. *People v. Arnold*, 15 Cal. 479.

72. It is better for the court below to adhere strictly to the provisions of the statute in respect to the mode of trial in criminal cases, than risk a reversal of the judgment by a deviation from the specific modes of procedure prescribed, even when the deviation does not seem to it material. *Ib.*

73. It is irregular for one of the justices composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not present during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed, should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, not here decided; but the practice is dangerous and disapproved of. *People v. Eckert*, 16 Cal. 113.

### 5. Recognizance.

74. The respondents were bail in a recognizance conditioned for the appearance of M. to answer at court upon an indictment found against him on the nineteenth of April, 1852. M. appeared at the proper time, and moved to quash the indictment, which was granted. Another indictment was found at the same term of the court, upon which M. was called and made default. Suit was brought on the bail bond, and judgment rendered thereon: held, that the bail were not liable thereon, and relief was granted from the judgment. *People v. Lafarge*, 1 Cal. 133.

75. Where the defendants were sureties for the appearance of one H., charged with the crime of receiving two mules alleged to be stolen, and the indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the same crime mentioned in the recognizance. *People v. Hunter*, 10 Cal. 503.

See RECOGNIZANCE.



6. *Jury.*a. *Challenge.*

76. A prisoner in a criminal prosecution who has not exhausted his peremptory challenges, has the right to challenge peremptorily one of the jurors after the twelve are accepted, but before they are sworn. *People v. Kohle*, 4 Cal. 199.

77. For the purpose of asserting the innocence or maintaining the defense of the prisoner, there is no system under which it is absolutely necessary that the right of challenge should be exercised at any precise point of time before the jurors are sworn. *Ib.*

78. No regular panel of jurors having been drawn or summoned, the court ordered thirty-six jurors to be summoned, which was done, and twenty-seven of them appearing, the court caused their names to be placed in a box of which twelve were drawn to constitute a trial panel: held, not to be ground for challenge to the whole panel. *People v. Stuart*, 4 Cal. 225.

79. A challenge for cause is warranted where the juror on his voir dire states that it would require proof to change the opinion then existing in his mind. *People v. Gehr*, 8 Cal. 362.

See CHALLENGE.

b. *Instructions.*

80. In every criminal case the instructions given and refused should be so marked and signed by the judge, or they will not be considered on questions of error. *People v. Lockwood*, 6 Cal. 205.

81. In a criminal trial it is error for the court to charge the jury orally without the consent of the parties. *People v. Beeler*, 6 Cal. 247; *People v. Demint*, 8 Cal. 424; *People v. Ah Fong*, 12 Cal. 347.

82. On a trial for murder it is not error to instruct the jury, that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree under our statute, where the evidence was sufficient to warrant the jury in finding the fact that the killing was deliberate and premeditated. *People v. Moore*, 8 Cal. 93.

83. In criminal cases the principles of law invoked by the defendant should be stated to the jury in clear and explicit terms. *People v. Ramirez*, 13 Cal. 172.

84. In criminal cases it is fatal error to give oral instructions to the jury without consent of defendant, whether in the first instance or after the jury has returned into court for further instructions. *People v. Woppner*, 14 Cal. 437.

85. Whether an instruction giving the general rule—without the qualification—be proper or not, depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case. *People v. Arnold*, 15 Cal. 482.

86. It is not error in the court, in a criminal case, to charge the jury to give such weight to the defendant's confession as they deem it entitled to, "judging from the circumstances under which it was given, and the motives which would naturally actuate the party in giving it;" and that they might, in their discretion, believe a part and disbelieve another part of such confession. *People v. Wyman*, 15 Cal. 74.

See INSTRUCTIONS.

c. *Jurors.*

87. A juror is competent though he may have formed and expressed an opinion from reports, yet who thought he could sit on a jury without bias if evidence would change his opinion, and that he would be governed by the evidence adduced. *People v. McCauley*, 1 Cal. 384.

88. To exclude a juror on the ground of implied bias under the criminal code of this State, he must have formed or expressed an unqualified opinion or belief that the prisoner is guilty of the offense charged, and upon this question it is for the court to determine both the law and the fact. *Ib.*

89. On the trial of an indictment for grand larceny, punishable with imprisonment or death at the discretion of the jury, a juror was asked by the prosecuting attorney whether he had any conscientious scruples against the infliction of capital punishment, to which he answered that he would hang a man for murder but would not hang him for stealing: held, that the

## Jurors.—Absence of the Prisoner.—Continuance.

juror was incompetent. *People v. Tanner*, 2 Cal. 258.

90. If one or more jurors in a criminal trial separate without leave of the court, so that such juror might have been improperly influenced by others, the verdict will be set aside. *People v. Backus*, 5 Cal. 276.

91. The defendant in a criminal trial has the right to question a juror whether he has formed or expressed an opinion relative to the guilt or innocence of the accused without first challenging him for cause, and it is error to compel the prisoner so to do. *Ib.* 277.

92. In cases of grand larceny it was the intention of the legislature that the jury should assess the punishment when they thought that the defendant deserved the punishment of death, and if they do not agree to such a punishment, that they should find a general verdict. *People v. Littlefield*, 5 Cal. 356.

93. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion when expressed was unqualified: held, that he was properly challenged by the prisoner, and should have been rejected. *People v. Williams*, 6 Cal. 207; *People v. Cottle*, 6 Cal. 227.

94. The declaration of a juror before trial, that "the people ought to take the prisoner out of jail and hang him," renders him incompetent to try the case, and where a verdict of guilty has been found by such juror, the court should grant a new trial. *People v. Plummer*, 9 Cal. 312.

95. A verdict in a criminal case cannot be impeached by an affidavit of one of the jurors, tending to show that it was not a fair expression of the opinion of the jury. *People v. Wyman*, 15 Cal. 75.

96. In criminal cases jurors may be sworn in chief as they are accepted, or the administration of the oath may be delayed until the panel is completed. In either case the defendant must exercise his right of peremptory challenge before the juror is sworn. *People v. Reynolds*, 16 Cal. 130.

97. In criminal cases the test under our statute of the exclusion of a juror for implied bias is, that he has formed or expressed an unqualified opinion or belief in the guilt or innocence of the accused. To exclude the juror, he must have a settled

conviction of the guilt or innocence of the party, or must have expressed such conviction. *Ib.* 131.

See JUROR, JURY.

## 7. Absence of the Prisoner.

98. If the prisoner object that he was not present at the time of trial, or the rendition of the verdict, or the passage of the sentence, he must prove his absence. *People v. Stewart*, 4 Cal. 226.

99. The statute allows the plea of not guilty to be entered on the minutes of the court in the absence of a prisoner. *People v. Thompson*, 4 Cal. 240.

100. In cases of felony, the prisoner must be present during the whole of his trial, and where depositions are read to a jury during his absence, a new trial will be ordered. *People v. Kohler*, 5 Cal. 72.

101. If a defendant in a criminal action is out of the State a portion of the time, it must be so averred in the indictment. Prima facie, the lapse of time is a good defense; and where the statutory exception is relied on, it must be set up. *People v. Miller*, 12 Cal. 295.

## 8. Continuance.

102. Affidavits upon which a motion is founded to continue a criminal cause from one term to another, should show that the prisoner has used due diligence in endeavoring to procure the attendance of his witnesses, and in preparing for trial. *People v. Baker*, 1 Cal. 404.

103. The absence of counsel for the defense on account of sickness is a sufficient ground of continuance in a criminal case. *People v. Logan*, 4 Cal. 189.

104. At common law applications for continuances in criminal cases were addressed to the sound discretion of the court, and the refusal could not be assigned as error. This rule has been modified by our statutes, which authorizes us to review these orders upon appeal. *People v. Dias*, 6 Cal. 249.

105. In criminal cases on motion for continuance by defendant, on the ground of the absence of a material witness, based

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Change of Venue.—Character.—Accessory.—Accomplice.—Confession.

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on a sufficient affidavit, the agreement of the district attorney that the witness, if present, would have deposed as averred in defendant's affidavit, is not sufficient to warrant the overruling of the motion. *Ib.*

See CONTINUANCE.

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9. *Change of Venue.*

106. Affidavits on a motion to change the venue of a criminal action must state the facts and circumstances from which the conclusion is deducted, that a fair and impartial trial cannot be had in the county in which the indictment is found. *People v. McCauley*, 1 Cal. 383.

107. Upon an application in a criminal case to change the place of trial, on the ground that a fair and impartial trial cannot be had in the county where the prisoner was indicted, it is insufficient to state in the affidavit that a jury cannot be had in a certain portion of the county, who would give the prisoner a fair and impartial trial. *People v. Baker*, 1 Cal. 404.

108. Where one hundred citizens united in employing counsel to prosecute a defendant: held, to be a sufficient ground to change the venue. *People v. Lee*, 5 Cal. 354.

109. The supreme court have complete appellate power over the right to grant a change of venue; it is not to be supposed that it will trust implicitly in the discretion of inferior courts. *People v. Lee*, 5 Cal. 354; *People v. Fisher*, 6 Cal. 155.

110. It is not error in the court, on a trial for murder, to postpone the consideration of a motion on the part of the defendant, for a change of venue, until an attempt is made to empanel a jury. *People v. Plummer*, 9 Cal. 309.

See VENUE.

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10. *Character.*

111. Evidence of good character, as a defense in criminal cases, should be restricted to the trait of character which is in issue. *People v. Josephs*, 7 Cal. 130.

112. The answer of a witness that the prisoner was a gambler, cannot be considered as an injury to the prisoner, at a time when gambling was licensed by law. *People v. Butler*, 8 Cal. 440.

113. The reputation of the deceased cannot be given in evidence, unless, at the least, the circumstances of the case raise a doubt in regard to the question, whether the prisoner acted in self-defense. *People v. Murray*, 10 Cal. 310.

See CHARACTER.

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11. *Accessory.*

114. Under our statute, an accessory is treated as a principal, and as if the person charged as such had committed the offense, and both may be charged in the same indictment. *People v. Davidson*, 5 Cal. 134.

115. By statute the distinction existing at common law between principals of the first and second degree is abolished; and the distinction between them and accusations before the fact is also abolished, so far as possible. *People v. Cryder*, 6 Cal. 23; *People v. Bearss*, 10 Cal. 69.

See ACCESSORY.

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12. *Accomplice.*

116. Where an accomplice or defendant in a criminal action elects to be tried separately, he is a competent witness for the other defendants, charged with the same offense, the credibility of his testimony being left to the jury. *People v. Labra*, 5 Cal. 185.

See ACCOMPLICE.

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13. *Confession.*

117. Where the admission or confession of a party is resorted to as evidence, it is error to exclude any portion of it made at the same time as the part which is related. *People v. Navis*, 3 Cal. 106.

118. Confession of a defendant indicted for larceny, made to the prosecutor and owner of property stolen, upon inducements held out to him, that if defendant would disclose his confederates, he would use his influence to get defendant acquitted, are not admissible in evidence against him. *People v. Smith*, 15 Cal. 410.

119. Query. Whether there is any

## Malice.—Sentence.—Crops.

foundation for the distinction between confessions induced by persons who have no authority or control over the prisoner, and those induced by persons having such authority, as constables, prosecutors, and the like. *Ib.*

See CONFESSION.

## 14. Malice.

120. A homicide being admitted, the law raises the presumption of malice, which it is necessary for the prisoner to rebut by proof. *People v. Milgate*, 5 Cal. 129; *People v. March*, 6 Cal. 547.

See MALICE, MANSLAUGHTER, MURDER.

## 15. Sentence.

121. When judgment of death has been rendered against a prisoner by the court of first instance, it was reversed by the supreme court, as well on the ground that it has no jurisdiction to pass sentence of death, as that numerous errors and irregularities appeared to have occurred at the trial and in the proceedings. *People v. Daniels*, 1 Cal. 107.

122. It is no error for a court in a criminal case to set a day for pronouncing sentence in the absence of the prisoner. It is only requisite that he should be present when the sentence is pronounced. *People v. Galvin*, 9 Cal. 116.

123. After sentencing the prisoner, but before signing final judgment, the court had the prisoner brought before it and amended the sentence by shortening the time: it was held not to be error. *People v. Thompson*, 4 Cal. 240.

## CROPS.

1. If by the construction of a railroad through the enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included

in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75.

2. Growing crops are not goods or chattels, within the meaning of the statute of frauds, and will pass by deed or conveyance, from the very necessity of the case, as they are not susceptible of manual delivery until harvested and reduced to actual possession. *Bours v. Webster*, 6 Cal. 664.

3. The declarations of the master of a steamboat whilst running the steamer, respecting fire communicating from the chimney of the boat to the crops of grain on the banks of the river, by which the crop was consumed, are admissible to establish the liability of the owners on an action against them to recover damages for the destruction of the crop. *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 255.

4. Where B. put in a crop on land leased of D., the lease providing that D. was to have one-half the crop, after expenses paid, and subsequently D., by another contract, sold to B. all his right, title and interest in the crop, which was then growing: held, that the fact that D. was on the premises and occupied a house there, shows no possession of the crop as against B. under the contract. *Visher v. Webster*, 13 Cal. 61.

5. Action against a sheriff for seizing plaintiff's wheat as the property of one Andeque. Evidence tending to show that the wheat was grown on the land of plaintiff and in his possession; that A. was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that plaintiff was entitled to one-third by the contract between him and A.; that A. sold to plaintiff and delivered possession, and then abandoned the premises, plaintiff residing thereon. A. took no further control of premises or crops, and plaintiff assumed entire dominion over both: held, that plaintiff was not bound to abandon the premises, or carry the grain beyond them, to protect his title against creditors of A.; that there was no error in refusing to instruct the jury that there was no evidence that the sale from A. to plaintiff was accompanied by an immediate delivery of the property, and followed by an actual and continued change of possession thereof. *Pacheco v. Hunsacker*, 14 Cal. 124.



6. Hay cut on land in possession of B. lies in three fields, of about one hundred and fifty acres, in swaths, cocks, windrows and stacks. Plaintiffs mowed it, and boarded with B. B. mortgages the hay to plaintiffs for work, and they cease to board with B., whose dwelling is separated from these fields by a fence. Plaintiffs proceed to gather and stack the hay, until the levy of an execution on it eight days afterwards, by defendant, as B.'s property: held, that even conceding removal from the premises to be essential to a complete delivery of the hay, still plaintiffs were entitled to reasonable time to do it; and that the court erred in assuming as matter of law that eight days were too long. *Chaffin v. Doub*, 14 Cal. 386.

7. The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is prima facie proof of negligence, sufficient to go to the jury. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

8. Valuable and permanent improvements, such as houses, orchards, vineyards, etc., should undoubtedly be protected, as also growing crops of every description; for these are as useful and necessary as the gold produced by the working of the mines. *Smith v. Doe*, 15 Cal. 100; *Gillan v. Hutchinson*, 16 Cal. 156.

9. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off of the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by the plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled, and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weight. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled up in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked the defendant whether he would take the surplus. Defendant said he would be over soon, and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nine-

teen dollars, balance due on the hay. The court instructed the jury, that if they believed from the evidence it was the understanding of the parties, that upon the payment of the two hundred dollars by defendant, the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by the defendant was mixed with other hay belonging to plaintiff made no difference, if defendant agreed to accept it in that condition, and to consider it as delivered—the contract for delivery would be fully executed. *Smith v. Friend*, 15 Cal. 126.

10. On the above facts, defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights, and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused: held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for defendant. *Ib.*

11. A landlord has no right to enter for a breach of covenant in the lease, and forcibly eject the tenant, the lease reserving no right of entry for such breach. If the landlord does so enter and eject the tenant, the tenant may recover damages for the vegetables and grape vines growing on the land, and planted by the tenant, for sale, he not being permitted to enter and gather them. *Fox v. Brissac*, 15 Cal. 226.

12. The act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right of entry upon the mineral lands of this State in cases where no such right existed anterior to its passage, is invalid. *Gillan v. Hutchinson*, 16 Cal. 155.



## CRUELTY.

1. We construe the expression "extreme cruelty," as used in our statute, to mean the same thing as the *sævitia* or cruelty of the English ecclesiastical court; and the offense may be defined, in general terms, to be any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other. *Morris v. Morris*, 14 Cal. 79.

2. Courts grant divorces in cases of cruelty, not to punish an offense already committed, but to relieve the complaining party of apprehended danger. And the divorce may follow even in the absence of any actual violence. *Ib.*

3. If there has been actual violence, it must be attended with danger to life, limb or health, or be such as to cause reasonable apprehension of future danger. *Ib.* 80.

4. Divorce for extreme cruelty is not generally granted when such cruelty is caused by the misconduct of the wife who applies. *Johnson v. Johnson*, 14 Cal. 460.

5. A wife divorced from her husband for extreme cruelty on his part, is entitled to the custody of their female child of tender years—the wife being blameless. The father has a right to see the child at all convenient times. *Wand v. Wand*, 14 Cal. 514.

## CUSTOM.

1. Custom is sometimes allowed not only to control, limit, modify and interpret the general rules of law, but even to establish a rule in direct and palpable contravention of the positive written law. *Von Schmidt v. Huntington*, 1 Cal. 64; *Tevis v. Pitcher*, 10 Cal. 477.

2. Custom and usage, when once settled, are equivalent to law, though they may be comparatively of recent date. *Reynolds v. West*, 1 Cal. 326.

3. Whether such custom existed or not, when a custom is about to be proven, is a question for the jury to decide. *Panaud v. Jones*, 1 Cal. 500.

4. Evidence may be offered to prove a custom that only two witnesses were necessary to the validity of a will. *Ib.*

5. Actual possession of a portion of a mining claim, according to the custom of miners in a given locality on the Yuba river, extends, by construction, to the limits of the claim held in accordance with such custom. *Hicks v. Bell*, 3 Cal. 224.

6. Checks payable at sight and bills of exchange are on the same footing, excepting the differences which may arise from the custom of merchants. *Minturn v. Fisher*, 4 Cal. 36.

7. The custom of merchants is not admissible in evidence to vary the plain meaning of a written contract. *Corwin v. Patch*, 4 Cal. 204.

8. By the customs of California under the Mexican rule, which have the force of law, two witnesses were sufficient to a will. *Castro v. Castro*, 6 Cal. 160; *Tevis v. Pitcher*, 10 Cal. 477.

9. The condition of California, its illiterate population, together with the fact that there were no escribanos or judges of the first instance residing in San Francisco, warrants the presumption that the law relative to conveyance never was regarded as authoritative, and that evidence of a custom of conveyance existing for many years, by which these requisitions of the law seem to be disregarded, is admissible. *Hayes v. Bona*, 7 Cal. 159.

10. Contracts for the sale of land, by the custom of the country, were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer and the price paid. *Hayes v. Bona*, 7 Cal. 159; *Stafford v. Lick*, 10 Cal. 17.

11. Parol evidence is admissible to prove that it is the custom of a mining locality to run boundary lines by the magnetic meridian, and that was the understanding of the parties. *Jenny Lind Co. v. Bowers*, 11 Cal. 198.

12. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring v. Crow*, 11 Cal. 372.

## Custom.—Damages in general.—For Breach of Contract.

13. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country "to permit domestic animals to roam at large upon the unenclosed commons," where the defense is negligence on the part of the plaintiff in thus allowing the horse to run at large. *Waters v. Moss*, 12 Cal. 538.

14. If by law, or usage having the force of law, a California grant was matter of record, then it would seem to follow that the record is proof of the grant, especially where, as in this case, the record is itself an exemplification of the grant, and contemporaneously signed by the same officers issuing the grant. *Gregory v. McPherson*, 13 Cal. 573.

15. Where the only question of fact in the case was whether the quartz rock—parted or not from its original connection—was a portion of the same quartz lode or claim taken up by defendant, it was not important whether the rock was upon or beneath the surface, or what its condition, provided it were a part of such lode or claim; and the custom of miners is entitled to great, if not controlling weight. *Brown v. '49 and '56 Quartz Mining Co.*, 15 Cal. 161.

16. Under certain circumstances, proof of the custom in other districts may be proper—at least, this court is not satisfied to the contrary. But in this case the admission of such testimony, if error, was immaterial, as the case was tried by the court, and the judgment placed on independent ground, upon which it can stand. *Ib.*

## DAMAGES.

- I. In general.
- II. For Breach of Contract.
  - a. Against Common Carriers.
- III. In Ejectment for Use and Occupation.
- IV. In Trespass.
- V. In Tort.
- VI. In Forcible Entry and Detainer.
- VII. In Collision.
- VIII. In Slander.
- IX. In Malicious Prosecution.
- X. Breach of Statutory Requirements.
- XI. Against Officers.

1. The Sheriff.
2. County Clerk.
3. Notary Public.

XII. Upon a Statutory Undertaking.

XIII. Damages as Costs.

1. For a Frivolous Appeal.

XIV. Nominal Damages.

XV. Remote and Contingent Damages.

XVI. Excessive Damages.

XVII. Interest as Damages.

XVIII. Apportionment of Damages.

## I. IN GENERAL.

1. Where there is proof of damages, the amount is simply within the province of the jury. The appellate court will not undertake to examine the proofs, or declare that the evidence was insufficient to justify the verdict. *Bartlett v. Hogden*, 3 Cal. 58; *Drake v. Palmer*, 4 Cal. 11.

## II. FOR BREACH OF CONTRACT.

2. Damages on the resale of an article not delivered according to contract do not legally result from the breach of the contract, and if not specially alleged in the pleading cannot be allowed. *Cole v. Swanton*, 1 Cal. 54.

3. Loss of time, value of services, and wages of employees, caused by the failure of a party to perform his contract, are not remote, but strictly proximate and immediate damages, and ought to be allowed. *Kenyon v. Goodall*, 3 Cal. 259.

4. A copartnership contract contained a covenant also for damages: it was held, that one partner could not sue the other for the damages without seeking an account and dissolution. *Stone v. Fouse*, 3 Cal. 294.

5. If damages accrue in an action on the dissolution of a partnership, they can be settled by the court if liquidated, and if not, an issue can be framed to have them ascertained. *Ib.*

6. A contract contained a covenant for stipulated damages, and by the same contract the parties were made partners: it was held, that in an action on said contract the legal demand for damages could be joined with the equitable demand for a dissolution. *Ib.*

## For Breach of Contract.

7. In a suit for damages for the failure of the defendants to deliver goods according to contract, the true rule of damages is the difference between the price agreed upon between the parties and the market value of the goods at the time of the breach of the contract. *Tobin v. Post*, 3 Cal. 375; *Haskell v. McHenry*, 4 Cal. 111; *Crosby v. Watkins*, 12 Cal. 88.

8. The measure of damages in an action on a breach of contract is the actual loss sustained; but where, from the nature of the contract, no possible mode is left to ascertain the damages, the only measure which remains is the price agreed to be paid. *Baldwin v. Bennett*, 4 Cal. 393; *Coffee v. Meiggs*, 9 Cal. 364.

9. The second of a foreign bill of exchange drawn here, payable at sight, was presented to the drawee, and payment being refused, it was duly protested; afterwards and before suit was brought the first of exchange was paid to the holder, with interest and cost of protest: held, that the drawer was released from the payment of damages for the dishonor of the second of exchange. *Page v. Warner*, 4 Cal. 396.

10. Where a check had been lost, and paid by a banker on forged endorsement: held, that on a refusal of the banker to deliver the check to the owner or pay the same, the damages is the full value of the amount for which it was drawn. *Survey v. Wells*, 5 Cal. 126.

11. The theory of the law is not that the party recovers the particular note or chose in action, as is commonly imagined, but that he recovers damages for the non-performance of the contract; and in case of failure to pay money due, the true damages is the amount of money owing and the interest which was agreed upon. *Guy v. Franklin*, 5 Cal. 417.

12. In an action for breach of contract and for hindering the plaintiff from completing his part thereof, the true measure of damages is the value of the labor performed by plaintiff, and the profit he could fairly have derived from the labor he was prevented from performing. *Cunningham v. Dorsey*, 6 Cal. 20.

13. In an action on a guarantee, though it is error in terms to charge the jury, if they find for plaintiff, to assess as damages the amount of the penalty fixed in the guarantee; yet, if the plaintiff's damages, if any, must exceed the penalty, the

direction must be regarded as limiting the verdict, and the defendant is not injured by the instruction. *Jones v. Post*, 6 Cal. 105.

14. Where the sum of \$15,000 was paid by the plaintiff as the consideration for a contract not to run a steamer, and the same amount was agreed to be paid back by him on failure to keep the contract: held, that the sum thus agreed to be paid was intended by the parties as liquidated damages. *California Steam Nav. Co. v. Wright*, 6 Cal. 262; *Fisk v. Fowler*, 10 Cal. 517.

15. The rule is, that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion. When the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion or at any time afterwards. *Douglass v. Kraft*, 9 Cal. 563.

16. Where A agreed with his tenant, who was occupying a wooden building, that if he would give up his lease, A would erect a brick building to cover such portion of the lot as would be satisfactory to the tenant, and would give him possession within three weeks, and a lease of the premises for six months, with the privilege of twelve months, or on failure so to do, would pay the tenant five hundred dollars damages: held, as breach of the contract on the part of A, that the sum named was a penalty, and not liquidated damages. *Nash v. Hermosilla*, 9 Cal. 588.

17. The measure of damages for non-delivery of fruit would be the highest market value of the fruit on the trees at the orchard as contracted for, if there was any market value for it there, and as it was; if not, then if the plaintiffs were prepared to gather it and carry it to the market, the market value there, less the cost of gathering and carriage, would be the criterion of recovery. *Dabovich v. Emeric*, 12 Cal. 181.

18. Where A contracts with a telegraph company to transmit a telegraphic dispatch to have his agent to secure a debt due him from a third party by attachment, and this service is so negligently performed that other creditors of the common debtor obtain the first attachment, and exhaust the assets of the debtor, which would not have been the case had the telegraph company performed its contract

## For Breach of Contract.—Against Common Carriers.

within a reasonable time, the company is liable, not only for the cost of the dispatch, but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. *Parks v. Alta California Telegraph Co.*, 13 Cal. 426.

19. Where damages resulting from a breach of an agreement are susceptible of precise admeasurement, equity will not take jurisdiction unless there are some peculiar equitable circumstances. *White v. Fratt*, 13 Cal. 524.

20. If a man sells his property or contracts with another, on good consideration, that the latter shall pay his debt, for a breach of the obligation the measure of damages would be the amount. *Ib.*

21. In an action for damages for violation of a contract to grind wheat and deliver the flour on demand, upon payment of the price agreed on for grinding, tender of the price is necessary to maintain the action. *Vance v. Dingley*, 14 Cal. 53.

22. B. & D. contracted to furnish G. & S., also defendants, twenty-five thousand gallons turpentine, to be distilled by the latter. The contract was to end April 1st, 1857. B. & D. were not bound to deliver all the turpentine at once, nor any given quantity per day. Damages for nondelivery of turpentine fixed at \$3,750, or fifteen cents per gallon. For accident to the distillery, reasonable time to be allowed G. & S. for repairs. Distillery burned last of January, 1857, requiring eighteen days to rebuild. In January and March, 1857, G. & S. respectively assigned their interest in the contract to plaintiff: held, that the benefit of the suspension of the works by the fire inured to B. & D. as well as G. & S.; that the time of performance of the contract was extended for the eighteen days; that up to April 18th, 1857, G. & S. would be bound to receive turpentine, and even if the assignment before this time did not put it out of their power to comply with their contract, at least the assignee could not sue before the expiration of the extended time. *Jackson v. Beers*, 14 Cal. 191.

23. Nominal damages are presumed to follow as a conclusion of law from proof of the breach of a contract. *Browner v. Davis*, 15 Cal. 11.

24. Plaintiff entered into a contract

with defendants by which the latter purchased of the former certain ditches for \$14,500, payable \$5,000 cash, and \$12,000 as follows: to wit: The expenses of keeping said ditches in good order, of employing agents to attend to the same, being first deducted from the proceeds of the sale of water, the balance was to be applied to liquidation of the said \$12,000, until the whole was paid, "and to hasten and make certain the timely and early payment of said sum of money by the sales as aforesaid, said company promise to furnish from their ditch, to be used in the above named ditches, so much water, which added to the water supplied to said ditches from their other sources, shall be sufficient to effect sales to the amount of \$1,000 per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen interest at the rate of ten per cent. per annum on the said monthly deficiency, until met by receipts from sales over and above the said \$1,000 per month:" held, that this contract is not an agreement on the part of defendants to pay the balance over the \$2,000 only from the proceeds of the ditches named therein, but that it is a guarantee on their part that the mode of payment prescribed shall be effectual to pay the debt within a given time. The last clause in the contract does not give defendants a right to refuse to supply this water, but simply provides a measure of damages for the breach of it. *Blen v. Bear River and Auburn W. and M. Co.*, 15 Cal. 99.

25. Where a contract from its terms is incapable of apportionment, the measure of damages in such cases is the sum fixed by the contract itself. *People v. Brooks*, 16 Cal. 38.

#### a. Against Common Carriers.

26. In an action against a common carrier, the rule of damages is the value of the goods at the port of delivery, and not the invoice price or the value at the port of shipment. *Ringgold v. Haven*, 1 Cal. 118; *Hart v. Spalding*, 1 Cal. 214.

27. Evidence showing that the plaintiff was a good bookkeeper was proper to be submitted to the jury to enable them to



## Against Common Carriers.—In Ejectment for Use and Occupation.

form an estimate of the damages which the plaintiff had probably sustained, and they should consider the probabilities of his procuring a situation and his retaining it. *Yonge v. Pacific Mail Steamship Co.*, 1 Cal. 354.

28. Where an action is brought for damages against a common carrier for the nonperformance of his contract to convey plaintiff's servant, the plaintiff must show that he is entitled to a claim for his services. *Ib.*

29. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. *Ib.*

30. Where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit—as to run a railroad there in the pursuit of a business which involves constant risk and danger—he is bound in the exercise of such rights to use extraordinary care. In this a private railroad differs from a public one. *Wilson v. Cunningham*, 3 Cal. 243.

31. In an action against a ferryman to recover for injuries sustained in driving off from his boat, it is not incumbent on the plaintiff to prove that he exercised ordinary care to avoid the injury, but the proof of the want of such care on the part of the plaintiff lies on the defendant. *May v. Hanson*, 5 Cal. 365.

32. In an action for damages brought by a passenger against a stage company for injuries to plaintiff caused by the carelessness of the driver in overturning the coach: held, that the fact that the driver was informed before the accident that a passenger was to be left at plaintiff's destination, and that after the accident the agent of defendant informed the driver that plaintiff was to stop there, was sufficient to establish prima facie the allegation in the complaint of a contract safely to carry, etc. *Thorne v. Cal. Stage Co.*, 6 Cal. 233.

33. When it appears that the coach was driven by the agent of the owner, the rule is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120.

34. Common carriers using steam must provide all reasonable precaution to protect the property of others, and they must

also be properly used. Carelessness in either particular, resulting to the injury of an innocent party, will make the company liable. They are bound to temper their care according to the circumstances of the danger. *Gerke v. Cal. Steam Nav. Co.*, 9 Cal. 256.

35. In actions against common carriers, damages for pain are recoverable. *Fairchild v. Cal. Stage Co.*, 13 Cal. 601.

36. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed among other things to find specially as to the negligence of the captain or crew of the steamer, and they found generally for plaintiff four hundred dollars damages, and also that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good in the absence of any objection at the time of its rendition that it was not responsive to the special direction. *Algier v. Steamer Maria*, 14 Cal. 170.

37. The fact that fire was communicated from the engine of defendants' cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is prima facie evidence of negligence, sufficient to go to the jury. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

### III. IN EJECTMENT FOR USE AND OCCUPATION.

38. Under our code plaintiff may recover real property, and damages for withholding it, and rents and profits all in one action. *Sullivan v. Davis*, 4 Cal. 292.

39. A claim for possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike & Plank Road Co.*, 5 Cal. 225.

40. In an action of ejectment where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on his property. *Ford v. Holton*, 5 Cal. 321.



## In Ejectment for Use and Occupation.—In Trespass.

41. When the prayer for damages for more than two hundred dollars is inserted in a complaint in a justice's court, in an action for the recovery of possession of a mining claim, it should be disregarded or stricken out, and the plaintiff allowed to try his right to the claim. *Van Etten v. Jilson*, 6 Cal. 19; *Grass Valley Q. M. Co. v. Stackhouse*, 6 Cal. 414.

42. Where the defendant in ejectment occupied and improved the land bona fide under color of title, the improvements erected by him constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 511.

43. Where claimants to land had prior to the issuance of a patent published a notice that they had become the owners of the grant, specifying its boundaries and warning off trespassers, it might possibly operate as a protection against any demand for damages until the approved survey was made. *Moore v. Wilkinson*, 13 Cal. 489.

44. Where in ejectment against several defendants the judgment for damages is several instead of joint, the damages may be remitted and the judgment for the land stand. *Curtis v. Herrick*, 14 Cal. 120.

45. In ejectment the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 466.

46. Damages which a plaintiff can recover in an action of ejectment for the use and occupation of the premises are such as arise subsequent to the accruing of his right of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Yount v. Howell*, 14 Cal. 468; *Clark v. Boyreau*, 14 Cal. 637.

47. Where the complaint in ejectment avers the ownership and right of plaintiff, and the possession and withholding by defendant in general terms, without stating any time when plaintiff's title accrued or existed, and without making any allegation as to damages for rents and profits, but simply praying judgment therefor in a given sum, and the complaint is demurred to as not stating facts sufficient, and a gen-

eral judgment for possession and \$2,250 damages is given: held, that damages cannot be recovered for any period preceding the commencement of the action; but that this point, to wit: that the complaint does not support the judgment for damages, cannot be raised for the first time, on petition, for rehearing in the supreme court—the defendant on the first hearing in this court having put his objection to the general judgment for damages on the ground of error in the charge of the court below to the jury, and of error in the admission of evidence as to the rents and profits, the point of his objection being that a recovery for rents and profits beyond three years was barred by the statute, and this court having decided against him because the point was not properly made by the record. *Payne v. Treadwell*, 16 Cal. 248.

48. In this case the judgment for damages must stand, as this court has no means of determining the manner in which the damages were made up by the jury, or whether any damages for the period preceding the commencement of the action were found. *Ib.*

49. Where damages are claimed for use and occupation prior to the commencement of the action, the complaint must state the title of plaintiff as existing at some prior date (to be designated) and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title. *Ib.*

50. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment being for possession and damages was affirmed in the supreme court upon respondents remitting the damages and paying costs of appeal. *Doll v. Feller*, 16 Cal. 434.

## IV. IN TRESPASS.

51. An action cannot be commenced against A to recover damages for a trespass to real estate committed by B. *Stevenson v. Lick*, 1 Cal. 129.

52. A municipal corporation is not liable in damages for the destruction of a building in pursuance of the directions of its officers, as in the case of a conflagration, where no statute exists creating such lia-

## In Trespass.

bility. *Dunbar v. City of San Francisco*, 1 Cal. 356.

53. In a complaint for trespass the plaintiff claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages; defendant demurred on the ground that two causes of action were improperly joined, and the court below sustained the demurrer. *Tendesen v. Marshall*, 3 Cal. 440.

54. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention, when the amount involved is over two hundred dollars. *Van Etten v. Jilson*, 6 Cal. 19.

55. In an action to abate a nuisance, damages are only an incident to an action, and the failure to recover two hundred dollars does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102.

56. In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them, considering the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Chipman v. Hibberd*, 6 Cal. 162.

57. Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession, who had filed his claim to the damages. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 640.

58. Where parties have located mining claims upon the bank of a creek or stream, and are using the bed of said stream for the purpose of working their claims, any subsequent erection, dam or embankment, which will turn the water back upon said claims, or hinder them from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said parties, and they are entitled to recover for the damages consequent on such obstruction. *Sims v. Smith*, 7 Cal. 150.

59. A writ of injunction will lie to restrain trespass or entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more

with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy for damages at law. *Merced Mining Co. v. Fremont*, 7 Cal. 327.

60. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek a dam or embankment of certain specified dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embankment was completed it was broken by a sudden freshet and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiff having brought suit to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable. *Boswell v. Laird*, 8 Cal. 489.

61. In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owens*, 11 Cal. 24.

62. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners of the ditch was taken by plaintiff, and subsequently and before the trial the witness conveyed, by deed, his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball v. Gearheart*, 12 Cal. 47.

63. In an action for injuries to a mining claim, a claim for damages to the plaintiff by the reason of the breaking away of the defendant's dam, and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears' Union Water Co.*, 12 Cal. 557.

64. The want of reasonable care on the part of another, who is injured by the

## In Trespass.—In Tort.

breaking of a dam, cannot be set up in defense to an action for damages for injuries thus suffered. *Ib.* 559.

65. In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald v. Bear River and Auburn Water & M. Co.*, 13 Cal. 230.

66. Action for damages against defendants, averring that they, "with force and arms, broke and entered upon the premises of plaintiff and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water:" held, that under our system of pleadings, the words "with force and arms broke and entered" do not confine the proof to the direct and immediate damage as in the old action of trespass; that the facts being clearly set out in the complaint, the addition of these words was surplusage. *Darst v. Rush*, 14 Cal. 84.

67. In an action for damages against a constable for illegal seizure of plaintiff's property, the judgment was for six hundred and fifty dollars, the sum claimed in the complaint, the value of the property being therein fixed at four hundred and fifty dollars and the damages at two hundred dollars. The court found the damages at six hundred and fifty dollars. There was no statement on new trial or appeal: held, that the finding of the court is conclusive, and that the judgment must stand. *Van Pelt v. Littler*, 14 Cal. 201.

68. In actions for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property with interest. *Dorsey v. Manlove*, 14 Cal. 555.

69. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. *Ib.*

70. In such actions the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass—as fraud, malice or oppression. *Ib.* 556.

71. Where the trespass is committed from wanton or malicious motives or a reckless disregard of the rights of others,

or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. *Ib.* 558.

72. The rule of compensation, as distinguished from the rule of exemplary damages, applies even though the writ under which the officer committed the trespass was void—there being no circumstances of aggravation. *Ib.*

73. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment, and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed so as to be res judicata in a subsequent suit. *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 149.

74. In such action for damages no issue could be taken upon the averment as to the particular quantity of water diverted. *Ib.*

75. In an action against a water company incorporated under the laws of this State for overflowing plaintiff's claim, the fact that plaintiffs could have prevented the damage by pulling off a board from defendant's flume, and permitting the water to discharge above plaintiff's claim, is no defense, because they were not obliged to avoid the injuries complained of by committing a trespass. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

## V. IN TORT.

76. Where the master ejects the servant from his premises, the latter refusing to leave after being discharged and notified, the former should use no more force than is actually necessary to accomplish the object, in which case only nominal damages can be recovered. *De Briar v. Minturn*, 1 Cal. 450.

77. Vindictive damages may be given in a civil action for a personal injury, though the act be punishable by a criminal prosecution. *Wilson v. Middleton*, 2 Cal. 56.

## In Forcible Entry and Detainer.—In Collision.—In Slander.

78. If the mortgagee acts in bad faith towards the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Benham v. Rowe*, 2 Cal. 408.

79. A claim for damages for a personal tort cannot be united with a demand properly cognizable in a court of equity in the same action. *Mayo v. Madden*, 4 Cal. 28.

80. Intoxication of the plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street. *Robinson v. Pioche*, 5 Cal. 461.

81. A master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and if he fails so to do, he will be held responsible for damages. *Hallower v. Henley*, 6 Cal. 210.

## VI. IN FORCIBLE ENTRY AND DETAINER.

82. A entered upon unoccupied land, marked it out so that its boundaries might be easily traced, and commenced to build a house upon it, when he was ousted by B: held, that in an action of forcible entry and detainer, A could recover the land from B, but without a fine or treble damages. *Stark v. Barnes*, 4 Cal. 412.

83. When treble damages are given by a statute the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute. *Chipman v. Emeric*, 5 Cal. 240.

84. The complaint in an action for forcible entry and detainer need not pray for treble damages to warrant the court in trebling them. *O'Callaghan v. Booth*, 6 Cal. 66; *Hart v. Moon*, 6 Cal. 162.

85. In forcible entry and detainer tried in the county court on appeal from a justice's court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the supreme court for mandamus to compel the court below to render judgment for treble damages: held, that the

application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 150.

## VII. IN COLLISION.

86. An action to recover damages for collision cannot be sustained where the injury complained of has resulted from the negligence of both parties. *Kelly v. Cunningham*, 1 Cal. 366.

87. A vessel in the harbor of San Francisco, moored on the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or it cannot recover damages for any injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. *Innis v. Steamer Senator*, 1 Cal. 459.

88. In an action to recover damages for collision, there being no indebtedness arising upon contract, an attachment cannot issue. *Griswold v. Sharpe*, 2 Cal. 24.

89. Where a vessel is properly in charge of a licensed pilot, the owner is not liable for damages which may ensue from the negligence or misconduct of the pilot; but the owner is not exempt from liability for injuries committed by taking an improper berth in the harbor, although it may have been selected by the pilot. *Ib.*

90. Plaintiff claimed damages for injuries done to himself, his horse and wagon, in a collision with the railroad cars, charging the defendant with negligence: held, that where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care. *Wilson v. Cunningham*, 3 Cal. 243.

## VIII. IN SLANDER.

91. In an action for slander, where



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In Malicious Prosecution.—Against Officers.—Upon an Undertaking.

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words are charged to have been spoken of and concerning a defendant as a clerk or tradesman, which it is alleged is his profession, it is unnecessary to allege special damages. *Butler v. Howe*, 7 Cal. 89.

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IX. IN MALICIOUS PROSECUTION.

92. In an action for a malicious prosecution, wherein an attachment was issued, the jury gave \$15,000 damages, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the court could not disturb the verdict, unless it clearly appear that injustice has been done. *Weaver v. Page*, 6 Cal. 685.

93. Malice cannot be presumed in a prosecution where the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law; and the plaintiff is only entitled to the damage which he actually sustained. *Sears v. Hathaway*, 12 Cal. 279.

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X. BREACH OF STATUTORY REQUIREMENT.

94. Where a statute required the owners or consignees of a vessel entering the harbor to give a several bond to the State, in a penalty of two hundred dollars, for every passenger and member of the crew aboard, but no penalty was given by the statute for a neglect to give the bond, the action must be brought to recover such damages as the plaintiffs can show they have actually sustained by reason of a refusal to give such bond. *Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 198.

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XI. AGAINST OFFICERS.

1. *The Sheriff.*

95. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits

should have been brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 9 Cal. 642.

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2. *County Clerk.*

96. For all damages resulting from a refusal of a clerk of the district court to issue an execution, the plaintiff has in ordinary course of law a plain and adequate remedy by an action on the bond of the officer, and it is well settled that the writ of mandate will not issue in such cases. *Goodwin v. Glazer*, 10 Cal. 333.

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3. *Notary Public.*

97. Where a notary public, in taking and certifying an acknowledgment to a mortgage, neglected to make a proper certificate: held, that such notary was guilty of gross and culpable negligence, and is responsible to the party injured for the damages resulting from such negligence. *Fogarty v. Finlay*, 10 Cal. 246.

98. Where a mortgaged debt has been lost by gross negligence of the notary, the measure of the damages is the amount of the debt and interest to be secured by the mortgage. *Ib.*

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XII. UPON A STATUTORY UNDERTAKING.

99. Where real property is attached and the possession of the owner not disturbed, it is difficult to say how any more than nominal damages can be recovered for the injury caused by the attachment. *Heath v. Lent*, 1 Cal. 411.

100. Damages caused by the depreciation of real estate under an attachment, and the injury caused to the credit and reputation of the defendant by reason of the attachment, are too remote to submit to the consideration of a jury in an action on the undertaking on attachment. *Ib.*

101. The court may order a reference to ascertain the damages sustained by an injunction issued without cause. *Russell v. Elliott*, 2 Cal. 246.



Upon an Undertaking.—As costs.—Nominal Damages.

102. If an attachment bond is void, the obligee cannot sue on the bond for damages sustained by the attachment. *Benedict v. Bray*, 2 Cal. 255.

103. Generally, the recovery of counsel fees as part of the damages is not allowed—as where the loss is consequential; but where the loss is direct—as in the case of an improper commencement and prosecution of a writ or other process in a suit, it should be allowed. *Ah Thae v. Quan Wan*, 3 Cal. 217; overruling *Heath v. Lent*, 1 Cal. 412.

104. In an action upon an injunction bond to recover damages for the wrongful issuing of the writ, the amount paid as counsel fees to procure the dissolution of the injunction is properly allowable as part of the damages. *Ah Thae v. Quan Wan*, 3 Cal. 218; *Summers v. Farish*, 10 Cal. 353; *Heyman v. Landers*, 12 Cal. 111; overruling *Heath v. Lent*, 1 Cal. 412.

105. In an action on an injunction bond the judgment of dissolution is conclusive, and the only question is the amount of damages sustained. *Gelston v. Whitesides*, 3 Cal. 311.

106. In an action for damages on an injunction bond, the defendants can plead that the business which they enjoined was a public nuisance. *Cunningham v. Breed*, 4 Cal. 385.

107. Where a plaintiff in replevin gives the statutory undertaking and takes possession of the property in suit, and is afterwards nonsuited and judgment entered against him for the return of the property and for costs: held, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 8 Cal. 448.

108. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Hunt v. Robinson*, 15 Cal. 277.

109. In an action on an injunction bond, no demand for payment of unliquidated damages need be made on the parties for whom the sureties stipulated. *Browner v. Davis*, 15 Cal. 11.

### XIII. DAMAGES AS COSTS.

110. In an action for damages where the jury found a verdict for plaintiff for fifty dollars and costs: held, that judgment could not be entered for costs in favor of plaintiff. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

111. Costs are incident to the judgment and cannot be given by the jury by way of damages. *Ib.*

112. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under a judgment. *McMillan v. Vischer*, 14 Cal. 241.

#### a. For a frivolous appeal.

113. Where the record discloses on the part of the appellant facts to satisfy the court that the appeal was taken merely for delay, damages were awarded on dismissing the appeal: (a.) In five per cent. *Pinkham v. Wemple*, 12 Cal. 449. (b.) In ten per cent. *Buckley v. Morse*, 2 Cal. 149; *Pacheco v. Bernal*, 2 Cal. 150; *Russell v. Williams*, 2 Cal. 158; *Bates v. Vischer*, 2 Cal. 357; *Taylor v. McKinley*, 3 Cal. 104; *Bliss v. Wyman*, 7 Cal. 258; *Winans v. Hardenburgh*, 8 Cal. 293; *Harvey v. Fisk*, 9 Cal. 94; *McCann v. Lewis*, 9 Cal. 247; *Primm v. Gray*, 10 Cal. 523; *Heston v. Martin*, 11 Cal. 42; *Hutchinson v. Ryan*, 11 Cal. 142; *Haswell v. Parsons*, 15 Cal. 267. (c.) In fifteen per cent. *Reyes v. Sandford*, 5 Cal. 117; *Parke v. Williams*, 7 Cal. 250; *Dewitt v. Porter*, 13 Cal. 172. (d.) In twenty per cent. *Nickerson v. Cal. Stage Co.*, 10 Cal. 522.

### XIV. NOMINAL DAMAGES.

114. Where property, the subject of the suit, is delivered and accepted pending the suit, before verdict, the damages should be merely nominal. *Conroy v. Flint*, 5 Cal. 328.

## Nominal Damages.—Excessive Damages.—Interest as Damages.

115. Where property is sued for and plaintiff accepts the goods, he has made his election to take the goods in lieu of their value, and he can only recover the interest upon their highest value at any time between detention and delivery, except where some special damage is specifically averred in the declaration. *Ib.* 329.

116. Damages which are professedly laid for the benefit of the public cannot be recovered in an action brought by a passenger of a stage coach against the owners thereof for injuries sustained by reason of the upsetting of the coach. *Wardrobe v. Cal. Stage Co.*, 7 Cal. 120.

117. In cases of simple negligence, the rule governing the measure of damages is to allow the actual damages and not smart money. *Moody v. McDonald*, 4 Cal. 299.

118. The only damage the law allows for the detention of money under its process is the legal interest. *Heyman v. Landers*, 12 Cal. 111.

119. Nominal damages are presumed to follow as a conclusion of law from proof of the breach of a contract. *Browner v. Davis*, 15 Cal. 11.

## XV. REMOTE AND CONTINGENT DAMAGES.

120. Contemplated and contingent profits cannot be allowed as damages. *Cortner v. Barling*, 2 Cal. 73.

121. Damages which are too remote and speculative, and involve too many contingencies, cannot form part of a judgment. *Muldrow v. Norris*, 2 Cal. 78.

## XVI. EXCESSIVE DAMAGES.

122. Courts reluctantly interfere with the finding of a jury in an action for unliquidated damages, for reason that the damages are excessive; and the verdict ought never to be set aside for such a cause unless beyond a doubt the verdict be unjust and oppressive, or obtained through some undue advantage, mistake or in violation of law. *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 36.

123. Courts will not interfere with the verdicts of a jury where the question upon

which they have passed is one solely of unliquidated damages, unless the verdict be beyond doubt unjust and oppressive, especially if the judgment creditor remit one-half thereof. *George v. Law*, 1 Cal. 364.

124. A verdict will be set aside where the damages are unjustifiably outrageous. *McDaniel v. Baca*, 2 Cal. 338.

125. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum. *Palmer v. Reynolds*, 3 Cal. 396.

126. It is the proper exercise of the discretion of a court to grant a new trial on the ground of excessive damages, when the verdict is grossly inconsistent in its relations to the facts. *Potter v. Seale*, 5 Cal. 411.

127. In an action for a malicious prosecution wherein an attachment was issued, the jury gave \$15,000 damages, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the court could not disturb the verdict, unless it clearly appear that injustice has been done. *Weaver v. Page*, 6 Cal. 685.

128. Where judgment for damages is for more than the amount claimed in the complaint, the excess may be remitted and the judgment stand. *Pierce v. Ryan*, 14 Cal. 420.

## XVII. INTEREST AS DAMAGES.

129. Interest is, as a general rule, not recoverable, except by virtue of statutory regulations, yet a small rate may be allowed in some cases by way of damages. *Davis v. Greely*, 1 Cal. 422.

## XVIII. APPORTIONMENT OF DAMAGES.

130. Where a part owner sues ex delicto and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial. *Whitney v. Stark*, 8 Cal. 516.

## Death.

## DEATH.

1. Where an appeal was taken and perfected after the death of the appellant: held, that there was no authority for prosecuting the cause in the name of the deceased, but that all proceedings should have been stayed until the executor or administrator could by suggestion have been made a party. *Sanchez v. Roach*, 5 Cal. 248.

2. Hearsay information of death derived from the immediate family of the deceased, is sufficient prima facie to establish the fact, and is properly admitted. *Anderson v. Parker*, 6 Cal. 200.

3. The allegation of the death of plaintiff's ancestor in a verified complaint, is not sufficiently controverted by the averment in the answer "that defendant had not sufficient knowledge to form a belief, and therefore neither admits nor denies." *Ib.*

4. In the case of an absent person from whom no tidings are received, the presumption of life ceases at the end of seven years. To shorten this time there must be evidence of some specific peril to his life. *Ashbury v. Sanders*, 8 Cal. 64.

5. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death. *Ib.* 65.

6. The ex-sheriff who made the sale of land on execution died after his term of office ceased, and before executing a conveyance; the law failed to provide for the completion of the execution in such a case: held, that the only remedy left to the purchaser is to apply to the court for the appointment of a commissioner or master to execute the conveyance. *People v. Boring*, 8 Cal. 411.

7. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers*, 9 Cal. 126.

8. A deed made after the death of a

party, though made to him and "his heirs," the word "heir" is not a word of purchase, carrying title to the heirs, but only qualifying the title of the grantee. A deed to a dead man is a nullity. *Hunter v. Watson*, 12 Cal. 376.

9. Possession of land at the time of the death of a party gives prima facie title to his heirs or representatives. *Gregory v. McPherson*, 13 Cal. 572.

10. Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds and execution against the property of the husband for any deficiency; and after the entry of the decree the husband died: held, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 Cal. 641.

11. Death of the principal revokes the authority of the agent, and a deed of land made by him after such death does not bind the representatives of the principal. *Travers v. Crane*, 15 Cal. 16.

12. But if the agent has a power coupled with an interest—that is, a power which conveys to the agent an interest in the property, then the execution of the power after death of the principal is good. *Ib.* 19.

13. If on an executory contract for the purchase of land, made by plaintiff with the agent during the lifetime of the principal, money due the principal was paid after his death to the agent, who settled the amount with the estate so that the estate received the benefit of the payment, plaintiff would be entitled in equity to call for the legal title, and could defend in ejectment by the representatives of the principal. *Ib.*

14. The declarations, on a question of boundary, of a deceased person who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, whether the boundary be one of a general or public interest, or be one between the estates of private proprietors; and their admissibility cannot be affected by the fact that they are reduced to writing, and were made under oath in a judicial proceeding. *Morton v. Folger*, 15 Cal. 280.

## DEBTOR AND CREDITOR.

1. A party cannot occupy the double position of debtor and creditor, and where the plaintiff was himself a subscriber to a paper for contribution to a third party, upon which his claim was founded, his liability and that of the defendant were of the same character, and would not constitute the defendant a debtor of the plaintiff. *Smith v. Truebody*, 2 Cal. 347.

2. To enable the plaintiff in equity to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy at law. *Lupton v. Lupton*, 3 Cal. 121.

3. Plaintiff consigned goods to A, who sold them and received the proceeds. A was a partner of a firm, which being in want of funds proposed to B, another partner, to loan the plaintiff's money, which was assented to, and the money advanced. The firm was sued for the money, and it was held, that there was no privity between the plaintiff and defendants on which to establish the relation of debtor and creditor. *Evans v. Bidleman*, 3 Cal. 437.

4. A sale of personal property to be valid against creditors must be accompanied by an actual and continued change of possession. *Fitzgerald v. Gorham*, 4 Cal. 290; *Stewart v. Scannell*, 8 Cal. 83; *Whitney v. Stark*, 8 Cal. 516; *Vance v. Boynton*, 8 Cal. 560.

5. Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge or obtaining his proportion of the assets, whether he be named in the assignment or not. *Lambert v. Slade*, 4 Cal. 337.

6. A bill filed by a creditor asking relief against fraudulent transfers and concealment of his property by the debtor, is a substantial ground of equity jurisdiction. *Swift v. Arents*, 4 Cal. 391.

7. Corporations are by law prohibited from issuing bills or notes upon loans or for circulation as money—that is, they shall not lend their credit; but no sound reason can be given why they should not borrow money and give evidence of indebtedness therefor. *Magee v. Mokelumne Hill Canal and Mining Co.*, 5 Cal. 259.

8. Where the defendant being indebted to the plaintiffs, a banking firm, made a payment on account in the bank, to one of

plaintiffs' clerks, and on a subsequent day agreed to lend the clerk the amount thus paid, who took the money and used it, and the amount thus paid was never credited to the defendant on the books of the plaintiff: held, that the amount paid by defendant in the usual way of business was a legal payment, and that defendant lost all control over it. *Rhodes v. Hinckley*, 6 Cal. 284.

9. Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution; and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment creditor, and attacking the assignment for fraud since discovered, and praying that it be set aside, and that the moneys in the hands of the assignee be appropriated to plaintiff's judgment: held, that it is no objection to the supplemental bill that it prays for a different relief, and fails to bring in all the other creditors who are alleged by the defendant to be entitled to a rateable distribution. *Baker v. Bartol*, 6 Cal. 486.

10. The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured, and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 616.

11. Creditors of a partnership have no interest in a partnership suit or proceeding for account and dissolution, and in the meantime they may pursue their remedies at law, and thereby secure a preference or lien upon the partnership assets. *Adams v. Hackett*, 7 Cal. 199; *Adams v. Woods*, 8 Cal. 156; *Naglee v. Minturn*, 8 Cal. 544.

12. Debts and credits are considered property in the statute. A judgment is a debt of record, and the parties to it are called the judgment creditor and debtor. *Adams v. Hackett*, 7 Cal. 203.

13. Where the defendant, in consideration of the extension by plaintiffs of a note held by them against A, executed a guaranty that the same should be paid within a specified time, with increased interest, by the checks of the defendant and from the proceeds of sales of his own property, and provided that a failure of defendant to comply with his guaranty should operate



as a determination of the extension granted to A: held, that under the proviso the plaintiffs must first exhaust their remedy against A on the original demand, and that then they could compel the guarantor to make good the deficiency. *Donahue v. Gift*, 7 Cal. 242.

14. An order drawn by a creditor on his debtor is prima facie evidence of an assignment of the debt pro tanto, and if accepted will bind all parties. *McEwen v. Johnson*, 7 Cal. 260.

15. Where an account is verbally assigned to a creditor, with the understanding that in case he collect it he will credit his claim with a portion thereof, and return the balance to the assignor, but if nothing is received, no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. *Ritter v. Stevenson*, 7 Cal. 389.

16. Testimony showing a fraudulent design in a vendor of goods is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such fraudulent design. *Landecker v. Houghtaling*, 7 Cal. 392.

17. A petition in insolvency must, under the statute, state the name of each creditor, if known, and if unknown, such fact must be stated. *McAllister v. Strode*, 7 Cal. 431.

18. To estop a party from claiming goods as against the creditor of a third person, it must appear that he stated to the creditors himself that he had sold the article to the third party; and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 29.

19. A debtor of a partnership is justified in payment to the sheriff on an execution held by a creditor of the firm; and a debtor has a right to purchase cross demands against the partnership and to set them up as a defense to the debt due by him to the partnership. *Naglee v. Minturn*, 8 Cal. 544.

20. A creditor has a right to the substance of the contract as he has made it. It is his privilege to judge for himself whether it is to his interest for the agreement to be discharged in a particular way stipulated, or in a different mode, and neither the court nor the legislature can

change it in any substantial particular. *People v. Bond*, 10 Cal. 571.

21. A conveyance giving a preference, is not fraudulent, though the debtor be insolvent, and the creditor be aware at the time that it will have the effect of defeating the collection of other debts. *Dana v. Standfords*, 10 Cal. 275.

22. There is no rule of law which prevents a debtor in insolvent circumstances from applying his property to the sole payment of one creditor rather than another. *Randall v. Buffington*, 10 Cal. 494.

23. A simple contract creditor of a common debtor cannot intervene in a foreclosure suit. *Horn v. Volcano W. Co.*, 13 Cal. 69.

24. As against subsequent creditors a conveyance, even if voluntary, is not void, unless fraudulent in fact: that is, unless made with the view to future debts; though evidence of an intent to defraud existing creditors is deemed sufficient prima facie evidence of fraud against subsequent creditors. *Ib.* 71.

25. A trust of assets or property for creditors of itself suggests specific and well defined duties, and imposes specific and well defined obligations upon the trustees. *Forbes v. Scannell*, 13 Cal. 287.

26. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared pro rata, and he prosecuted both claims, and bought the property in, he is not liable for money had and received. *Herrick v. Hodges*, 13 Cal. 433.

27. The lien of firm creditors is paramount to the lien of individual creditors. *Conroy v. Woods*, 13 Cal. 632.

28. The fact that an individual creditor obtains judgment, issues execution and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. *Ib.* 633.

29. In this State, each member of an incorporated company is answerable personally for his proportion of the debts and liabilities of the company. Each corporator is a principal debtor, and not a mere surety for the corporation, and in relation to the creditors of the corporation stands on the same footing as if it



## Debtor and Creditor.—Decisions.

were an ordinary partnership. *Mokelumne Hill C. & M. Co. v. Woodbury*, 14 Cal. 266.

30. If the debtor at the time of or previous to payment neglects to designate to which of several debts he applies his payments, his right to control the application is gone, and the creditor may exercise it at any time before suit. *Haynes v. Waite*, 14 Cal. 448.

31. If, when a creditor takes a bill before maturity as collateral security for an antecedent debt, there be any change in the legal rights of the parties in relation to such debt, the creditor becomes a holder for value, and the bill is not subject to the equities between the original parties. *Naglee v. Lyman*, 14 Cal. 454.

32. Neither the husband nor the creditor can claim the proceeds or fruits of the separate estate of the wife. A law giving them such fruits is unconstitutional. *George v. Ransom*, 14 Cal. 660; 15 Cal. 323.

33. A tax is a personal debt, or in the nature of a personal debt due from the property holder, and not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute; and the legislature may prescribe a mode of correcting an informal assessment. *People v. Seymour*, 16 Cal. 342.

34. Plaintiff sues defendants for partition of certain property. The court orders a sale of the property, and distribution of the proceeds. After the sale, G. files a petition, stating that he is creditor of one F. M. Harris, (not plaintiff) and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property in fact belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff. Court refused: held, that there was no error; that the petition of G. being an attempt to defeat a conveyance to plaintiff on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud. *Harris v. Taylor*, 16 Cal. 349.

35. A conveyance in such case, however fraudulent as to creditors, may be good between the parties, and creditors cannot impeach it without showing that they have been injured by it. They must show that by the conveyance they have been deprived of their remedy at law, and are compelled to resort to equity. If the debtor have other property which may be reached by ordinary legal remedies, equity will not interfere. It must be affirmatively shown that such remedies have been exhausted, or that a resort to them would be fruitless. *Ib.*

## DECISIONS.

1. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

2. The legislature cannot require the supreme court to give the reasons of its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decisions. *Houston v. Williams*, 13 Cal. 25.

3. A decision of the court is its judgment; the opinion is the reasons given for that judgment. *Ib.* 27.

4. A decision is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing or a modification. *Ib.*

## DECEASED PERSONS.

See ADMINISTRATOR, DEATH, DECLARATION OF A DYING PERSON, ESTATES, PROBATE COURT.

## DECLARATIONS.

See ADMISSION, COMPLAINT, CONFES-  
SION.

DECLARATIONS OF DECEASED  
PERSON.

1. Evidence of the dying declarations of a deceased person are admissible on a trial for murder, upon the substantial ground of necessity. *People v. Glenn*, 10 Cal. 36.

2. The verbal declarations of the deceased are admissible in evidence where the written declarations, signed by deceased, have been first introduced or their absence accounted for. Having done this, it is proper to admit proof of the fact that the deceased had, at different times, made the same statement. *Ib.* 37.

3. The declarations, on a question of boundary, of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, whether the boundary be one of a general or public interest, or be one between the estates of private proprietors. And their admissibility cannot be affected by the fact that they are reduced to writing, and were made under oath in a judicial proceeding. *Morton v. Folger*, 15 Cal. 280.

## DECREE.

See JUDGMENT.

## DEDICATION.

1. A dedication of land to the public

use, as a street or highway, may be made by deed or other overt act, or may be presumed from lapse of time or acquiescence of the party. *City of San Francisco v. Scott*, 4 Cal. 116.

2. Where there is no abandonment or dedication of the land, the use for a limited time by the public cannot fairly raise the presumption of a dedication. *Ib.*

3. It requires stronger proof of dedication in the cases of roads in the country than that of streets or lanes in a town or city. *Harding v. Jasper*, 14 Cal. 647.

4. To constitute a dedication of land for the purposes of a rural highway, no particular formality is necessary. The intention on the part of the owner to so dedicate is the vital question. *Ib.*

5. This intention may be manifested with or without writing, by any act of the owner; as throwing open his land to public travel, platting it and selling lots bounded by streets designated on the plat, or acquiescence in the use of land as a highway; and hence time is not an essential ingredient in the act of dedication. *Ib.*

6. Time, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If the soil be accepted and used by the public in the manner intended by the owner, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. *Ib.*

7. Dedication is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway. *Ib.* 648.

8. The idea of a dedication to the public of a use of land for a public road must rest on the clear assent of the owner in some way to such dedication. *Ib.* 649.

9. Where a portion of land claimed under a Mexican grant, being uninclosed and waste, has been used as a road for public travel for a series of years, and pending proceedings by the claimant for confirmation of his grant, the land being for the most part in the actual possession of settlers, and the claimant being aware that the land was so used and not objecting to it: held, that this does not consti-

## Dedication.—Deeds in general.—Of a Married Woman.

tute a dedication of the land used as a road to public use; that the land being in litigation between the government and claimant, both as to the right and boundaries, the claimant had a right to wait under the statute until after a patent issued, without prejudice to his right of action by lapse of time; that he was not bound to fence in the whole land to rebut the presumption of dedication of a smaller part. *Ib.* 650.

10. An order of the board of supervisors of a county that all roads now traveled by wagons and pack mules within the limits of the county "be and the same are hereby declared public highways," though not valid as transferring the title of the land to the public, still may be good evidence, in connection with other proof, to show a control on the part of the county over a road as a public highway, and a knowledge of such control on the part of the owners of the land, and thus to furnish a circumstance from which a dedication may be inferred. *Ib.*

## DEEDS.

- I. In general.
- II. Of a Married Woman.
- III. Sufficiency of a Deed.
  - 1. Description.
  - 2. Consideration.
  - 3. Delivery.
- IV. Void Deed.
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- VI. Demand for a Deed.
- VII. Covenants in a Deed.
- VIII. Acknowledgement to a Deed.
- IX. Notice by Registration.
- X. Evidence of a Deed.
- XI. Estoppel by a Deed.
- XII. When a cloud upon Title.
- XIII. A Deed construed as a Mortgage.
- XIV. Deed of a Homestead.
- XV. Deed of Separation.
- XVI. Trust Deed.
- XVII. Sheriff's Deed.
- XVIII. Tax Deed.

## I. IN GENERAL.

1. The first step in the construction of

a deed is to ascertain the understanding and intention of the parties contracting, and the situation of the parties and the subject matter at the time of contracting should be considered; the whole deed should be taken together, and if possible, effect should be given to all its parts, although the immediate object of inquiry be the meaning of an isolated clause. *Brannan v. Mesick*, 10 Cal. 106.

2. It is not necessary that a water right must be conveyed by deed, so as to pass the legal title from grantor to grantee. *Ortman v. Dixon*, 13 Cal. 36.

3. Whether the conditions of a deed are complied with or not is matter between the grantor and grantee, with which third persons have nothing to do. *Smith v. Brannan*, 13 Cal. 115.

4. The deed to a house is held to include the land on which it is, and it would be absurd to hold that a deed to a mill, only of use because of the water which moves it, does not include the right to the waters, especially when the phrase et cetera, to which Lord Coke attaches such extension of meaning, is used. *McDonald v. Bear River Auburn W. and M. Co.*, 13 Cal. 236.

5. A complaint in ejectment should not set out the mesne conveyances through which plaintiffs deraign title. These are matters of evidence, not of pleading, and should be stricken from the complaint on motion. *Coryell v. Cain*, 16 Cal. 572.

## II. OF A MARRIED WOMAN.

6. Defective deeds and acknowledgements of married women cannot be reformed in chancery. *Selover v. American Russian Comm. Co.*, 7 Cal. 275; *Barrett v. Tewksbury*, 9 Cal. 15.

7. A deed properly executed and acknowledged by the wife of her separate property, with the assent of her husband underwritten—not under seal, but properly acknowledged—is sufficient to pass title. *Ingoldsby v. Juan*, 12 Cal. 574.

8. A deed which recites the title of the wife and then declares that the husband unites in the conveyance, in pursuance of the statute, is sufficient. A substantial compliance with the statute is all that is required. *Ib.* 577.

9. The wife cannot convey her separate estate, acquired before the act of 1850, whether legal or equitable, except by the joint deed of herself and husband. *Morrison v. Wilson*, 13 Cal. 497.

10. A deed to a married woman is prima facie valid. *Ib.* 500.

### III. SUFFICIENCY OF A DEED.

11. It is essential to the validity of a deed that there should be a legal capacity in the grantor to convey and in the grantee to receive, and if either be wanting the instrument is invalid. *Sunol v. Hepburn*, 1 Cal. 274.

12. A deed purporting to convey real estate, executed by an agent or attorney in his own name instead of the name of his principal, is not binding upon the latter and does not transfer the title to the property. *Fisher v. Salmon*, 1 Cal. 414.

13. An ordinary quit claim deed is sufficient to enable the grantee to maintain ejectment, if the grantor could have done so. *Sullivan v. Davis*, 4 Cal. 292.

14. An instrument setting forth that A "has this day sold" a piece of land to B, for a sum of money then paid and a further consideration agreed to be paid, and further providing that, on payment of said further agreed consideration, the said A "binds himself, his heirs, etc., to make a general warranty deed of said land, free and clear from all persons claiming through or under him:" held, to be an executory contract for a deed, and not a present conveyance. *Ellis v. Jeans*, 7 Cal. 414.

15. A power to sell and convey property is special and must be strictly pursued, and the agent can only transfer the property by deed for a valid consideration. *Depont v. Wertheman*, 10 Cal. 367.

16. A deed made under and in pursuance of a general power of attorney, which authorizes the attorney "to make and execute conveyances," and where the purchase money was received by the principal, cannot be assailed for the want of authority to execute it. *Hunter v. Watson*, 12 Cal. 376.

17. There is no peculiar form for the signing of a deed. Any writing which clearly shows that a party has adopted a sealed instrument as his own, intended to

be bound by the contents of it, is, if not formal, at least a sufficient execution to satisfy the statute. *Ingoldsby v. Juan*, 12 Cal. 578.

#### 1. Description.

18. A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but one lot in the place, is not void for uncertainty in the description. *Lick v. O'Connell*, 3 Cal. 63.

19. Such a deed only conveys an undivided half of the said lot, and the grantee can only take as tenant, in common with the grantor. *Ib.*

20. A deed of "the following described property, situate, lying and being in the city of Sacramento and State of California, consisting of two thousand two hundred town lots, be the same more or less, said lots being bounded according to the original plot or plan of said city," is void, on account of a patent ambiguity which cannot be cured by parol evidence. *Mesick v. Sunderland*, 6 Cal. 312.

21. The assertion of quantity in a deed must yield to a description by metes and bounds, or by name or number. *Stanley v. Green*, 12 Cal. 164.

22. A power of attorney to sell land must contain some description of the property to be sold, unless it be shown aliunde that the land in controversy is the only land owned by the principal at the time. *Stafford v. Lick*, 13 Cal. 242.

23. Land outside of a city or incorporated town must be described by metes and bounds—the number of acres as nearly as possible, and the locality and township must be given. *Lachman v. Clark*, 14 Cal. 133.

24. A deed to a defendant being admitted as prima facie evidence, the question as to the identity and description of the premises is a matter of subsequent proof. *McCartney v. Fitz Henry*, 16 Cal. 186.

#### 2. Consideration.

25. As to instruments under seal generally, the American rule seems to be that the consideration clause in a deed can be explained by parol proof; at least, where

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 Consideration.—Delivery.—Void Deed.
 

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the consideration proven is of the same species as that mentioned in the instrument. *Bennett v. Solomon*, 6 Cal. 137.

26. Where the deed contains a covenant that, in case the grantees therein named shall pay a certain sum of money before a certain day, "then this instrument is to take effect as a full and complete conveyance in fee of all and singular the lands, tenements, hereditaments, appurtenances and real estate in the State of California belonging to and in which the said party of the first part, his heirs, executors, administrators or assigns is or are in any way entitled or interested:" held, that the payment of the purchase money was a condition precedent to the vesting of the legal estate; that it was the event which cast the title and not the deed; and the rational intention gathered from the terms of the instrument is, that the grantor only bound himself to convey upon the payment of the purchase money. *Mesick v. Sunderland*, 6 Cal. 311.

27. Where in an action on a promissory note the defense set up is that the defendant executed said note as the consideration for a deed from plaintiff, who had an interest therein, the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

28. The defendants are not bound to tender a deed and demand the purchase money back in order to avoid a contract. In this State there is no rule on the subject, but in England it is the duty of the vendee to tender a deed. *Brown v. Covillaud*, 6 Cal. 573.

29. Where the court below, sitting as a jury, found that a sale was not made in good faith, and was without consideration, but failed to find as a fact a fraudulent intent, and entered judgment accordingly in favor of a subsequent purchaser: held, to be error. *Gillan v. Metcalf*, 7 Cal. 137.

30. There is no conclusion of fraud springing from the want of consideration in a deed which will enable a stranger to attack it, though it is a circumstance among others from which fraud may be inferred. *Id.* 139.

31. Where a parent executes to his infant son a deed in consideration of services performed, it must be considered as a voluntary conveyance without legal consider-

ation, as he is not legally bound to pay for his son's services. Such a deed is, therefore, void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz v. Hazlett*, 8 Cal. 120.

32. Where a purchaser of land does not obtain the title which the deed purported to convey and the covenants embrace, and he goes into and retains possession under the deed, and the failure of the title goes to the entire consideration paid or to be paid for the land, then he must seek his remedy by a rescission of the contract, alleging a paramount title in another, and offering to redeliver possession and account for the rents and profits. *Walker v. Sedgwick*, 8 Cal. 404.

33. An action for a false and fraudulent representation as to the naked title in the vendor of real estate cannot be maintained by the purchaser who has taken possession of the premises sold under a deed with express covenants. *Peabody v. Phelps*, 9 Cal. 225.

34. A nominal consideration stated, and the operative words of transfer, grant, bargain, sell and convey, do not change the character or object of the deed. *Barker v. Koneman*, 13 Cal. 11.

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### 3. Delivery.

35. Delivery of a deed is a question of fact, to be determined by the jury, and depends more upon the intention of the parties than upon the mode of fulfilling the intention. *Hastings v. Vaughn*, 5 Cal. 318.

36. Where a deed is offered in evidence which purports on its face to be a deed of bargain and sale for an alleged consideration, executed and acknowledged by the defendant, and on the same day recorded, it is some evidence to go to the jury of the delivery of such deed. *Bensley v. Atwill*, 12 Cal. 236.

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## IV. VOID DEED.

37. A party cannot by the Mexican law acquire possession beyond the metes and bounds of his actual occupancy, unless



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 Fraudulent Consideration.—Covenants in a Deed.—Acknowledgement of a Deed.
 

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he claims to hold under what is termed a "just title;" and a deed void on its face is not a just title. *Sunol v. Hepburn*, 1 Cal. 272.

38. A deed from an Indian to a white person is a nullity on its face, and no one can derive title under it. Such a conveyance is contrary to the policy of Spanish and Mexican as well as American law, and is strictly forbidden. *Ib.* 278.

39. Where a deed is void upon its face as being in violation of law, the party claiming under it is chargeable with knowledge of the law and of the invalidity of the deed. *Ib.* 280.

40. A deed made to a man who is dead at the time of its execution is a nullity. *Hunter v. Watson*, 12 Cal. 376.

41. Death of a principal revokes the authority of the grant; and a deed of land made by him after such death does not bind the representatives of the principal. *Travers v. Crane*, 15 Cal. 16.

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#### V. FRAUDULENT CONSIDERATION.

42. Where defendant sold a lot to plaintiff, by deed of bargain and sale, for \$6,000, and plaintiff, supposing himself to be the owner thereof, paid taxes thereon, and afterwards discovered that his grantor had previously conveyed the lot; and the court finds as a fact that defendant knew of his prior conveyance, and that the money was fraudulently obtained—the procurement by defendant of a full title to the lot, and a tender of a conveyance of the same to plaintiff, will not bar the plaintiff's recovery of the purchase money and interest. *Alvarez v. Brannan*, 7 Cal. 508.

43. Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money thereof is paid, which is afterwards fraudulently attached in a suit brought by the real, though not the ostensible purchaser against the husband alone: held, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 286.

44. An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an act for the

recovery of real estate, and governed by the statute of limitations applicable to such actions. *City of Oakland v. Carpenter*, 13 Cal. 552.

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#### VI. DEMAND FOR A DEED.

45. A refusal in writing to execute a conveyance is evidence proving a demand of such conveyance. *Goodale v. West*, 5 Cal. 341.

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#### VII. COVENANTS IN A DEED.

46. The words "good and sufficient deed," in a covenant, refer only to the form of the conveyance, and not to the interest intended to be conveyed therein, differing from words of covenant and warranty. *Brown v. Covillaud*, 6 Cal. 573.

47. A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel. *Gee v. Moore*, 14 Cal. 473.

48. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after-acquired interest. *Ib.*

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#### VIII. ACKNOWLEDGMENT OF A DEED.

49. A certificate of acknowledgment of a deed in the words, "Before me," etc., "personally appeared A. B., to be the individual described in, and who executed," etc., is bad, in omitting the word "known," or "proven," and the record of the conveyance on such a certificate imparts no notice to third parties. *Wolf v. Fogarty*, 6 Cal. 225; *Henderson v. Grewell*, 8 Cal. 584; *Kelsey v. Dunlap*, 7 Cal. 162.

50. A certificate of acknowledgment to a deed should state the fact of acknowledgment therein. *Bryan v. Ramirez*, 8 Cal. 466.

51. Where the officer taking an acknowledgment to a deed, certifies that the parties "were known to him," and omits the word "personally," it is still valid.

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 Notice of Registration.—Evidence of a Deed.
 

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*Hopkins v. Delany*, 8 Cal. 87; *Welch v. Sullivan*, 8 Cal. 512.

52. The certificate of the acknowledgment of a married woman to a deed must state that the contents of the deed were explained to her; otherwise it is defective, and will not pass her interest in the estate. *Pease v. Barbier*, 10 Cal. 440.

53. Where to a certificate of proof by a subscribing witness of the execution of a deed, the witness adds his signature, and the officer adds the usual part to an affidavit, such addition do not vitiate the certificate, if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage. *Whitney v. Arnold*, 10 Cal. 532.

54. In acknowledgments to deeds, substantial conformity with the statute is sufficient. *Goode v. Smith*, 13 Cal. 83.

55. The certificate of acknowledgment of a notary public to a deed is not an act in pais, which he may exercise by virtue of his office at any time while in office. *Bours v. Zachariah*, 11 Cal. 292.

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 IX. NOTICE OF REGISTRATION.

56. Although a deed be defective in the acknowledgment, so as not to entitle it to registration, it is not void, but is still good as between the parties, and as to all the world, except subsequent purchasers without notice. *Hastings v. Vaughn*, 5 Cal. 319.

57. A deed defective in the acknowledgment should not be rejected as evidence for that reason, but should be admitted with instructions to the jury as to its effect in giving notice to third persons. *Ib.*

58. Where the plaintiff in ejectment claimed under a subsequent deed from the grantor in the above instrument, and the defendants held under the grantees named therein: held, that the record of said instrument in the county recorder's office, made June 20th, 1850, imparted no notice to the plaintiff, who purchased, July 9th, 1855, the registration of executory contracts, not being authorized or made notice by statute. *Mesick v. Sunderland*, 6 Cal. 315.

59. Where the defendant bought the property in question and recorded his deed,

but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendant's deed to be amended by interlineation of the description: held, that the plaintiff had no notice of the previous conveyance of the property. *Chamberlain v. Bell*, 7 Cal. 294.

60. Where commissioners in pursuance of a contract of a portion of the parties executing a partition deed, allotted to one G., who was not a party to the deed in partition, and release one hundred acres, and where the defendant claimed through the parties executing such contract, and both contract and deed were upon record at the time of the defendant's purchase: held, that the defendant in contemplation of law had notice of such contract of his predecessors and vendors, and that he is bound by it. *Tewksbury v. Provizzo*, 12 Cal. 25.

61. A deed recorded January 30th, 1850, by a person acting as recorder, by virtue of an election by the people without authority of law, is not properly recorded. *Smith v. Brannan*, 13 Cal. 115.

62. All the title which a vendor of land has at the time of his deed passes to the vendee, as against volunteers or donees, even though the deed, under which the vendor holds, be unrecorded. *Snodgrass v. Ricketts*, 13 Cal. 362.

63. The omission, in the record of a deed, to make the copy of a seal, or some mark to indicate the seal, does not vitiate the record; it is sufficient if it appear from the record, that the instrument copied is under seal; as for instance, where the deed purports to be under seal, and to be signed, sealed and delivered in the presence of the notary before whom it was acknowledged. *Smith v. Dall*, 13 Cal. 512.

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 X. EVIDENCE OF A DEED.

64. Secondary evidence of the contents of a deed or grant is admissible where the possession of the original is traced to the possession of a party not in the State. *Gordon v. Searing*, 8 Cal. 50.

65. The evidence of the circumstances under which a deed was executed is ad-

## Evidence of a Deed.

missible beyond question. It is not to contradict or vary the terms of the instrument, that the evidence is received, but to apply them to the subject matter. *Stanley v. Green*, 12 Cal. 162.

66. To make a copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witness to the deed, if such there be, should be had, at least, to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the court. *Smith v. Brannan*, 13 Cal. 115.

67. Evidence of circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. *Pierce v. Robinson*, 13 Cal. 125.

68. An affidavit by a party to the suit, that the original deed "is not in his possession or under his control," is sufficient to admit in evidence a certified copy only from the recorder's office, the deed having been properly acknowledged and recorded and the grantee being a third person. *Skinker v. Flohr*, 13 Cal. 638.

69. Where a deed of land in Yuba county, California, describes the grantor, W. Johnson, as "of the Island of Hawaii, Sandwich Islands," and after designating the property in which the interest of the grantor is conveyed as the tract situated in the county of Yuba, and known as "Johnson's ranch," and giving its boundaries, proceeds to state that the ranch was originally granted to Pablo Gutieras by the Mexican government, and has since been confirmed to the party of the first part, by the board of commissioners to ascertain and settle private land claims in California, and then in ejectment on a patent from the United States to William Johnson for this land—the patent being in evidence, and referring to Johnson as claimant, and as the person filing the petition before the land commission for confirmation of his claim under the grant to Pablo Gutieras, but not mentioning the residence of Johnson—this deed is offered in evidence, and objected to on the ground that there was no proof of the identity of the William Johnson of the deed with the William Johnson of the patent: held, that the deed, from the identity of names, and by its reference to the source of title, contains sufficient prima facie evidence as to identity of person to admit it in evidence;

that before additional proof of such identity could be required, some circumstances must be shown to create doubts upon the point. *Mott v. Smith*, 16 Cal. 552.

70. In this case the original deed was produced in court, and the case tried in Yuba county, where Johnson had formerly lived for years, and where his signature could probably have been easily proved or disproved, had there been any suspicion as to its genuineness. *Ib.* 554.

71. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, of the city slip property in San Francisco, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *McCracken v. City of San Francisco*, 16 Cal. 638.

72. The deed to plaintiff of the land bought being signed by the mayor of the city and sealed with the corporate seal—the mayor being the legal custodian of the seal, and it being affixed by his authority—is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution. The seal is prima facie evidence that it was affixed by proper authority, and the deed is prima facie sufficient to pass the title. *Ib.*

73. The deed in this case is not a mere nullity. So far as passing the title to the land, or creating any right or interest against the city is concerned, the deed is inoperative and void, and may be attacked collaterally. But the objections to it do not appear on its face, and its invalidity must be shown by the party impeaching it by evidence aliunde. *Ib.* 640.

74. Prima facie it is a valid and sufficient conveyance, and a party holding under it must be deemed to hold adversely and not in subordination to the real title. Possession under it may ripen into a per-

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 Estoppel by a Deed.—When a cloud upon Title.
 

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fect title, and it cannot fail to prejudice the interests, if not the rights of the lawful owner. *Ib.*

75. Such being the effect of the deed in this case, plaintiff cannot recover the purchase money without procuring a reconveyance of the property and a surrender of the possession, so as to place the parties in statu quo. *Ib.*

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 XI. ESTOPPEL BY A DEED.

76. A deed of release, conveyance and partition, providing for the appointment of commissioners to make partition of the land therein described, according to the terms therein set forth in the deed; and also by its terms providing that the release shall take effect upon the making of the partition and report by the commissioners of a map of the partition, which, together with the deed, is to be handed over to one F., who is to file the same for record in the proper office, is sufficient to estop a party thereto from controverting the deed. *Tewksbury v. Provizzo*, 12 Cal. 24.

77. The acceptance of a deed does not, in favor of a stranger—that is, one neither party nor privy to the deed—estop the grantee in fee from showing that the grantor had no title at the date of the deed. *Schuhman v. Garratt*, 16 Cal. 102.

78. Estoppels are mutual, and bind both parties or neither; and as a person neither party nor privy to a deed is not bound to acknowledge a title under it, so the grantee in the deed is not bound by it in favor of such person. *Ib.*

79. Whether this principle would be affected by the fact that the grantee in such case obtained actual possession under his deed, not determined. *Ib.*

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 XII. WHEN A CLOUD UPON TITLE.

80. Where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, chancery will order such deed to be canceled and annulled. *Shattuck v. Carson*, 2 Cal. 589.

81. The jurisdiction of a court to enjoin a sale of real estate is coextensive with its

jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, liable to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court, that the deed casts a cloud over the title of the plaintiff. As in such case the court will remove the cloud by directing the cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such a cloud must result. *Pixley v. Huggins*, 15 Cal. 131.

82. L. conveys real property by deed to the wife of M. for \$4,000, which sum is recited in the deed as the consideration. Subsequently, M. and wife convey, by their joint deed, the property to plaintiff, for the consideration recited therein of \$9,500. This deed was acknowledged by both husband and wife, and of the acknowledgment two certificates were endorsed by the notary, both of which were sufficient in form as to the acknowledgment of the husband, but only one of them was sufficient as to the acknowledgment of the wife—the other was defective. The deed was recorded with the defective certificate, the other being omitted. Later still, defendants H. & H. recovered judgment against M., which was duly docketed, and became, from the time of its docketing, a lien on his property in the county in which was situated the property embraced in the deed from L. to M. and wife. Upon this judgment execution was issued, placed in the hands of the sheriff, who levied it upon the property in said deed, and advertised for sale all the right, title and interest which M. had therein at the time said judgment became a lien, etc. Plaintiff files his bill to enjoin this sale: held, that an injunction lies; that the property acquired under the deed from L. to the wife of M. became community property, and as such was subject to the absolute disposition of the husband, and passed in full title to plaintiff under the deed to him. Held, further, that the fact that the deed from L. was taken in the name of the wife alone, created no inference that the property was her separate property, the deed having been made on a



## A Deed construed as a Mortgage.—Deed of Separation.—Trust Deed.

purchase; that the fact of purchase excludes the supposition of acquisition by gift, bequest, devise or descent, and that in the absence of proof that the property was purchased with the separate funds of the wife, the presumption that it is community property is absolute and conclusive; that the husband could sell the property by his sole deed without the concurrence of his wife, and that the fact that the deed was recorded with the defective certificate of her acknowledgment was immaterial, and that her signature was unnecessary and added nothing to the validity or completeness of the transfer to plaintiff. *Ib.*

83. And a deed from the sheriff upon an execution sale against the vendor of plaintiff, would have the same effect in casting a cloud upon the title as if the deed were made directly by such vendor. Such a deed from the sheriff, put on record, would create doubts as to the validity, as against the judgment creditor, of the previous transfer to plaintiff. *Ib.*

84. The true test by which the question whether a deed would cast a cloud upon the title of the plaintiff may be determined, is this: Would the owner of the property in an action of ejectment brought by the adverse party, founded upon the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist; otherwise, not. *Ib.*

85. Every deed from the same source through which plaintiff derives his real property must, if valid on its face, necessarily cast a cloud upon the title. *Ib.*

## XIII. A DEED CONSTRUED AS A MORTGAGE.

86. Parol evidence is admissible in equity to show that a deed, absolute upon its face, was intended as a mortgage. *Pierce v. Robinson*, 13 Cal. 125, overruling *Lee v. Evans*, 8 Cal. 124, and *Low v. Henry*, 9 Cal. 538.

87. A deed of land from A. to F., reciting the consideration at one hundred dollars, and a contract not under seal, not acknowledged nor recorded from F. agreeing to reconvey the land to A. upon payment within a given time of \$8,600, with

interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time; held, that the deed is not a mortgage in the absence of proof; that the consideration for it was a debt preëxisting or created at the time, and still subsisting between the parties; that the provision in the contract of reconveyance, relative to the payment of interest and the rents and profits, do not necessarily imply the existence of a debt which is essential to a mortgage. *People v. Irwin*, 14 Cal. 435.

## XIV. DEED OF A HOMESTEAD.

88. To make a valid sale of the homestead requires the joint deed of the husband and wife. Separate deeds of the husband and wife are both invalid. *Poole v. Gerrard*, 6 Cal. 73.

## XV. DEED OF SEPARATION.

89. Courts of equity will enforce the stipulations of a deed of separation whenever it affects rights to property or income, and sometimes where the jurisdiction has attached on account of questions relating to property, it will even lend its aid collaterally to enforce the stipulation for a separation. *Joyce v. Joyce*, 5 Cal. 164.

90. A deed of land on the part of the husband to a trustee, securing the payment of an annuity to the wife, in consideration of an indemnity by the trustee against all debts of the wife, for maintenance and other account, is valid and supported by a valid consideration. *Wells v. Stout*, 9 Cal. 494.

## XVI. TRUST DEED.

91. A deed by a husband of his separate real estate to a trustee, for the benefit of his wife, whether executed in compliance with an ante-nuptial contract, or by way of settlement upon his wife, independent of any previous contract, the husband being at the time free from debts and lia-



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 Sheriff's Deed.—Tax Deed.—Default in general.
 

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bilities, is valid. *Barker v. Koneman*, 13 Cal. 11.

92. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage requiring judicial sale and foreclosure. *Kock v. Briggs*, 14 Cal. 262.

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 XVII. SHERIFF'S DEED.

93. A claim of title, by virtue of a sheriff's deed, is insufficient without showing the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

94. The title to real estate sold at sheriff's sale does not pass until the execution and delivery of the sheriff's deed. *Anthony v. Wessel*, 9 Cal. 104.

95. A sheriff, who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Ib.*

96. Where parties claim under a deed executed by the sheriff, upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Wells v. Stout*, 9 Cal. 497.

97. Where a sheriff's deed is executed by a deputy, in the name of a sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be real as evidence in an action of ejectment. *Cloud v. El Dorado County*, 12 Cal. 134.

98. On mandamus by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale, cannot be tried. The right to the deed is the only matter in controversy. *People v. Irwin*, 14 Cal. 436.

99. Where a defendant in ejectment brought upon a sheriff's deed, executed upon a purchase made on a sale under a

decree of foreclosure, and was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that suit adjudicated against him. *Clark v. Boyreau*, 14 Cal. 637.

100. The damages which a plaintiff can recover in an action of ejectment, for the use and occupation of the premises, are such as arise subsequent to the accruing of his rights of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Ib.*

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 XVIII. TAX DEED.

101. To sustain a title upon a tax deed, every prerequisite to the exercise of the power of sale by the officer must be shown to have been accomplished. *Ford v. Holton*, 5 Cal. 321.

102. To sustain a title by virtue of a tax collector's deed, it has, by the best authorities, been held that every prerequisite to the exercise of the power of sale by the officer must be shown to have been accomplished. *Norris v. Russell*, 5 Cal. 250; *Ferris v. Coover*, 10 Cal. 632.

103. An assessment of property as "a ranch commonly known as 'Clark's Ranch,' situated on the Auburn road, two miles south of Grass Valley, in Nevada county, State of California," is insufficient, and a deed on a sale under it is void. *Lachman v. Clark*, 14 Cal. 133.

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 DEFAULT.

- I. In general.
- II. Appeal from the Judgment.
- III. When taken prematurely.
- IV. Upon Publication of the Summons.

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 IN GENERAL.

1. Under the code of 1850 defaults were entered in open court, and if within

In general.

three days after the defendant did not appear and answer, the judgment was made final.\* *Stevens v. Ross*, 1 Cal. 96.

2. If a summons be radically defective it will not support a judgment by default. *People v. Woodlief*, 2 Cal. 242.

3. A judgment by default will be set aside on the ground of fraud or surprise. *Bidleman v. Kewen*, 2 Cal. 250.

4. The court below, sitting as a jury, must find separately the facts and conclusions of law, or the verdict will be set aside; but this rule does not apply to a judgment by default against one defendant where there are two, and the other goes to trial. *Brown v. Brown*, 3 Cal. 111.

5. Where a default is entered and judgment had, and no testimony appearing, the presumption is that the judge informed himself as to the matter of complaint in a proper and regular manner, and such judgment will be affirmed. *Crane v. Brannan*, 3 Cal. 195.

6. A final judgment by default can properly be rendered upon an unliquidated demand where the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman v. Williams*, 4 Cal. 255.

7. A defendant who has suffered default is not a competent witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. *Washburn v. Alden*, 5 Cal. 465.

8. The want of an allegation of actual ouster in a complaint in ejectment is a defect which cannot be cured by a default taken through the mistake or inadvertence of defendant's counsel. *Watson v. Zimmerman*, 6 Cal. 47.

9. At common law, default confessed every issuable fact stated in the declaration, and could only be set aside for objections to the declaration which would have been good on general demurrer. *Harlan v. Smith*, 6 Cal. 174; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Hentsch v. Porter*, 10 Cal. 558; *McGregor v. Shaw*, 11 Cal. 48; *Hunt v. City of San Francisco*, 11 Cal. 259; *Curtis v. Herrick*, 14 Cal. 119; *Smith v. Billett*, 15 Cal. 26.

10. In an action brought jointly against

two defendants on a joint and several obligation, the entry of final judgment on default against one of the defendants is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 180.

11. Service of summons on a party in possession of the property who does not appear to be one of the officers named, will not entitle the plaintiff to judgment by default. *Aiken v. Quartz Rock Mariposa Gold Mining Co.*, 6 Cal. 186.

12. Where a defendant made default he cannot then raise the objection that the complaint set out an unlawful occupation as the cause of action, unless it appears on the face of the complaint; he should have established it in his defense. *Whipley v. Flower*, 6 Cal. 632.

13. An order of court setting aside a default and judgment entered during vacation is regular and correct where there has been no service of summons upon the defendants. *Pico v. Carrillo*, 7 Cal. 32.

14. A judgment by default, where summons has been served on defendant, cannot be attacked collaterally for a mere irregularity of service or for a defective return. *Dorente v. Sullivan*, 7 Cal. 280.

15. An appearance in the supreme court on a former appeal does not absolve the defendant from the necessity or from the consequences of his neglect to do so, by which a default is taken. *Grewell v. Henderson*, 7 Cal. 292.

16. Where two defendants are jointly sued and service had on both, the clerk of the court has no authority to enter judgment by default against one, and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 449.

17. A judgment against an administrator, though in the form of a common money judgment by default, is valid, its only effect being to establish the validity of the claim. *Chase v. Swain*, 9 Cal. 136.

18. A judgment by default may as well be taken against an administrator as any other party. *Ib.* 137.

19. A judgment by default admits the facts alleged in the complaint in a justice's court, and no appeal will lie from such judgment in reference to such facts, there being no issue of fact. *People v. County Court of El Dorado County*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328.

20. A judgment by default may be

\* The code of April 29th, 1851, differs in this provision, by allowing a default to be entered by the clerk, and the judgment is final.

In general.—Appeal from the Judgment.—When taken Prematurely.

taken against a corporation when the summons is properly served. *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

21. A default admits only the facts alleged in the complaint, but none other. *Hentsch v. Porter*, 10 Cal. 558.

22. A defective allegation may be cured by default or verdict, but not the entire absence of any allegation whatever. *Garner v. Marshall*, 9 Cal. 269; *Hentsch v. Porter*, 10 Cal. 559.

23. Where the complaint avers title as administrator, a default admits it. *Curtis v. Herrick*, 14 Cal. 119.

24. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 202.

25. If a judgment by default be void because entered by the clerk without authority, that fact constitutes no ground for equity to interfere. *Chipman v. Bowman*, 14 Cal. 158.

26. Where the complaint shows no legal cause of action, a judgment by default can no more be taken than it can be over a demurrer. *Abbe v. Marr*, 14 Cal. 211.

27. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Smith v. Billett*, 15 Cal. 26.

28. After judgment by default in ejectment a jury trial cannot be awarded, there being no issue. *Ib.*

29. If a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

30. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal,

then the complaint here, to enjoin the enforcement of the judgment, should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Ib.*

31. An affidavit by defendant that he was under the impression when he retained counsel in the case that the time to answer had not expired; that he did not recollect the precise day upon which the summons and complaint were served; and that he was quite ill at the time and did not as carefully note the time as he otherwise would have done, is entirely insufficient to open a judgment by default. *Elliot v. Shaw*, 16 Cal. 377.

## II. APPEAL FROM THE JUDGMENT.

32. An appeal will lie from a judgment by default, for therein may exist errors as well as in a judgment rendered upon issue joined in the pleadings and trial by jury, which error may be corrected on appeal. *Stevens v. Ross*, 1 Cal. 97.

33. An injunction will not lie to enjoin a judgment by default on account of a defect in the return of the summons; the remedy is by appeal, or by motion to vacate the judgment. *Pico v. Sunol*, 6 Cal. 295.

34. On appeal, a judgment by default will be reversed, unless the record show service on the defendant, or appearance, though possibly a judgment so obtained could not be impeached collaterally. *Schloss v. White*, 16 Cal. 68.

## III. WHEN TAKEN PREMATURELY.

35. A judgment by default rendered before the time for answering expires, will be reversed upon appeal. *Burt v. Scrantom*, 1 Cal. 417; *Parker v. Shephard*, 1 Cal. 132.

36. Where a defendant is served with summons in a county other than that in which the action is brought, he has thirty days within which to answer, and a judgment by default rendered before the time

Upon Publication of the Summons.—Defeasance.—Defendant.

for answering expires will be set aside.\*  
*Burt v. Scrantom*, 1 Cal. 146.

37. A judgment by default will be reversed in the supreme court, where the record shows that the defendant had not been legally served with process. *Joyce v. Joyce*, 5 Cal. 449.

38. Where a defendant was served with process but was not given the time allowed by statute to appear and answer, it would be a sufficient reason for the court to quash the writ on motion by an amicus curiae, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment or motion for a new trial; but it cannot be said that the court had no jurisdiction of the person so as to make its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 64.

IV. UPON PUBLICATION OF THE SUMMONS.

39. An appeal taken by defendant immediately after judgment on default, on the ground of insufficiency of the affidavit of publication of summons, the appellate court will not disturb the judgment, the defendant having his remedy in the courts below within six months after judgment. *Guy v. Ide*, 6 Cal. 101.

40. After the adjournment of the term a court loses all control over its judgments, except when personal service of summons has not been had, in which case a party may, within six months, move to set aside the judgment. *Shaw v. McGregor*, 8 Cal. 521.

41. The provision of the code authorizing judgment, personal and final, against an absent defendant, for whom the court has appointed an attorney, with privilege to come in and deny within six months, is not in violation of the constitution of the United States or of this State. *Ware v. Robinson*, 9 Cal. 111.

\*The code of April 29th, 1861, allows forty days in a county other than that in the same district.

DEFEASANCE.

1. Where the condition of a bond is to pay the debt of another, the condition operates merely by way of defeasance; and if a defendant chooses to put his obligation in that form he elects to be originally liable. *Baker v. Cornwall*, 4 Cal. 16.

2. Where an agreement operates by its terms a present and effectual change of ownership in the subject matter, the title is supposed in law to remain divested until it be affirmatively shown that the conditions of defeasance have happened. *Myers v. South Feather Water Co.*, 10 Cal. 583.

3. The approval of a grant by the departmental assembly simply discharges the grant from liability to defeasance by the Mexican government, except for breach of its conditions subsequent. *Waterman v. Smith*, 13 Cal. 409.

See MORTGAGE.

DEFENDANT.

- I. In general.
- II. As a Witness.

I. IN GENERAL.

1. Where there are four defendants, and a case made out against one only, a nonsuit should be entered in favor of those defendants against whom no case is made, and the action allowed to proceed against the one alone. *Acquital v. Crowell*, 1 Cal. 193.

2. If it is intended to charge the defendants with taking possession of one or more parcels of land, distinct from the lot sued for in the complaint, of which one defendant is in possession, the claim against the others should not be included in the same action. *Suñol v. Hepburn*, 1 Cal. 258.

3. Where it is clear that two or more defendants are not jointly liable, a joint judgment against both cannot be sustained,

## In general.

although each may be severally liable. *Pierce v. Minturn*, 1 Cal. 471.

4. It is error to sue two persons as co-defendants who have no joint interest in the subject matter of the suit, and are under no joint liability, and the mistake should be corrected in the court below. *Sterling v. Hanson*, 1 Cal. 480.

5. The code permits a party defendant whose name is unknown to be sued by any name. *Morgan v. Thrift*, 2 Cal. 563.

6. The plaintiff in ejectment may sue one or more defendants, and they may answer separately or demand separate verdicts; unless they do so, however, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 80.

7. A defendant in a foreclosure suit cannot object that his wife, who joined with him in the execution of the mortgage, is not made a codefendant. *Powell v. Ross*, 4 Cal. 198.

8. An appeal does not lie from an order of a chancellor making a new party defendant. *Beck v. City of San Francisco*, 4 Cal. 375.

9. In an action against a married woman, alleged to be a sole trader under the act of 1852, on a contract executed by her as such, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable. *McKune v. Mc Garvey*, 6 Cal. 498.

10. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Hirschfeld v. Franklin*, 6 Cal. 609.

11. Where several defendants are declared against jointly, but no joint trespass is proven, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant. *McCarron v. McConnell*, 7 Cal. 153.

12. The provision of the code that any person may be made defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination of the question involved, has no application to the action of ejectment. *Garner v. Marshall*, 13 Cal. 270.

13. A justice of the peace, after having entered the judgment according to law, has no right to alter it without notice to the defendant. *Chester v. Miller*, 13 Cal. 561.

14. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court, on the trial, permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

15. Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company as to plaintiff Parke, the finding supports a judgment for plaintiff. *Parke v. Hinds*, 14 Cal. 417.

16. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court or the court below, on motion. *Browner v. Davis*, 15 Cal. 11.

17. If a defendant interposes no objection to trying an action of ejectment on a title acquired subsequently to the commencement of the action, and set up in an amended complaint, he cannot object after judgment. *Smith v. Billett*, 15 Cal. 26.

18. Plaintiff, January 10th, 1858, in a suit entitled "C. v. M. and others, composing the Wisconsin Quartz Mining Co.," a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following—W. the purchaser. Defendants here are in possession, under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his



## As a Witness.—Delivery.

judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 403.

## II. AS A WITNESS.

19. A codefendant is not a competent witness upon an issue where his testimony would enure to his own benefit; but would be to show that his codefendant is not jointly liable with him. *Sparks v. Kohler*, 3 Cal. 301; *Johnson v. Henderson*, 3 Cal. 369; *Buckley v. Manife*, 3 Cal. 442; *Gates v. Nash*, 6 Cal. 195; *Lucas v. Payne*, 7 Cal. 96; *Turner v. McIlhany*, 8 Cal. 579.

20. Where a codefendant is called generally as a witness, and he was clearly incompetent on one of the issues, the court should properly reject him, unless the examination is confined to the specific point. *Sparks v. Kohler*, 3 Cal. 301.

21. A defendant who has suffered default is not a competent witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. *Washburn v. Alden*, 5 Cal. 464.

22. A defendant who has not been served with process is not a competent witness for his codefendants in an action of trespass. *Gates v. Nash*, 6 Cal. 194.

23. A party who calls on an adverse party to testify, makes him a witness, and waives his incompetency, to be heard for himself, or his codefendant, or coplaintiff. *Turner v. McIlhany*, 8 Cal. 580.

## DEFENSE.

See ANSWER.

## DELIVERY.

1. Delivery of goods by the master, and payment of freight by the consignee are concurrent acts, and neither party is bound to perform his part of the shipping contract, unless the other is ready to perform the correlative act. *Frothingham v. Jenkins*, 1 Cal. 42.

2. Delivery of part of the goods mentioned in one bill of lading to the consignee does not defeat a lien on the remainder for the whole freight unpaid. *Ib.*

3. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading, until the whole freight is paid; and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. *Ib.*

4. It is no answer to the action for non-delivery of the lumber that the plaintiff resold it soon after the purchase; it appearing that the purchaser from the plaintiff had a claim against him for non-delivery. *Gunter v. Sanchez*, 1 Cal. 48.

5. On a sale of chattels where no time of payment or delivery are agreed upon, they are concurrent acts, and neither party can maintain an action for nonperformance without showing a readiness and willingness to perform on his part. *Cole v. Swanston*, 1 Cal. 54.

6. Upon part delivery of goods, and an inability on the part of the vendor to deliver the whole quantity sold, he is nevertheless entitled to recover the stipulated price of the quantity actually delivered, deducting therefrom the damages sustained by the purchaser on account of the nondelivery of the whole. *Ib.*

7. A mere parol agreement for the conveyance of land made before the adoption of the common law and the reenactment of the statute of frauds in this State, is void, there being neither delivery of possession nor of title deeds, and no payment of the purchase money. *Harris v. Brown*, 1 Cal. 100.

8. Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed or delivered, the contract will be deemed inchoate and incomplete, and neither party will be

## Delivery.

bound by it. *Hoen v. Simmons*, 1 Cal. 121.

9. A contract for the sale of goods for the price of two hundred dollars or over is void, unless a note or memorandum thereof be made in writing and subscribed by the parties to be charged therewith, or unless the buyer shall accept or receive part of such goods, or shall at the time pay part of the purchase money. *Bunting v. Beideman*, 1 Cal. 182.

10. Under a verbal contract of sale of real estate, the delivery of the title deeds is equivalent to a symbolical delivery of and admission into possession of the property, as between vendor and vendee, whatever might be its effect in conferring actual possession, in case the rights of third persons were concerned. *Tohler v. Folsom*, 1 Cal. 212.

11. But where there was a verbal contract of sale in presenti, and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter upon and take possession of the land, and the vendee did accordingly take possession and made valuable improvements on the premises: held, that a specific performance of the verbal contract should be secured. *Ib.*

12. Words alone unaccompanied by acts cannot make out a delivery, to take the cause out of the statute. *Gardet v. Belknap*, 1 Cal. 402.

13. The consignee named in a bill of lading is to be deemed prima facie the owner of the goods mentioned therein, and upon payment of freight, may maintain an action against any person who assumes a control over them in violation of his right of property for their delivery. *Webb v. Winter*, 1 Cal. 418.

14. A delivery of an order for goods is only considered as a delivery of the goods themselves, when they are susceptible of an immediate delivery. *Stevens v. Stewart*, 3 Cal. 143.

15. Where the contract is for goods on a vessel, which are not yet discharged and cannot be delivered, there cannot be a defense of a delivery, which takes the case out of the statute, and a good, legal excuse for nondelivery. *Ib.*

16. Where the question is as to the kind of delivery which effects a change of property, although the goods cannot be immediately delivered, the delay may be

imputed as one of the stipulations; but where the delivery is necessary to make a contract, a symbolical delivery can only be effectual where it can be followed by an actual delivery. *Ib.*

17. Where the owner of goods made a bona fide sale of them to a purchaser and delivered possession of them to him, and the purchaser immediately appointed the former owner of them his agent, to take charge of them and sell them, and for that purpose delivered the possession of them to him: held, that the sale was fraudulent and void as against the creditors of the original owner. *Fitzgerald v. Gorham*, 4 Cal. 290.

18. A complaint is insufficient which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued—whether on account of the defendant or that of another. *Mershon v. Randall*, 4 Cal. 326.

19. Where the vendors cannot recover on their written contract, and there has been a partial delivery of the goods sold, they may recover the value of the goods so delivered on a quantum valebant. *Ruiz v. Norton*, 4 Cal. 358.

20. The omission to allege a delivery of a bond in an action on the bond can be taken advantage of only on demurrer. *Garcia v. Satrustigui*, 4 Cal. 244.

21. Delivery of a conveyance depends more upon the intention than upon the mode of fulfilling the intention. It is a question of fact to be determined by the jury. *Hastings v. Vaughn*, 5 Cal. 318.

22. Where a contract stipulated for the delivery of a vessel, but designated no particular place for such delivery: held, that a notice of a readiness to deliver must be treated, under the contract, as an actual delivery. *Albretson v. Hooker*, 5 Cal. 178.

23. Where suits have been commenced before a magistrate against the drawers of prizes in a lottery to forfeit the prizes drawn to the State under the statute, a bill for an injunction against the owner of the lottery to restrain him from disposing of the prizes until the decision of those suits will properly lie in the district court. The prizes are forfeited as soon as drawn and before they are delivered. *People v. Kent*, 6 Cal. 90.

## Delivery.

24. Service of a copy of execution and notice of garnishment upon a third party constitute no lien on property of the debtor in his hands capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196.

25. A complaint alleging that defendant sold to plaintiff certain fruit growing in an orchard, and after the sale executed a guaranty that they should be at plaintiff's disposal, and further alleging a demand for the same and the refusal of the defendant to deliver, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 212.

26. Where the plaintiff bought eight hundred sacks of flour on storage in a warehouse, which stood therein as a separate pile, the number of sacks in which was ascertained by counting the outside rows and the number of the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days after attached as the property of the vendor: held, that the delivery was sufficient and the sale valid. *Cartwright v. Phoenix*, 7 Cal. 282; *Horr v. Barker*, 8 Cal. 608; 11 Cal. 403.

27. The mere signing an assignment of a mechanic's lien, without delivery, is insufficient to enable the assignee to maintain an action thereupon. *Ritter v. Stevenson*, 7 Cal. 389; 11 Cal. 27.

28. A levy on personal property capable of manual delivery must be made by taking the property in custody. If it is allowed to remain in the hands of the debtor, the levy cannot operate so as to defeat subsequent executions. *Dutertre v. Driard*, 7 Cal. 551.

29. When delivery and change of possession exist, the subsequent purchaser has notice, and if he purchase of the original vendor—then out of possession—there is nothing in the statute to give him relief. *Vance v. Boynton*, 8 Cal. 560.

30. The question of delivery and change of possession is a mixed question of law and of fact, but as to what shall constitute a delivery is a question of law alone. *Ib.*

31. The delivery of a warehouse receipt passes the title to the property the same as the delivery of a bill of lading. *Horr v. Barker*, 8 Cal. 614.

32. F. sold to P. certain goods, the possession of which P. retained for two or

three days, when he leased the premises in which the goods were and delivered the goods to F.—his vendor—and one M., who, after carrying on the business in connection with F. for a few days, retired, leaving F. in the exclusive possession of the property: held, that there was not a sufficient delivery of the goods with a continued change of possession. *Van Pelt v. Littler*, 10 Cal. 394; *Richards v. Schroeder*, 10 Cal. 434; *Hurlburt v. Bogardus*, 10 Cal. 519.

33. A grantor, by the execution and acknowledgment of a deed, admits the delivery. *Bensley v. Atwill*, 12 Cal. 236.

34. There may be a delivery of a fraudulent deed without recording and a recording without a delivery, and the fraud is as complete without the actual delivery as with it, if the fraudulent intent be carried out. *Fisk v. His Creditors*, 12 Cal. 282.

35. There is no rule requiring a delivery as in formal deeds of an assignment in trust. *Forbes v. Scannell*, 13 Cal. 287.

36. No delivery of personal property is necessary as against parties who are neither creditors or subsequent purchasers of such vendors. *Paige v. O'Neal*, 12 Cal. 495.

37. A sale is good as between the parties, whether possession be delivered or not, and only void as to creditors and subsequent purchasers. *Visher v. Webster*, 13 Cal. 61.

38. The execution of an undertaking, the delivery of it to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, are prima facie sufficient proof of delivery, if delivery is essential, as if the instrument were sealed. *Dore v. Covey*, 13 Cal. 510.

39. Action against the sheriff for selling plaintiff's wheat as the property of one Andeque. Evidence tending to show that the wheat was grown on the land of plaintiff and in his possession; that A. was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that the plaintiff was entitled to one-third by the contract between him and A., and that A. sold to plaintiff and delivered possession, and then abandoned the premises—plaintiff residing thereon. A. took no further control of the premises or crops, and plaintiff assumed entire dominion of both: held, that plaintiff was not bound to abandon his premises or carry

## Delivery.

the grain beyond them to protect his title against creditors of A.; that there was no error in refusing to instruct the jury that there was no evidence that the sale from A. to plaintiff was accompanied by an immediate delivery of the property, and followed by an actual and continued change of possession thereof. *Pacheco v. Hunsacker*, 14 Cal. 124.

40. What constitutes delivery under our statute depends on the character of the article and the circumstances of the case. *Chaffin v. Doub*, 14 Cal. 386.

41. Hay cut on land in possession of B. lies in three fields of about one hundred and fifty acres, in swaths, cocks, windrows and stacks. Plaintiff mowed it, and boarded with B. B. mortgaged the hay to plaintiffs for work, and they cease to board with B., whose dwelling is separated from these fields by a fence. Plaintiffs proceed to gather and stack the hay, until the levy of an execution on it, eight days afterwards, by defendant, as B.'s property: held, that even conceding removal from the premises to be essential to a complete delivery of the hay, still plaintiffs were entitled to reasonable time to do it, and that the court erred in assuming as matter of law that eight days was too long. *Ib.*

42. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off of the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred pounds of hay baled and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weight. The plaintiff then went to the house of defendant and told him that the hay was baled and piled up in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nineteen dollars, balance due on the hay. The court instructed the jury that if they believed from the evidence it was the understanding of the parties that upon the payment

of the two hundred dollars by defendant the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff made no difference, if defendant agreed to accept it in that condition and consider it as delivered—the contract for delivery would be fully executed. *Smith v. Friend*, 15 Cal. 126.

43. On the above facts defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused: held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. *Ib.*

44. All the statute requires is that delivery must be made; the vendee must take actual possession; the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. The possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement of the status of the property and the claim to it by the vendee. *Stevens v. Irwin*, 15 Cal. 506.

45. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Blankman v. Vallejo*, 15 Cal. 644.

46. Plaintiff also asked this instruction: "That a delivery at the wharf is not sufficient unless notice be previously given to the vendee of their arrival, and that suf-



On an Account.—On a Contract.—For Rent.—Against an Agent.

sufficient time be allowed to enable him to receive and remove them:" held, that this proposition is not strictly correct; that if the trees bargained for were put out on the wharf, marked W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Thompson v. Paige*, 16 Cal. 79.

## DEMAND.

- I. On an Account stated.
- II. On a Contract.
- III. For Money had and received.
- IV. For Rent.
- V. Against an Agent.
- VI. On a Promissory Note.
- VII. On a Claim against an Estate.
- VIII. Of Property unlawfully taken.
  - 1. By an Officer of the Law.

### I. ON AN ACCOUNT STATED.

1. To sustain an action on an account stated it must be shown that there was a demand in favor of plaintiff acceded to by defendant. *Terry v. Sickles*, 13 Cal. 429.

### II. ON A CONTRACT.

2. A complaint alleging that the defendants sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guaranty that the share of plaintiffs should be at their disposal, and further alleging a demand for the same, and the refusal of defendants to deliver it, is demurrable, as it should have contained an assignment of the breach of the contract or guaranty. *Dabovich v. Emeric*, 7 Cal. 212.

3. In an action on an injunction bond, no demand for payment of unliquidated damages need be made on the parties for

whom the sureties—that is, the obligees—stipulated. *Browner v. Davis*, 15 Cal. 11.

### III. FOR MONEY HAD AND RECEIVED.

4. A count in a complaint for money had and received, which does not allege a demand, is demurrable. *Reina v. Cross*, 6 Cal. 31.

### IV. FOR RENT.

5. A demand for rent at any time during the term when the same might be due, will be sufficient diligence to hold a party who has guaranteed its payment. *Evoy v. Tewksbury*, 5 Cal. 287.

6. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises; plaintiff brings ejectment; defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

### V. AGAINST AN AGENT.

7. In an action to recover money received by a person acting as agent, he cannot be arrested without showing some fraudulent conduct on his part, or a demand on him by the principal and a refu-



## Against an Agent.—On a Promissory Note.

sal by him to pay. An arrest in such case is prohibited by section fifteen, article first, of the constitution. *Ex parte Holdforth*, 1 Cal. 440.

8. On an action against an agent for not accounting, etc., a request to account and pay over must be alleged in the complaint, and proved at the trial. *Bushnell v. McCauley*, 7 Cal. 422.

9. The rule in relation to factors or consignees is well settled, that they are not liable to an action until a demand or instructions to remit. *Kane v. Cook*, 8 Cal. 457.

10. Where a defendant contracted with a factor who was in his debt for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership and a conversion of the property, and no demand was necessary previous to bringing suit. *Scriber v. Masten*, 11 Cal. 306.

11. In suit against an agent for fraudulently appropriating money of plaintiff, defendant cannot, on the trial, object that the person making the demand on him before suit did not exhibit his authority so to do, unless defendant questioned his authority at the time of demand. *Baxter v. McKinlay*, 16 Cal. 77.

12. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. *Baker v. Joseph*, 16 Cal. 176.

tions in the aggregate. *Van Norden v. Buckley*, 5 Cal. 284.

15. A demand upon the makers of a note was made at maturity, but the notice to the endorsers stated the demand to have been made on a day subsequent to maturity: held, that such notice was insufficient to bind the endorsers. *Tevie v. Wood*, 5 Cal. 394.

16. The presentment and demand of commercial paper having days of grace must be made within reasonable hours of the last day of grace. For the purpose of fixing the liability of endorsers, the note or bill is payable on demand at any time within those hours. *McFarland v. Pico*, 8 Cal. 631.

17. In this State the English rule, that where a place of payment is named in a bill of exchange or promissory note it is a substantial contract, is not adopted, and it is not necessary to allege and prove a demand at the place specified. *Montgomery v. Tutt*, 11 Cal. 327, overruling *Wild v. Van Valkenburgh*, 7 Cal. 167.

18. An endorser, after maturity of a promissory note, is entitled to demand and notice of nonpayment before he is liable to pay. *Beebe v. Brooks*, 12 Cal. 311.

19. The law requires a demand of a promissory note to be made within a reasonable time, and notice of nonpayment must be reasonably given. *Ib.*

20. Where a note, due January, 1857, was endorsed by the payee to the present holder, November 26th, 1858, and he, November 29th, 1858, demanded payment of the maker, and verbally notified the endorser of such demand, and that he would be held on his endorsement, it is no objection to the notice that it did not state the time of demand. The demand was good if made within a reasonable time, and before the notice otherwise as to notes endorsed before maturity. In such case, the notice must state the time of demand. *Thompson v. Williams*, 14 Cal. 163.

21. If much time intervenes between demand and notice in transfers after maturity, the question may arise whether the delay has not released the endorser. *Ib.*

22. A notice by the holder that he "had demanded payment of that note," implies that payment was demanded of the person liable to pay, to wit: the maker; and the declaration that he intended to look for payment to defendant,

## VI. ON A PROMISSORY NOTE.

13. By the statute concerning notaries public, notes are made protestable; and the protest of a notary is expressly made evidence of demand and nonpayment of notes as well as bills. *Connolly v. Goodwin*, 5 Cal. 221.

14. Where payment by the maker to the endorser is relied upon as an excuse for want of demand and notice, it must be payment directly and specifically for the note, and not as security for all transac-

## Of Property unlawfully taken.—Demurrage.—Demurrer.

the endorser, implies the fact of nonpayment. *Ib.* 164.

23. An endorser of a note payable on demand, no demand being made until thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable. *Jerome v. Stebins*, 14 Cal. 458.

24. In such case, facts to excuse the delay are an essential part of the complaint, and if not averred therein, it is insufficient. *Ib.*

## VII. ON A CLAIM AGAINST AN ESTATE.

25. The failure of the plaintiff to allege in his complaint in an action on a claim against an estate, its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action. *Ellisen v. Halleck*, 6 Cal. 363; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 560.

## VIII. OF PROPERTY UNLAWFULLY TAKEN.

26. Where the defendant contracted with a factor, who was in his debt, for certain goods, but before he took them away was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership and a conversion of the property, and no demand is necessary previous to bringing suit. *Scriber v. Masten*, 11 Cal. 306.

## 1. By an Officer of the Law.

27. In an action against a sheriff by A for seizing the property of A on an execution against B: held, that no demand was necessary before bringing suit, if the officer was previously informed of the claim. *Ledley v. Hays*, 1 Cal. 161.

28. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in

damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 514; *Daumiel v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Cal. 75.

29. Where the seizure of property is originally acquired by a tort, no demand previous to the institution of suit for its recovery is necessary. *Paige v. O'Neal*, 12 Cal. 495.

## DEMURRAGE.

1. Where a vessel is seized and detained by a revenue officer of the United States, the charterer cannot be made liable for demurrage during the period of such detention. *Brooks v. Minturn*, 1 Cal. 483.

2. If under a charter party, a vessel is seized by custom house officers, the question should be settled whether the seizure were legal, and if occasioned by any act or neglect on the part of the master, the owners would be entitled to freight, subject to a deduction for damages for the delay; but they could not recover for demurrage. If the seizure were legal and occasioned by any act or neglect on the part of the freighters—as neglecting to pay duties—then the owners can recover full freight, and perhaps demurrage. *Ib.* 485.

## DEMURRER.

- I. In general.
- II. Admits the facts in the Complaint.
- III. No Demurrer necessary to a defective Bill in Chancery.
- IV. Appeal from a Demurrer.
- V. In Criminal Cases.
- VI. In Quo Warranto.
- VII. Waiver of Demurrer.
- VIII. When a Demurrer is improper.
- IX. Judgment upon Demurrer.
- X. Special Demurrer.
  1. In general.
  2. To Jurisdiction.
  3. Another action pending between the same parties for the same cause.

In general.—In Criminal Cases.—Waiver of Demurrer.

4. That there is a defect of parties.
5. That several causes of action have been improperly united.
6. That the Complaint does not state facts sufficient to constitute a cause of action.

#### I. IN GENERAL.

1. A demurrer "that the court has no jurisdiction either of the persons of the defendants or of the subject of the action," and "that the complaint does not state facts sufficient to constitute a cause of action," is sufficiently explicit, under the rule of construction adopted by the courts of this State. *Ellissen v. Halleck*, 6 Cal. 393.

2. Unless the alleged defect in the pleading can be included under one or more of the causes of demurrer laid down in the code, a demurrer cannot be sustained. *Hentsch v. Porter*, 10 Cal. 558.

#### II. ADMITS THE FACTS IN THE COMPLAINT.

3. A demurrer in effect admits the truth of the facts alleged. *Selkirk v. Sup. of Sacramento County*, 3 Cal. 326; *Tuolumne Water Co. v. Chapman*, 8 Cal. 397; *Halleck v. Mixer*, 16 Cal. 578.

#### III. NO DEMURRER NECESSARY TO A DEFECTIVE BILL IN CHANCERY.

4. Where a bill in chancery shows on its face that the plaintiff is not entitled to relief, the defect may be taken advantage of in the appellate court, even though no demurrer be filed. *White v. Fratt*, 13 Cal. 525; *Gregory v. Ford*, 14 Cal. 143.

#### IV. APPEAL FROM A DEMURRER.

5. No appeal can now be taken before final judgment from a mere decision on a demurrer. *Moraga v. Emeric*, 4 Cal. 303.

6. No appeal lies to the supreme court from an order of the court below overrul-

ing a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

#### V. IN CRIMINAL CASES.

7. The insufficiency of an indictment should be taken advantage of by demurrer. *People v. Josephs*, 7 Cal. 130; *People v. Apple*, 7 Cal. 290.

8. No appeal lies to the supreme court from an order of the court below overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

9. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appeal from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People v. Wooster*, 16 Cal. 435.

#### VI. IN QUO WARRANTO.

10. If the complaint in quo warranto be defective in alleging that defendant is in possession of the office without lawful authority, the defect must be reached by special demurrer. *People v. Woodbury*, 14 Cal. 45.

11. In quo warranto for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the rights of relator, but only in the determination of their own right to the office. *People v. Abbott*, 16 Cal. 364.

#### VII. WAIVER OF DEMURRER.

12. When a demurrer to a complaint is

## When a Demurrer is improper.—Judgment upon Demurrer.

put in and then overruled, and the defendant answers, the answer is a waiver of the demurrer.\* *De Boom v. Priestly*, 1 Cal. 107; *Pierce v. Minturn*, 1 Cal. 471; *Brooks v. Minturn*, 1 Cal. 481.

13. Where a demurrer is sustained and plaintiff amends by making two counts instead of one, he cannot after the trial complain of error in sustaining the demurrer. He should have gone to trial on the pleadings where the judgment on demurrer left them. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

14. Although it does not appear from the record on appeal that a demurrer to the complaint was formally disposed of, yet if it does appear in the statement that one of the errors relied on is "the ruling of the court on demurrer, and that the same should have been sustained;" and if the appellant went to trial without insisting on a disposition of the demurrer, he cannot object in the supreme court that the demurrer was not formally disposed of. *De Leon v. Higuera*, 15 Cal. 494.

## VIII. WHEN A DEMURRER IS IMPROPER.

15. Objections to a complaint, when they arise from matters of form, are not subject of a demurrer. *Otero v. Bullard*, 3 Cal. 189.

16. Unless defects are alleged as the grounds of a demurrer, the party cannot avail himself of it. When the grounds of a demurrer are either technical or otherwise unsubstantial, no effect will be given them. *Montifiori v. Engels*, 3 Cal. 434.

17. Objections to the prayer of a complaint cannot be taken by demurrer. *Rolins v. Forbes*, 10 Cal. 300.

18. The want of any averment of special damage in a complaint could not be reached by demurrer. *McCarty v. Beach*, 10 Cal. 464.

19. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson v. Highland*, 13 Cal. 75.

20. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is

the proper remedy. *Watts v. White*, 13 Cal. 324.

## IX. JUDGMENT UPON DEMURRER.

21. A judgment upon demurrer is not always a bar to a subsequent action. It is only so where it determines the merits of the case. *Robinson v. Howard*, 5 Cal. 429.

22. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim, and this averment is found to be true, the judgment upon demurrer is a bar to the suit. *Ib.*

23. When a final judgment or demurrer to the complaint sustaining the demurrer is reversed, the plaintiff has a right to amend on application to the court below. *Phelan v. Supervisors of San Francisco County*, 9 Cal. 16.

24. Where a record shows that a demurrer was interposed to the complaint, and was sustained by the court, and afterwards, during the same term, a judgment was rendered in favor of the plaintiff, the court will not presume that the order sustaining the demurrer was set aside by the court before judgment was rendered. *Seaver v. Cay*, 9 Cal. 565.

25. It is error to render final judgment on demurrer to plaintiff's complaint. Where the complaint is defective the court should sustain the demurrer with leave to the plaintiff to amend his complaint; and if the plaintiff then declines, judgment final should be given. *Gallagher v. Delaney*, 10 Cal. 410.

26. Where a demurrer to a complaint is overruled, and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the court subject to review in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

27. If, after the demurrer to a complaint sustained, defendant does not offer to amend, final judgment against him will not be disturbed. *Smith v. Yreka Water Co.*, 14 Cal. 201.

\*These decisions were made when the code permitted appeals from an interlocutory order, which was restricted by the amendment of 1854. See note, p. 98.

## Special Demurrer.

## X. SPECIAL DEMURRER.

1. *In General.*

28. A complaint was filed to compel a copartnership account, and contained sufficient to call upon the defendants for an account as to a particular branch of their business, but was in other respects inartificially drawn and insufficient; a demurrer was filed to the whole complaint and overruled. *Young v. Pearson*, 1 Cal. 448.

29. A demurrer to the whole declaration, when some of the counts are good, should be overruled. *Whiting v. Heslep*, 4 Cal. 330; *Weaver v. Conger*, 10 Cal. 237; *Phelps v. Owen*, 11 Cal. 23; *Boles v. Weifenback*, 15 Cal. 144.

2. *Jurisdiction.*

30. Demurrer to the jurisdiction of a court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint. Otherwise, of courts of limited and special jurisdiction; there, every fact essential to confer jurisdiction must be alleged. *Doll v. Feller*, 16 Cal. 433.

3. *Another action pending between the same parties for the same cause.*

31. When a bill disclosed that the same subject matter had been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was held bad on demurrer, and was ordered to be dismissed. *Barnett v. Richey*, 3 Cal. 327.

4. *That there is a defect of parties.*

32. A defendant may demur if there is a misjoinder; for the words, "defects of parties" in the code mean a defect in the complaint by reason of too many or too few parties. *Rowe v. Chandler*, 1 Cal. 174.

33. The objection to a defect of parties should be taken by demurrer, or it must be deemed to have been waived and could not then be raised at the trial. *Sampson v. Shaeffer*, 3 Cal. 202; *Warner v. Wilson*, 4 Cal. 313; *Beard v. Knox*, 5 Cal. 257; *Oliver v. Walsh*, 6 Cal. 456; *Tissot v. Throckmorton*, 6 Cal. 473; *McKune v. Mc Garvey*, 6 Cal. 498; *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334; *Alvarez v. Brannan*, 7 Cal. 510; *Dunn v. Tozer*, 10 Cal. 170; *Mott v. Smith*, 16 Cal. 557.

34. An allegation in the answer that the debt sued for, if due at all, is due to the plaintiff and another as partners, cannot be treated as a demurrer. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334.

35. Where a mortgage is given to secure the separate debts of several persons as mortgagees, and the bill against one avers the other mortgagees are no longer interested and are not parties, demurrer for defect does not lie. *Tyler v. Yreka Water Co.*, 14 Cal. 217.

36. If several causes of action are improperly united in the same action, the objection must be taken by answer or demurrer, or it will be deemed to have been waived. *Macondray v. Simmons*, 1 Cal. 395.

37. A demurrer to a complaint on the ground that it seeks a remedy at law, and also seeks for equitable relief, is bad. *Gates v. Kieff*, 7 Cal. 125; *Marius v. Bicknell*, 10 Cal. 224; *Weaver v. Conger*, 10 Cal. 237; *Rollins v. Forbes*, 10 Cal. 300.

38. Where in a complaint the law and equity are inseparably mixed together, it would be demurrable. *Gates v. Kieff*, 7 Cal. 125.

39. An objection that different causes of action have been improperly joined, is waived by the failure of defendants to demur. *Marius v. Bicknell*, 10 Cal. 224.

40. The union in one count of a complaint of an allegation, that defendants "have wrongfully built dams and flumes across said Mormon creek \* \* \* so as to turn the water of said creek out of its natural channel," etc., and thus divert it from plaintiff, with an allegation that defendants "have constructed gates, etc., in their said dams and flumes, which they \* \* \* hoist for the purpose of clearing out said dams and flumes of slum, stone and gravel," the accumulation of which



That the Complaint does not state facts sufficient.

renders the water useless to plaintiff, does not make the complaint demurrable, on the ground that it unites several distinct causes of action in one count. *Gale v. Tuolumne Water Co.*, 14 Cal. 28.

41. The improper joinder of several causes of action can only be taken advantage of by demurrer. *Clark v. Boyreau*, 14 Cal. 638.

6. *That the Complaint does not state facts sufficient to constitute a cause of action.*

42. Where a declaration states a condition precedent, and fails to aver a performance, the defect must be urged before verdict on demurrer. *Happe v. Stout*, 2 Cal. 461.

43. To enable a plaintiff in equity to subject the assets of an absent debtor to the payment of a claim, he must show that he is without a remedy in law, and if the bill discloses such a remedy, it will be dismissed upon demurrer. *Lupton v. Lupton*, 3 Cal. 121.

44. A declaration setting forth that plaintiff had purchased a quantity of goods from W. & P., "then and there acting as agent of the defendant," is only another form of declaring that he had purchased from the defendant, and is sufficiently certain to prevent any misapprehension of its meaning, and is good on demurrer. *Cockran v. Goodman*, 3 Cal. 245.

45. In an action to recover damages, by the owner of a licensed ferry, against a party alleged to have run a ferry within the limits prohibited by law, it was held, that the complaint should have alleged that defendant ran his ferry for a fee or reward, or the promise or expectation of it, or that he ran it for other than his own personal use or that of his family, and the omission of those allegations was fatal. *Hanson v. Webb*, 3 Cal. 237.

46. Where the complaint alleged that in September, 1849, plaintiff settled on a tract of land, "the same being public land of the United States," that subsequently H., a foreigner, built a house and occupied a portion of the tract, and now that H.'s executor is offering the same for sale, and plaintiff prays for an injunction and damages for the occupation: held, that the

complaint does state facts sufficient to constitute a cause of action. *O'Conner v. Corbett*, 3 Cal. 371.

47. The statute does not require an allegation in the complaint of possession; an averment that the premises are unlawfully withheld from the plaintiff is somewhat general; yet not insufficient in a justice's court, except upon demurrer. *Cronise v. Carghill*, 4 Cal. 122.

48. An objection that sureties sued on are not promissory notes must be taken advantage of by demurrer; and a demurrer having been filed without pointing out this objection, it must be considered waived. *Powell v. Ross*, 4 Cal. 198.

49. An omission to allege delivery in a suit on a bond can be taken advantage of only on demurrer, or the defect is cured by a verdict. *Garcia v. Satrustegui*, 4 Cal. 244.

50. Though a plea would be bad upon demurrer, yet if no objection be taken at the time, and the cause be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. *Ritchie v. Davis*, 5 Cal. 454.

51. A complaint for money had and received, which fails to allege a demand, is bad on demurrer. *Reina v. Cross*, 6 Cal. 31.

52. Where a complaint, though defective, states facts sufficient to constitute a cause of action, the objections to it should have been taken by demurrer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

53. Prima facie, the governor of California, under the Mexican domain, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such a grant, on the ground of want of authority in the governor, is not sustainable. *Den v. Den*, 6 Cal. 82.

54. The failure of the plaintiff to allege in his complaint, in an action upon a claim against an estate, its presentation to and rejection by the administrator, is an objection that the complaint does not state facts sufficient to constitute a cause of action. *Ellisen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 558.

55. The statute providing that no person shall sue a county, unless the claim has been first presented to the board of supervisors, and been by them rejected;

That the Complaint does not state facts sufficient.

this fact must appear in the complaint, or it is demurrable. *McCann v. Sierra County*, 7 Cal. 123.

56. A complaint alleging that the defendant sold to plaintiffs a certain share of fruit growing in an orchard, and after the sale executed a guarantee that the share of the plaintiff should be at his disposal, and further alleging a demand for the same, and refusal to deliver, is demurrable, as it should contain an assignment of the breach of the contract or guarantee. *Dabovich v. Emeric*, 7 Cal. 212.

57. Where the payment of a promissory note is by agreement of parties made conditional upon the payment by the payee of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made, or it is demurrable. *Rogers v. Cody*, 8 Cal. 324.

58. Where it appears upon the face of a complaint that the suit is barred by the statute of limitation, the defendant may demur. *Sublette v. Finney*, 9 Cal. 425; *Barringer v. Warden*, 12 Cal. 314.

59. In an action on an undertaking executed to release property from attachment, the complaint should allege that the property was released upon the delivery of the undertaking, or it is demurrable. *Williamson v. Blattan*, 9 Cal. 501.

60. Where an answer disclosed the fact that the contract was not in writing; but it also averred acts of part performance, which took the contract out of the operation of the statute, it is not demurrable. *Arguello v. Edinger*, 10 Cal. 160.

61. The averment in a complaint that the plaintiff is the owner of the note and mortgage, is a sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins v. Forbes*, 10 Cal. 299.

62. A count in the ordinary form of counts of indebitatus assumpsit for goods sold and delivered, and money paid and expended, is sufficient under our system of practice, and not demurrable. *Freeborn v. Glazer*, 10 Cal. 338.

63. The ground of demurrer "that the complaint does not state facts sufficient to constitute a cause of action," is confined to those cases in which no case of action at all, as against the defendants, arises

from the complaint. *Summers v. Farish*, 10 Cal. 350.

64. Any defect apparent upon the face of the complaint, which will defeat the present right to recover in whole or in part, will be a good ground of demurrer. *Hentsch v. Porter*, 10 Cal. 560.

65. Upon plaintiff's statement of his case, the court intimates that, conceding the facts, he cannot recover; and the plaintiff then offers to prove his allegations; whereupon defendant admits they could be proved, and demurs to the evidence: held, that this is not a demurrer to the evidence. It is rather deciding the case on the demurrer, as on demurrer to the complaint, or as on motion for nonsuit. *Snodgrass v. Ricketts*, 13 Cal. 360.

66. An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship. *Castro v. Armesti*, 14 Cal. 39.

67. Bill filed by a judgment creditor of J. upon an order of court permitting it against defendants as executors. Bill avers that the will of deceased directed, by written or oral instructions, the executors to sell certain cattle, and retain the proceeds for the use and benefit of J., after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use; held, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader; and that there is no law giving effect to an oral instruction of a testator as a will or part of a will; and that the creditor of J. can have no more rights than J. himself. *Sparks v. De la Guerra*, 14 Cal. 111.

68. In a suit by a physician against a county on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

69. If, in justification by the sheriff

That the Complaint does not state facts sufficient.—Deposit.—Deposition.

under an attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Walker v. Woods*, 15 Cal. 69.

70. A complaint in ejectment, averring that plaintiff was in actual possession of the premises by inclosure and cultivation; that defendants, on a certain day, entered upon the same, and ousted the plaintiff; and that defendant is still in possession, is not demurrable. *Boles v. Weisenback*, 15 Cal. 144.

71. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D., in taking said deed, acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to declare such trust, and execute a deed of the property to plaintiff; that, on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that trust be declared,

that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then plaintiff have judgment against H. and wife on said notes; that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken; that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *DeLeon v. Higuera*, 15 Cal. 494.

## DEPOSIT.

1. A having moneys on general deposit with B, a tax for county purposes was levied thereon, and payment demanded both of B and of A: held, that the tax was legal. *Yuba County v. Adams*, 7 Cal. 37.

See BAILMENT.

## DEPOSIT, CERTIFICATE OF.

See CERTIFICATE OF DEPOSIT.

## DEPOSITION.

1. Upon a return to the writ of habeas corpus, it is proper for the court to look into the depositions taken before the com-

## Deposition.

mitting magistrate, in order to ascertain whether there is probable cause to suppose that a felony has been committed by the prisoner. *People v. Smith*, 1 Cal. 14.

2. Taking testimony by depositions is in derogation of the common law, and must not only be done before the proper officer, but every requirement of law must be complied with. *McCann v. Beach*, 2 Cal. 28; *Dye v. Bailey*, 2 Cal. 384.

3. There is nothing in the statute that requires exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence. *Dye v. Bailey*, 2 Cal. 384; *Mills v. Dunlap*, 3 Cal. 96.

4. Proof of notice to take a deposition where a written notice was defective was held good, when made by parol, and it conforms substantially to the statute. *Ib.* 97.

5. The depositions of witnesses taken before a magistrate upon a criminal charge may be used before a grand jury. *People v. Stuart*, 4 Cal. 225.

6. The reading of evidence taken by deposition, although done after the jury have retired, is as much a part of a trial as any other proceeding. *People v. Kohler*, 5 Cal. 72.

7. An order to take testimony by deposition should specify the notice to be given to the adverse party. A deposition taken upon an order without such specification, where the opposite party has not had reasonable notice, ought not to be read in evidence. *Ellis v. Jazynsky*, 5 Cal. 444.

8. Where a deposition is taken ex parte, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring v. Hill*, 6 Cal. 18.

9. A deposition taken before an examining magistrate, on the preliminary examination of a person charged with the commission of a felony, is not admissible on his trial, because the magistrate is not authorized or required to take it, and because taken before the defendant was held to answer. *People v. Garrett*, 6 Cal. 204.

10. It is no ground for the exclusion of a deposition that it was noticed to be taken before the county judge, but was taken

before the county clerk. *Williams v. Chadbourne*, 6 Cal. 561.

11. Notice of the time and place having been given, it is a matter of small importance who took the deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Ib.*

12. A certificate to a deposition must state that the deposition was read to the witness before signing; it must set forth an actual compliance with all the requirements of the statute. The admission of hearsay testimony to a fact admitted by both parties, is not error. *Ib.*

13. There is no appeal from an order refusing to issue a commission to take testimony by deposition. *People v. Stillman*, 7 Cal. 118.

14. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial. *Turner v. McIlhane*, 8 Cal. 579.

15. When the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived. *Jones v. Love*, 9 Cal. 70.

16. Where a rule of the district court requires three days written notice of exceptions to depositions, if they are returned and filed with the clerk that length of time before trial, and such notice is not given on the first trial, the depositions may be admitted on the second trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial. *Myers v. Casey*, 14 Cal. 543.

17. If part of the deposition be liable to the exception of hearsay, this goes only to the rejection of that part, and the objection should be taken at the hearing. *Ib.* 544.

18. Where such rule of a district court requires the notice as above, unless the exceptions appear on the face of the depositions, the meaning is that the objection, not the objectionable matter, must appear on the face of the complaint. *Ib.*

19. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties as hearsay evidence upon the location of such lines after his death. *Morton v. Folger*, 15 Cal. 278.



## Deposition.—Deputy.—Description.

20. There were pending before the board of U. S. land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in 558 entered into a written agreement with V., the claimant, and B. his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before the said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case, No. 558, and on file therein; and to use their “best endeavors to procure the confirmation of said claim No. 558.” B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558, he acted for the U. S. law agent, in taking said depositions, which were important to the government in defeating claim 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement. *Held*, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine v. Stewart*, 16 Cal. 401.

21. *Held*, further, that the depositions having become regularly a part of the records of the land commission, and the government being thus entitled to use them, like other archives, the agreement to withdraw them, and thus to interpose obstacles to the exercise of this right of the government, is contrary to public policy and void, and this, whether the depositions were true or false, or whether the government would be benefited or not by their possession. *Ib.*

22. There is no difference, in principle, between a contract to keep a witness out of the way, and an agreement to suppress and get from the archives or offices of the government a deposition—a knowledge of which may be important to the government. *Ib.*

## DEPUTY.

1. A constable, like any other ministerial officer, has the right to appoint as many deputies as he pleases, and the deputy is not guilty of any trespass in levying by virtue of legal process in his hands. *Taylor v. Brown*, 4 Cal. 188.

2. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

3. A map made by a county surveyor, with protractions of certain lines made by his deputy, is admissible in evidence when both officers swear to the correctness of the protractions. *Gates v. Kieff*, 7 Cal. 126.

4. Where a sheriff's deed is executed by a deputy in the name of the sheriff, whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read in evidence in an action of ejectment. *Cloud v. El Dorado County*, 2 Cal. 134.

5. Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock on Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Whitney v. Butterfield*, 13 Cal. 340.

## DESCENT.

See ESTATES, HEIRS, INHERITANCE.

## DESCRIPTION.

I. Of Real Property.



## Of Real Property.

1. Correction of a mistake.
2. When sufficient.
3. When insufficient.
4. When necessary in a Power of Attorney.
5. In an Assessment.
6. In a Mechanic's Lien.
7. In a Mortgage.
8. In Ejectment.
9. In Forcible Entry and Detainer.
- II. Of Property sold on Execution by an Administrator.
- III. Of Merchandise sold.
- IV. Of Debts in an Insolvent's Schedule.
- V. Of Stolen Property in an Indictment.
- VI. Of Papers noticed to be produced at a Trial.

## I. OF REAL PROPERTY.

1. *Correction of a mistake.*

1. A court of equity will, against a mortgagor, correct a description of the mortgaged premises as a matter of course, and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Woodworth v. Guzman*, 1 Cal. 205.

2. A court of equity will relieve against a mistake as well as fraud in the description of property in a deed or contract in writing, and parol evidence is admissible to show the mistake. *Wagenblast v. Washburn*, 12 Cal. 212.

2. *When sufficient.*

3. A description of premises in a lease, though imperfect, is sufficiently certain, if the boundaries of the premises can be ascertained with a reasonable degree of certainty, and they have been taken possession of and occupied under the lease. *Pierce v. Minturn*, 1 Cal. 472.

4. Where a complaint describes land by a certain name, this is as good a description as one by metes and bounds, if it can be rendered sufficiently certain by evidence. *Castro v. Gill*, 5 Cal. 42.

5. It is essential to the validity of a conveyance that the thing conveyed must be described so as to be capable of identification, but it is not essential that the conveyance should itself contain such a de-

scription as to enable the identification to be made without the aid of extrinsic evidence. *Castro v. Gill*, 5 Cal. 42; *Stanley v. Green*, 12 Cal. 166.

6. A description in a sheriff's return on an execution of city lots by numbers, referring to the official city map, is sufficient. *Welch v. Sullivan*, 8 Cal. 186.

7. The language of the act of congress of September 28th, 1859, conveyed to the State a present interest in the lands. The description of "swamp and overflowed lands" is sufficient to give the State a present prima facie right. *Owens v. Jackson*, 9 Cal. 324.

8. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive as between the United States and the State. *Id.*

9. The assertion of quantity in a deed must yield to a description by metes and bounds, or by name and number. *Stanley v. Green*, 12 Cal. 165.

10. Where a Mexican grant refers in its description of the premises to the plat or map accompanying the expediente, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself as if incorporated therein. *Seaward v. Malotte*, 15 Cal. 306.

11. Where land is described in a lease as "land lying along the American fork, bounded by said fork, and running down to land owned by Mark Stewart; thence easterly and north-easterly along a slough to the north of A street, and following the bank of said slough around where the high land slopes to said American fork," etc., the true construction of this description fixes the boundary on the slough, and the words "around where the high land slopes," if they have any meaning at all, can only be applied to the bank or high ground adjoining the slough. *De Rutte v. Muldrow*, 16 Cal. 514.

3. *When insufficient.*

12. A conveyance of "the following described property, situate, lying and being in the city of Sacramento and State of California, consisting of two thousand two hundred town lots, be the same more or less, said lots being bounded according

## In a Power of Attorney.—Assessment.—Mortgage.—In Ejectment.

to the original plat of said city," is void on account of a patent ambiguity which cannot be cured by parol evidence. *Merrick v. Sunderland*, 6 Cal. 311.

#### 4. When necessary in a Power of Attorney.

13. A power of attorney to sell land must contain some description of the property to be sold, unless it be shown aliunde that the land in controversy is the only land owned by the principal at the time. *Stafford v. Lick*, 13 Cal. 242.

#### 5. In an Assessment.

14. An assessment of land as balance of land on Rancho Arroyo de San Antonio, ten thousand and ninety acres, at four dollars per acre, forty thousand three hundred and sixty dollars, is sufficient description, it appearing on the roll that the part of the ranch not assessed was comprehended within the plat of a town, certain lots in which were assessed on the same list to the same owner. *Patten v. Green*, 13 Cal. 328.

15. Lands outside of a city or incorporated town must be described by metes and bounds, the number of acres as nearly as possible, and the locality and township must be given in an assessment. *Lachman v. Clark*, 14 Cal. 133.

#### 6. In a Mechanic's Lien.

16. The following notice of a mechanic's lien does not contain such a description of the premises as the statute contemplates: "A dwelling place lately erected by me for A., situated on Bryant street, between Second and Third streets, in the city of San Francisco, on lot No. —," though A. owned no other building on that street. *Montrose v. Conner*, 8 Cal. 347.

17. R. & Co., defendants, had two mechanics' liens upon certain property; one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens

did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale, on the ground of fraud: held, that plaintiffs here cannot object that the premises are not so described in the lien as to pass title under such sale. If, from insufficient description, R. & Co. got no title, plaintiffs have their remedy in ejectment. *Gamble v. Voll*, 15 Cal. 510.

#### 7. In a Mortgage.

18. Mere indefiniteness of description in a mortgage is no objection to its enforcement as it is written, whatever the effect of the sale under such a description. The mortgagor cannot complain. *Tryon v. Sutton*, 13 Cal. 491.

19. That property mortgaged is so indefinitely described as not to pass title by sale or foreclosure, is no objection to the enforcement of the mortgage against the mortgagor. *Whitney v. Buckman*, 13 Cal. 538.

20. A mortgage describing the land as "the rancho of her property, in the place known by the names of 'laguna de los Palos Colorados,' or 'Santa Clara,' in Contra Costa county," and stating the land to be the half league the mortgagor acquired from the grant to her first husband, Juan Bernal, which grant is before the U. S. land commission for confirmation, is not void for uncertainty in description. *De Leon v. Higuera*, 15 Cal. 496.

#### 8. In Ejectment.

21. A complaint in ejectment, describing the premises as "lot No. 1, in block No. 23, as per plot of the town of Red Bluff,

## In Ejectment.—In Forcible Entry and Detainer.

as laid out by the Red Bluff land corporation in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley," and specifying the county in which they are situated, by the terms "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 433.

22. In ejectment on a patent, defendant introduced a witness who stated that he knew where the defendant resided; that he knew where Dry creek was, and where it entered Bear river; that he knew no other Dry creek than the one named, and did not think there was any other creek by that name between the foot-hills and Bear river. He was then requested to state, if he knew, whether the lands occupied by the defendant for the last two years or more, or any part thereof, lay below Dry creek and Bear river, the counsel declaring the object of the inquiry to be to show that the lands were not within the calls of the patent or grant. To this inquiry objection was made and sustained, on the ground that it did not relate to the starting point or monument named in the patent; the court offering at the time to allow the witness to be asked whether the lands were situated below the oak tree marked as the commencement or first monument of the patent: held, that the court below did not err in ruling out the testimony, because the question put to the witness did not, as it should have done—limit the inquiry to that Dry creek at the junction of which the marked oak tree stood—it appearing from a map, incorporated into the patent, that there were two streams emptying into Bear river, within the calls of the patent, each of which was termed Dry creek, and that below one of them, and above the other, the premises in controversy were situated; and it further appearing that the description in the patent commenced at an oak tree marked with an (x) and certain figures and letters, at the junction of Dry creek and Bear river, and the map designated the position of the tree—the starting point—at the mouth of the lower Dry creek. *Mott v. Smith*, 16 Cal. 558.

23. From the description in the patent, and from the map, the position of this starting point was fixed beyond doubt; and, as the witness stated he knew only of one Dry creek, the inquiry made of him and ruled out would only tend to mislead and confuse the jury, unless that inquiry were limited to the Dry creek at the junction of which the marked oak tree stood; and the ruling of the Court did not tend to exclude legitimate proof that the premises lay below the creek which the patent designated, but to require it to be directed to such creek, and not to the other creek of the same name. *Id.*

24. The fact that a complaint in ejectment, in addition to giving a description of the premises by metes and bounds, designates them as one half of a certain preëmption claim taken up by Morris, from whom plaintiff traced title, in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential, to entitle the plaintiffs to a recovery as against the defendant in possession, that they should allege in their complaint and establish on the trial such facts as would bring them within the provisions of the preëmption laws of the United States, or of the possessory act of this State. The designation of the property as a part of a preëmption claim does not preclude the claimants from relying upon any other source of title than the United States or the State. *Coryell v. Cain*, 16 Cal. 572.

### 9. In Forcible Entry and Detainer.

25. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-west-erly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres). "The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate

## Of Property sold on Execution.—Of stolen Property.

was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

## II. OF PROPERTY SOLD ON EXECUTION.

26. The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease, which is referred to and described in the decree. *Gaskill v. Moore*, 4 Cal. 235.

27. It is of the essence of every public sale that there be a description sufficient to apprise the bystanders with reasonable accuracy of what is sold or offered. *Crandall v. Blen*, 13 Cal. 23.

28. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Id.*

## 1. By an Administrator.

29. In a sale of public property by an administratrix, it would be holding the rule with much strictness to hold that the sale is void upon its face because the petition does not give an exact accurate description of the real estate. *Stuart v. Allen*, 16 Cal. 503.

## III. OF MERCHANDISE SOLD.

30. A bill of sale of "all the goods and merchandise and property we own, have or have an interest in, in a store in Nevada, formerly occupied by Baily Gatzert, and now in possession of the sheriff of Nevada county, said goods forwarded by us to Bailey Gatzert, Nevada," contains a sufficient description of the goods. *Coghill v. Boring*, 15 Cal. 218.

## IV. OF DEBTS IN AN INSOLVENT SCHEDULE.

31. Where an insolvent was liable on a note made by S. to him, and endorsed by him to R., and by him over to M., and describes the same in his schedule: "To R. I am contingently liable for one thousand dollars and interest, as endorser for one S., upon a promissory note made and executed by said S. to said R.:" held, that the description was insufficient, for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strode*, 7 Cal. 431.

32. Where there is a misdescription of a note, and a want of specification of the name of the real owner, or of any averment that his name is unknown in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwill*, 9 Cal. 478.

33. A note for five hundred dollars by an insolvent to the order of Alfred McCarty is insufficiently described, where the schedule states: "Alfred McCarty, borrowed money, April, 1855, five hundred dollars;" and a discharge in such case is no bar to a suit on the note. *McCarty v. Christie*, 13 Cal. 81.

## V. OF STOLEN PROPERTY IN AN INDICTMENT.

34. An indictment for larceny describing the property as "a black or brown mare or filly, branded with a small mule shoe on the left shoulder," is sufficiently

Description.—Deserters.—Desertion.—Detinue.—Diagram.

particular in description. To state the color is not necessary, and putting it in the alternative is not a fatal objection, especially when other terms of description are given, which identify the property. Our statute does not require more exactness than obtained at common law. *People v. Smith*, 15 Cal. 410.

#### VI. OF PAPERS NOTICED TO BE PRODUCED AT A TRIAL.

35. Literal accuracy cannot be expected in the description given in the notice of a paper in the possession of the adverse party. Such a description as will apprise a man of ordinary intelligence of the document desired, is sufficient. *Burke v. Table Mountain W. Co.*, 12 Cal. 408.

#### DESERTERS.

1. Justices of the peace alone have power to try and commit deserted seamen under the acts of congress; and commissioners of the United States courts can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

#### DESERTION.

1. In an action for divorce, the desertion of the husband entitles the wife to her own domicile for the purposes of maintaining the action. *Moffatt v. Moffatt*, 5 Cal. 281.

2. Willful desertion of the other by either party for the period of two years is ground for a divorce under the statute; and desertion for a less period is not sufficient to bar a decree. *Conant v. Conant*, 10 Cal. 256.

3. The refusal of the wife to accompany her husband on a change of residence,

followed by actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, is evidence of desertion, and authorizes a divorce. *Hardenburgh v. Hardenburgh*, 14 Cal. 656.

4. Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert in the mind of the offending party. *Ib.* 657.

#### DETINUE.

1. In an action of detinue it is usual to aver a bailment or finding; but the manner in which the defendant became possessed of the property has always been held to be mere matter of inducement. *Otero v. Bullard*, 3 Cal. 189.

#### DEVISE.

1. The taking of a legacy by the wife under the will of the husband will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property to others. *Beard v. Knox*, 5 Cal. 257.

#### DIAGRAM.

1. A survey may be detailed from memory by a witness as well as defined by a diagram; and should be excluded unless the witness be a county surveyor, or be introduced to rebut or explain a survey by a county surveyor. *Vines v. Whitten*, 4 Cal. 230.

2. A map made by a county surveyor, with protractions of certain lines made by



Diagram.—Discontinuance.

his deputy, is admissible in evidence when both officers swear to the correctness of the protractions. *Gates v. Kieff*, 7 Cal. 126.

3. It is not error to exclude from the jury a diagram, where no drawing is necessary to illustrate the fact asserted. *Thrall v. Smiley*, 9 Cal. 537.

4. When a private survey is admitted as a diagram, but not as evidence, the court should clearly explain to the jury the precise purpose and effect of its admission. *Rose v. Davis*, 11 Cal. 141.

5. A survey or map of the United States surveyor of a grant is admissible as evidence to establish boundaries, without proof of the orders or authority under which he acted. *Ib.* 142.

6. Where a Mexican grant refers in its description of the premises to the plat or map accompanying the expediente, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself as if incorporated therein. *Seaward v. Malotte*, 15 Cal. 306.

7. In ejectment on a patent, defendant introduced a witness who stated that he knew where the defendant resided; that he knew where Dry creek was, and where it entered Bear river; that he knew no other Dry creek than the one named, and did not think there was any other creek by that name between the foot-hills and the mouth of Bear river. He was then requested to state, if he knew, whether the lands occupied by the defendant for the last two years or more, or any part thereof, lay below Dry creek and Bear river, the counsel declaring the object of the inquiry to be to show that the lands were not within the calls of the patent or grant. To this inquiry objection was made and sustained, on the ground that it did not relate to the starting point or monument named in the patent; the court offering at the time to allow the witness to be asked whether the lands were situated below the oak tree marked as the commencement or first monument of the patent: held, that the court below did not err in ruling out the testimony, because the question put to the witness did not, as it should have done, limit the inquiry to that Dry creek at the junction of which the marked oak tree stood, it appearing from a map, incorporated into the patent, that there were two streams emptying into Bear

river, within the calls of the patent, each of which was termed Dry creek, and that below one of them, and above the other, the premises in controversy were situated; and it further appearing that the description in the patent commenced at an oak tree marked with a (x) and certain figures and letters, at the junction of Dry creek and Bear river, and the map designated the position of the tree, the starting point, as at the mouth of the lower Dry creek. *Mott v. Smith*, 16 Cal. 558.

8. From the description in the patent, and from the map, the position of this starting point was fixed beyond doubt; and, as the witness stated he knew only of one Dry creek, the inquiry made of him and ruled out would only tend to mislead and confuse the jury, unless that inquiry were limited to the Dry creek at the junction of which the marked oak tree stood; and the ruling of the court did not tend to exclude legitimate proof that the premises lay below the creek which the patent designated, but to require it to be directed to such creek, and not to the creek of the same name. *Ib.*

DISCONTINUANCE.

1. The submission of a cause in court to arbitration operates as a discontinuance of the suit; but not if the cause is referred. *Gunter v. Sanchez*, 1 Cal. 48.

2. Where several persons are sued as codefendants, on a joint contract, and no evidence is adduced to establish the joint liability of all, the plaintiff may discontinue the suit as against those not shown to be liable, and proceed to judgment against the others. *Acquital v. Crowell*, 1 Cal. 192.

3. A reference or arbitration in which there is no order of court or agreement filed with the clerk, or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which the court loses all control over the case, and has no authority to enter judgment upon the finding, except by consent of parties. *Heslep v. City of San Francisco*, 4 Cal. 4; overruled in *Carsley v. Lindsay*, 14 Cal. 395.

## Discontinuance.—Discovery.—Discretion.

4. The plaintiff commenced an action of forcible entry and detainer against the defendant, in a justice's court. The justice, instead of trying the case, certified it to the district court: held, that the transfer was illegal, and could not defeat the plaintiff's rights by operating a discontinuance. *Larue v. Gaskins*, 5 Cal. 509.

5. Where there is evidence before a jury, connecting a defendant not served with process with the trespass, a motion to dismiss, as to the defendant, by the other defendants, should be overruled. *Gates v. Nash*, 6 Cal. 195.

6. A motion to dismiss an appeal, on the ground that the transcript was not filed within the time required by the third rule of this court, is too late after the case has been submitted. *Cook v. Klink*, 8 Cal. 352.

7. Complaint filed against M. & D. and H. & L., sureties. Complaint amended, and H. & L. only named defendants, and on this complaint, the issue was found and the cause tried: held, that this operated as a discontinuance as to M. & D., and that although the judgment runs as against "said defendants," the verdict and judgment being entitled, B., plaintiff v. M. et al., still the judgment must be referred to the issue, is of no effect against M. & D., and may be modified as a clerical misprision, in the supreme court. *Browner v. Davis*, 15 Cal. 11.

8. Courts should of their own motion dismiss a case based upon a consideration which contravenes public policy, whether the parties to the suit take the objection or not. *Valentine v. Stewart*, 15 Cal. 405.

9. Dismissal of an appeal in the supreme court for want of prosecution, in accordance with the rules of the court, operates as an affirmance of the judgment below, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term. *Karth v. Light*, 15 Cal. 326; *Chamberlain v. Reed*, 16 Cal. 207.

10. The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence not as an affirmance of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not

vacated during the term, or the dismissal is on the merits. *Karth v. Light*, 15 Cal. 326; *Chamberlain v. Reed*, 16 Cal. 207.

## DISCOVERY, BILL FOR.

1. After a judgment had been entered, it is too late for defendant to file a bill for a discovery in aid of his defense, on the ground that it is meritorious, and lies entirely within the knowledge of the judgment creditor, if he was cognizant of the facts before the judgment was obtained. *Morris v. Denton*, 2 Cal. 380.

2. A bill in chancery, in the nature of a "bill of peace," and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession, claiming title to land. *Ritchie v. Dorland*, 6 Cal. 37.  
See EQUITY.

## DISCRETION.

1. The exercise of a sound discretion, in granting a new trial upon a review of the facts alone, will not be disturbed. *Drake v. Palmer*, 2 Cal. 182; *Speck v. Hoyt*, 3 Cal. 420; *Watson v. Mc Clay*, 4 Cal. 288; *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Peters v. Foss*, 16 Cal. 358.

2. The substitution of papers or pleadings in a case is always within the discretion of the court, and no notice of the motion to apply for it need be given when the notice can be of no use. *Benedict v. Cozzens*, 4 Cal. 382.

3. The court may impose terms in granting or refusing a new trial. In requiring a remittitur of a portion of a judgment as terms for refusing the motion for a new trial, the court used a sound and admitted discretion. *Ib.* 383.

4. The administering of the oath as provided by statute to a person who is challenged for not being a qualified voter,

## Discretion.

is a matter in the discretion of the judges of the election. *People v. Gordon*, 5 Cal. 236.

5. The supreme court having complete appellate power over the right to grant a change of venue, it is not to be supposed that it will trust implicitly in the discretion of inferior courts. *People v. Lee*, 5 Cal. 354.

6. In an action against a ferryman, it was no error to allow the plaintiff to introduce the ferry license after a motion for nonsuit, as this is a matter within the discretion of the court. *May v. Hanson*, 5 Cal. 363.

7. The discretion of the probate court in certifying an issue of fact joined therein for trial to the district court, is subject to review by the supreme court; and in case of gross abuse, would be corrected. *Keller v. Franklin*, 5 Cal. 434.

8. Where in a chancery cause certain issues of fact are submitted to and determined by a jury, the granting of a new trial is entirely discretionary with the chancellor, and his action is not revisable. *Gray v. Eaton*, 5 Cal. 448.

9. A court may in its discretion allow plaintiff—after defendants have closed their case, and before the case is submitted—to supply an omission in the testimony occasioned by mistake or inadvertence, nor is such action any ground of reversal, unless it appear that injustice has been done by an abuse of discretion. *Priest v. Union Canal Co.*, 6 Cal. 171; *Lisman v. Early*, 15 Cal. 199.

10. Courts have a large discretion over conduct of proceedings before them, and may limit counsel to a reasonable time. But in capital cases, this should be done, if at all, only in very extraordinary and peculiar instances. *People v. Tock Chew*, 6 Cal. 636; *People v. Keenan*, 13 Cal. 584.

11. The order in which evidence shall be admitted is in the discretion of the court before whom the case is tried. *Gordon v. Searing*, 8 Cal. 50.

12. Where a reference is had to take an account, it is within the discretion of the referees to open the case, after it has been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in case of gross abuse, will not be reviewed on appeal. *Marziou v. Pioche*, 10 Cal. 546.

13. The granting or refusing a continuance rests in the sound discretion of the court. *Pilot Creek Canal Co. v. Chapman*, 11 Cal. 162.

14. The sufficiency of a notice to the adverse party to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case. *Burke v. Table Mountain Water Co.*, 12 Cal. 407.

15. The allowance to file an answer after demurrer overruled vests in the discretion of the court below, subject to review of course, in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

16. The terms of new trials are peculiarly within the discretion of the court, with the exercise of which the appellate court will not interfere, except in case of clear abuse. *Rice v. Gashirie*, 13 Cal. 54.

17. Two defendants filed a joint plea of the statute of limitation, and the plea being held bad as to the defendant, the court, on the trial, permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

18. Questions of discretion of the judge below cannot be reviewed in the supreme court, except in cases of gross abuse to the injury of the party. *Smith v. Billett*, 15 Cal. 26.

19. A statement on motion for a new trial, regularly settled and signed by the judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the judge so as to insert a specification of the grounds of the motion after the time for filing a statement has passed, being in the furtherance of justice and a matter of discretion, not of power. *Valentine v. Stewart*, 15 Cal. 396.

20. Lower courts have an enlarged discretion in the conduct of the business before them, and with this discretion the appellate court will not interfere, unless it affirmatively appear that injustice has been done. *Broadus v. Nelson*, 16 Cal. 80.

21. The allowance of an amendment to pleadings is a matter of discretion, for the abuse of which only can the appellate court interfere. *Gillan v. Hutchinson*, 16 Cal. 156.

## Distribution.—District Court.

22. Courts of equity are ever ready to grant relief from sales made upon their decrees where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property or the estate sold; provided, application be made to them in the suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. The nature and extent of the relief in such cases are matters vesting very much in the sound discretion of the court. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 563.

## DISHONOR, NOTICE OF.

See PROTEST.

## DISMISSAL.

See APPEAL, DISCONTINUANCE.

## DISSOLUTION.

See COPARTNERSHIP, III; CORPORATION, VI.

## DISTRIBUTION.

1. The stock of an association being divided into money shares and labor

shares, the holders of the latter of which had contributed no capital to the outfit of the company, had performed no labor beneficial to the company, and had their expenses to California paid out of the funds contributed by the holders of the money shares: held, that the assets of the company should be distributed among the holders of the money shares alone. *Von Schmidt v. Huntington*, 1 Cal. 74.

2. Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution; and the plaintiff subsequently filed a supplemental bill, setting forth that in the meantime he had become a judgment creditor, and attacking the assignment for fraud since discovered, and praying that it be set aside and the moneys in the hands of the assignee be appropriated to plaintiff's judgment: held, that it is no objection to the supplemental bill that it prays for a different relief; and fails to bring in all the other creditors who are alleged by the defense to be entitled to a ratable distribution. *Baker v. Bartol*, 6 Cal. 486.

## DISTRICTS.

1. The legislature has power so to change the assembly districts as to join two counties in one district. *People v. Hill*, 7 Cal. 104.

## DISTRICT COURT.

## I. Jurisdiction.

1. In general.
2. Not appellate.
3. In Probate matters.
4. Over Proceedings in other District Courts.
5. Over Judgments.

## II. Appeal.

1. From the District Court.
2. On Remittitur from Supreme Court.

## III. Costs.

## IV. Sessions of the Court.

## Jurisdiction.

## I. JURISDICTION.

1. *In general.*

1. The district courts have no jurisdiction beyond what has been conferred upon them by the statutes of the State. *Selby v. Bark Alice Tarlton*, 1 Cal. 104.

2. In adopting the common law, by the act organizing the district courts and by the act prescribing the practice therein, the legislature have defined the limits of the powers and jurisdiction of district courts, and have nowhere conferred upon them the powers of a court of admiralty. *Ib.\**

3. The supreme court may issue a writ of certiorari to a district court for the purpose of reviewing summary proceedings in a case where no appeal would lie. *People v. Turner*, 1 Cal. 156.

4. An attorney licensed to practice in the supreme court is, by the rules of the court, authorized by virtue thereof to practice in all the courts of the State; and a district court cannot expel him from that bar. *Ib.* 190.

5. The act of the legislature, by which a district judge is empowered to hold a district court in another district, is constitutional and valid; and a court held in pursuance of that act by a district judge in a district other than the one for which he has been elected, is not for that reason improperly organized. *People v. McCauley*, 1 Cal. 380.

6. The jurisdiction of the district court is confirmed and defined by the constitution; and no statute can deprive it of its powers to take cognizance of any action wherein the amount in controversy exceeds the value of two hundred dollars. *Hicks v. Bell*, 3 Cal. 224.

7. Where the principal sum sued for is less than two hundred dollars, the district court has no jurisdiction. *Arnold v. Van Brunt*, 4 Cal. 89.

8. District courts cannot entertain jurisdiction of cases in a justice's court by certiorari where the error complained of might be corrected on appeal to the county court. *Gray v. Schupp*, 4 Cal. 185.

9. In a suit brought by one of the partners in a mining company against the

company to recover his share which had been sold for an alleged nonpayment of an assessment, and also to recover the sum of \$2,027, his proportionate share of the gold taken out by said company, the district court had jurisdiction. *Schuepler v. Evans*, 4 Cal. 212.

10. The district courts have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the county court cannot take away the constitutional jurisdiction of the district court. *Fitzgerald v. Urton*, 4 Cal. 238.

11. The legislature possessed an undoubted right to transfer the criminal business of the court of sessions to the district court. *People v. Gilmore*, 4 Cal. 380.

12. Actions in forcible entry and detainer are summary proceedings provided by statute, and do not belong to district courts by virtue of original, nor can they have appellate jurisdiction. *Townsend v. Brooks*, 5 Cal. 53.

13. Where an action has been commenced in a district court in good faith for a sum exceeding two hundred dollars, exclusive of interest, a judgment may be rendered for an amount less than that sum. *Jackson v. Whartenby*, 5 Cal. 95.

14. The district court is a court of general original jurisdiction; its process is co-extensive with the State. *Reyes v. Sanford*, 5 Cal. 117.

15. Causes may be removed from one district court to another, in the manner provided by statute, before answer. *Ib.*

16. Proceedings in insolvency are not stricti juris either proceedings in law or equity, but a new remedy or proceeding created by statute, the administration of which is vested in the district court, independent of their common law or chancery powers as courts of general jurisdiction. *Cohen v. Barrett*, 5 Cal. 210.

17. District courts cannot take cognizance of any case where the sum involved does not exceed two hundred dollars. *Zander v. Coe*, 5 Cal. 232.

18. District courts by the constitution are clothed with original jurisdiction in law and equity where the amount in controversy exceeds two hundred dollars, exclusive of interest. *Zander v. Coe*, 5 Cal. 232; *Sandford v. Head*, 5 Cal. 298.

19. District courts of this State are courts of original and common law juris-

\* This admiralty jurisdiction was conferred by the practice act of April 29th, 1851, title VI.



## Jurisdiction.—In Probate matters.

diction and are courts of record, and have power to naturalize aliens according to the laws of congress, and are the only State courts which have that power. *Ex parte Knowles*, 5 Cal. 306.

20. In an action for service and a division of the property acquired during coverture, the jurisdiction of the district court is not limited as to the amount. *Deuprez v. Deuprez*, 5 Cal. 388.

21. District courts have jurisdiction to punish for contempts of their process, and to issue such writs as are necessary to the exercise of their jurisdiction. *Ex parte Cohen*, 5 Cal. 495.

22. The legislature, in conferring jurisdiction in insolvency on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

23. The grant of authority to the county judge to award injunctions in cases brought in the district courts is a mere power to issue mesne process, auxiliary to the proper jurisdiction of the district court, and is not trenching upon it. *Thompson v. Williams*, 6 Cal. 89; *Crandall v. Woods*, 6 Cal. 451.

24. A district court may issue a writ of certiorari to a county judge to review the proceedings of his court. *Chard v. Harrison*, 7 Cal. 116.

25. As soon as proceedings supplementary to execution were instituted before the district court, that court obtained jurisdiction over the case, and had authority to proceed and apply the property of the judgment debtors to the satisfaction of the judgment upon which proceedings were had. *Adams v. Hackett*, 7 Cal. 202.

26. In an application for a mandamus to compel a district judge to sign a bill of exceptions which the relator alleges he refuses to do, and the judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: held, that the vendor is not entitled to a jury to try the issue of the verity of the bill. *People v. Judge of the Tenth District Court*, 9 Cal. 20.

27. A writ of certiorari will lie in the district court to review the action of the board of supervisors, otherwise their action would be beyond control. *People v. El Dorado County*, 8 Cal. 61; overruling *People v. Hester*, 6 Cal. 680.

28. Where suit was brought in the district court on an undertaking on appeal to the supreme court, given in the sum of three hundred dollars conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the supreme court, and the damages and costs so awarded were only thirty dollars and fifteen cents: held, that the district court had no jurisdiction. *Page v. Ellis*, 9 Cal. 250.

29. The jurisdiction of the fourth and twelfth judicial district courts within the limits of the city of San Francisco is equally extensive, and proceedings may be commenced in either court, at the option of the suitor. *Slade v. His Creditors*, 10 Cal. 485.

30. District courts are courts of general jurisdiction in all matters given them by law, wherever those matters may be locally situated or wherever the parties may reside; but for convenience, parties have a right to a trial of particular cases in particular counties. *Watts v. White*, 13 Cal. 324.

## 2. Not appellate.

31. The district court has no appellate jurisdiction constitutionally. *People v. Perralta*, 3 Cal. 379; *Caulfield v. Hudson*, 3 Cal. 389; *Hernandez v. Simon*, 3 Cal. 464; *Gray v. Schupp*, 4 Cal. 185; *Reed v. McCormick*, 4 Cal. 342; *Townsend v. Brooks*, 5 Cal. 52; *Zander v. Coe*, 5 Cal. 230; *People v. Fowler*, 9 Cal. 86.

## 3. In Probate matters.

32. District courts of this State have the same control over the persons of minors as well as their estates that the courts of chancery in England possess. *Wilson v. Roach*, 4 Cal. 366; *Belloc v. Rogers*, 9 Cal. 129.

33. The issues of fact joined in the probate court and which are sent to the district court for trial are of that class upon which the probate judge is unwilling to pass his judgment, or where from great conflict of evidence a reasonable doubt must exist in his mind as to which side has

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 Probate Matters.—Over Proceedings in other District Courts.—Over Judgments.
 

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the right. *Keller v. Franklin*, 5 Cal. 433.

34. District courts have unlimited jurisdiction over issues of fact sent to be tried out of the probate court. *Ib.* 434.

35. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court is unconstitutional and void. *Deck's Estate v. Gherke*, 6 Cal. 669.

36. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding, and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim is presented to the administrator and probate court it is otherwise. *Belloc v. Rogers*, 9 Cal. 129.

37. An action to foreclose a mortgage, given for the purchase money of a homestead by a deceased person, is not a claim in the sense of the statute against the estate of the deceased. Suit can be brought thereupon in the district court, and the administrator is a proper party for the purpose of liquidating the amount of the indebtedness. *Carr v. Caldwell*, 10 Cal. 385.

38. There is no relation of inferiority in the constitution or powers of probate court, as respects the district court. They are unlike, but neither their respective spheres equal. They are both constitutional courts. No appeal lies from one to the other. *Pond v. Pond*, 10 Cal. 500.

39. Issues of fact are sent from the probate court to the district court, not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. *Ib.*

40. The district court, by virtue of its common law powers alone, derives its powers to try issues of fact, and that court, as a court of law, has no jurisdiction over probate matters. *Ib.* 501.

41. Under former decisions of this court, district courts, as courts of chancery, have assumed jurisdiction over probate matters, and as probably rights have vested under their decrees, and the principle asserted is more convenient in practice, it is not permissible now to question the jurisdiction. *Deck's Estate v. Gerke*, 12 Cal. 436.

42. The district court may take jurisdiction of the settlement of an estate,

when there are peculiar circumstances of embarrassment to its administration, and when the assuming jurisdiction would prevent waste, delay and expense, and thus conclude by one action and decree a protracted and vexatious legislation. *Ib.* 437.

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#### 4. Over Proceedings in other District Courts.

43. The several district courts of the State have all the same jurisdiction and stand on the same level, and one cannot attempt by the writ of mandamus to supervise, direct or restrain the action of another, and this power must exist in the supreme court, for without it the judiciary system would be irremediably imperfect. *People v. Turner*, 1 Cal. 149.

44. One district court has no authority to enjoin the proceedings of another district court. *Anthony v. Dunlap*, 8 Cal. 27; *Rickett v. Johnson*, 8 Cal. 35; *Revalk v. Kraemer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; *Gorham v. Toomey*, 9 Cal. 77.

45. A district court cannot enjoin the proceedings of a federal court. *Phelan v. Smith*, 8 Cal. 521.

46. The exception to the general rule, that one district court cannot restrain the proceedings of another district court, is where the court in which the action or proceeding should be had is unable, by reason of its jurisdiction, to afford the relief sought; as where several fraudulent judgments are confessed in several courts, it would not be necessary for the creditor to bring a different suit in each different court. *Uhlfelder v. Levy*, 9 Cal. 614.

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#### 5. Over Judgments.

47. A judgment rendered by a district court after the time appointed for the adjournment of the term is invalid, and will be set aside. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

48. After the adjournment of the term, no person remains in the district court to set aside the judgment, or grant a new

## Appeal.—Costs.—Sessions of the Court.

trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kramer*, 2 Cal. 583; *Morrison v. Dopman*, 3 Cal. 257; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

49. The district court is a superior court of general jurisdiction, and its judgment upon any subject matter within its power is conclusive between the parties in every collateral issue, as long as such judgment is unreversed. *Webb v. Hanson*, 3 Cal. 105.

50. The district court is not limited by the present act, as to the time within which it may grant relief upon a judgment unjustly or improperly obtained. *People v. Lafarge*, 3 Cal. 133.

51. It is a wrongful exercise of authority, in the district court, to strike out, on an ex parte motion, a marginal entry of satisfaction, on a judgment rendered two years before. *Henly v. Hastings*, 3 Cal. 342.

## II. APPEAL.

1. *From the District Court.*

52. No appeal lies from a judgment of a district court, on an appeal from an order of the court of sessions,\* upon an application of a ferry license. *Webb v. Hunson*, 2 Cal. 134.

53. A party desiring to appeal from the district court, in a case wherein the statute has failed to make provision, must bring himself within the constitutional provisions of appeal, else the judgment of the district court is final and conclusive. *Webb v. Hanson*, 3 Cal. 68: 105.

2. *On Remittitur from Supreme Court.*

54. Where a case is remitted from the supreme court to a district court, the clerk of the district court may issue an execution for the costs accrued thereon, and the district court has no authority to prevent it. *City of Marysville v. Buchanan*, 3 Cal. 213.

\*This appellate jurisdiction from the court of sessions declared unconstitutional.

## III. Costs.

55. A district court has no authority to allow counsel fees, as in admiralty cases, in a cause transferred from the court of first instance into that court by statute. *Selby v. Bark Alice Tarlton*, 1 Cal. 104.

## IV. SESSIONS OF THE COURT.

56. At a regular term of the district court, the court fixed the time of holding an adjourned term in accordance with another statute; a new statute was passed, fixing other regular terms, and repealing the previous law regulating regular terms; it was held that the law authorizing the time of holding adjourned terms was impliedly repealed, and that a term so holden was not legal. *Domingues v. Domingues*, 4 Cal. 186.

57. Though the legislature are required directly to select the places of holding the district court, it does not follow that the right to select a county seat may not be conferred by law upon the people, as the constitution does not require that the district court shall be held at a county seat. *Up-ham v. Supervisors Sutter County*, 8 Cal. 382.

## DISTRICT JUDGE.

1. The constitution of the State confers the authority of peace officers upon the justices of the supreme court and the district judge. *People v. Smith*, 1 Cal. 13.

2. An attachment will not be issued against a district judge for noncompliance with a writ of mandamus, by which he was directed to vacate an order expelling the relator from the bar, and reinstate him in his office of attorney, where it did not appear from the papers on which the motion of attachment was founded that any application has been made to the court to vacate the order, as commanded by the writ of mandamus, and where it appears that so far as the action of the judge in vacation is concerned, he has in substance

complied with the command of the writ of mandamus; and in such case, it will not be deemed a disobedience of the writ, that the court had again expelled the relator for reasons alleged to have arisen after the issuing of the writ. *People v. Turner*, 1 Cal. 189.

3. The act of the legislature by which a district judge is empowered to hold a district court is constitutional and valid, and a court held in pursuance of said act by a district judge, in a district other than the one for which he was elected, is not for that reason improperly organized. *People v. McCauley*, 1 Cal. 380.

4. The legislature created the tenth judicial district, and not having appointed a judge therefor, the governor, on the first May, 1851, appointed the respondent, who was duly qualified. The relator having been elected judge at the general election in September, received his commission and was duly qualified: held, that he was rightfully entitled to his office. *People v. Barbour*, 3 Cal. 504.

5. In an application for a mandamus to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the district judge, in his answer, avers that he has signed a true bill of exceptions, and that the one presented by the relator is not a true bill: held, that the relator is not entitled to a jury to try this issue. *People v. Judge of the Tenth Judicial District*, 9 Cal. 20.

6. An execution issued upon a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Wells v. Stout*, 9 Cal. 497.

7. District judges have power to issue writs of certiorari and to hear them on their return at chambers. *People v. Supervisors of Marin County*, 10 Cal. 346.

8. A person duly elected judge of the district court of this State is entitled to hold office for the period of six years. *People v. Weller*, 11 Cal. 85; *People v. Burbank*, 12 Cal. 388.

9. Where an election for the office of district Judge has been held by the qualified electors of such district at the general election in 1853, and the term of the present incumbent does not expire until January, 1861: held, that such election was unauthorized, and the person elected

was not entitled to a commission as judge. *People v. Weller*, 11 Cal. 88.

10. Every act done by a district judge, acting as such under a commission, and in open possession of the office, whether rightfully in office or not, is to all intents and purposes as valid, so far as third persons are concerned, as if he were both judge de facto and de jure. *People v. Burbank*, 12 Cal. 386.

11. The constitution, though it fixes the period of the term of the office of district judge, does not fix any day for the commencement of the term; and if it did, it would not follow that it applied to judges afterwards elected to new districts. Nor would it result that the judge elected in consequence of a vacancy was necessarily elected to fill a vacancy. *Ib.* 387.

12. The legislature can direct the time and prescribe the mode of electing district judges, but cannot change the tenure of the office; hence, so much of the act as limited the period of incumbency is void. *Ib.* 392.

13. The fact that a record is erroneous in stating that the parties waived a jury, cannot be shown by an affidavit of the district judge who tried the cause. *Smith v. Brannan*, 13 Cal. 115.

14. The act giving jurisdiction over the subject of contested elections to the judge of the county court, is constitutional, and judges of the district courts are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

15. A district judge inducted into office with a commission from the governor showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date. *Turner v. Melony*, 13 Cal. 623.

16. The certificate of a district judge, made eight years after the trial, that he believed the exceptions taken were correctly noted in the clerk's minutes of the testimony, cannot supply the place of a bill of exceptions. *Castro v. Armesti*, 14 Cal. 39.

17. A statement on appeal certified by a district judge to be correct according to his recollection is not sufficient. *Van Pelt v. Littler*, 14 Cal. 196.

18. Where a district judge cannot be found, the proposed statement or bill in a criminal case may be delivered to the clerk of the court for him, the clerk's office being the proper place for the deposit of pa-

pers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt and hand it to the judge at the earliest convenient opportunity. *People v. Lee*, 14 Cal. 512.

19. Questions of discretion in the judge of the district court are not reviewed in the supreme court except in cases of gross abuse, to the injury of the party. *Smith v. Billett*, 15 Cal. 26.

20. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *McCartney v. Fitz Henry*, 16 Cal. 185.

### DITCHES.

See WATER COURSES.

### DIVIDEND.

1. Plaintiff assigns to defendant, September 22d, two shares of stock in a mining company, stating in the assignment, "I authorize the transfer to him, (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second. The trustees did not in fact declare dividends until between noon and one o'clock on Tuesday: held, that the dividends belonged to plaintiff, and that parol evidence was admissible to explain the transaction and point its meaning. *Brewster v. Lathrop*, 15 Cal. 22.

### DIVORCE.

1. By the Mexican law, marriage lawfully contracted in the Mexican church between members thereof cannot be dissolved by the civil tribunals. Without the sanction of the church, marriage is a mere civil contract, and as such falls within the jurisdiction of the court of first instance. *Harman v. Harman*, 3 Cal. 215.

2. Upon granting a divorce, the act relative to husband and wife directs that the common property shall be equally divided. It is held that one of the direct results, and part and parcel of a decree of divorce, is the partition of the common property and is one of the proper subjects of the action. *Kashaw v. Kashaw*, 3 Cal. 321.

3. The wife, in an action for a divorce, may make a party of any one claiming an interest in the common property. *Ib.* 322.

4. Where the husband resided and had his domicil some time in this State, and the wife followed him and arrived here and commenced an action for divorce before six months had elapsed after her arrival: it was held, that the domicil of the husband is the domicil of the wife, and she must be considered as having been a resident of the State continuously since her husband arrived. *Ib.*

5. In an action for divorce, the desertion of the husband entitles the wife to her own domicil for the purposes of maintaining the action. *Moffatt v. Moffatt*, 5 Cal. 281.

6. In an action for divorce and a partition of the property acquired during coverture, the district court has jurisdiction alone and in an unlimited amount, and can also provide for the support of the wife and child. *Deuprez v. Deuprez*, 5 Cal. 388.

7. In an action by the wife for a divorce on the ground of the willful neglect of the husband and his failure to provide her with the necessaries of life for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears that they were not living together at the commencement of the suit. *Washburn v. Washburn*, 9 Cal. 476.

8. Willful neglect, whether accompanied with desertion or otherwise, is a distinct ground of divorce. *Ib.*



Divorce.

9. It must appear affirmatively on the part of the applicant that the husband was the owner of property sufficient to provide for the necessities of life, and neglected so to do. *Ib.*

10. In an action for divorce, the defendant cannot have a portion of the homestead set apart to him, where it is not shown that the property claimed as a homestead has been at any time during the existence of the marriage the residence of the family. *Elmore v. Elmore*, 10 Cal. 226.

11. The supreme court possesses appellate jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Conant v. Conant*, 10 Cal. 253.

12. The charge of adultery should be stated with reasonable certainty as to time and place, so as to enable the defendant to prepare to meet it on the trial. *Ib.* 254.

13. The statute has not altered any of the ordinary rules of pleading for cases of divorce, except that nothing can be taken by admission or default. *Ib.*

14. The doctrine of recrimination or compensatio criminum applicable in suits for divorce, and the several offenses which by the statute constitute grounds of divorce, are pleadable in bar to such suits, the one to the other, within the principle of the doctrine. *Ib.*

15. Willful desertion of the other by either party for the period of two years is ground for a divorce under the statute; and desertion for a less period is not sufficient to bar a decree. *Ib.* 256.

16. The true rule which should govern the courts in the exercise of their discretion in this respect is this: that to entitle to a decree for an absolute divorce from the bonds of matrimony, the applicant must be an innocent party; one who has faithfully discharged the obligations of the marriage relations, and seeks relief because really injured or aggrieved by the misconduct of the other; and on the other hand, where there are circumstances showing a disregard of those obligations, though not carried to such a degree as to constitute itself a ground for divorce, the decree should be only for a divorce from bed and board. *Ib.* 257.

17. The whole issue in divorce cases cannot, even by stipulation, be referred; and when a reference is had, the referee cannot pass upon the testimony. If he

make any statement or finding of facts, the court is obliged to disregard it, and base its decree only upon the legal testimony taken. *Baker v. Baker*, 10 Cal. 527.

18. An order setting aside the findings of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character, and not the subject of appeal. *Ib.*

19. The statute on divorces does not in terms prohibit the introduction of confessions in evidence; but only provides that the decree shall not be granted on them. *Baker v. Baker*, 13 Cal. 93.

20. When all presumptions of collusion are repelled, and from circumstances it appears reasonably certain that the confession made is true, the ground of the rule of exclusion in cases of divorce is obviated, and there can be no reason for refusing consideration to the confession. *Ib.* 94.

21. Marriage by our law is a civil contract, and may be avoided for material and substantive fraud in its procurement; and ante nuptial pregnancy by a stranger is a fraud going to the very substance of the contract, vitiates it ab initio, and authorizes a divorce. *Ib.* 102.

22. Extreme cruelty in our divorce act means the same thing as the sævitia or cruelty of the English ecclesiastical court; and may be defined generally to be any conduct in one of the married parties which furnishes reasonable apprehension that the continuance of the cohabitation would be attended with bodily harm to the other. *Morris v. Morris*, 14 Cal. 79.

23. Courts grant divorces in cases of cruelty, not to punish an offense already committed, but to relieve the complaining party of apprehended danger. And the divorce may follow, even in the absence of any actual violence. *Ib.*

24. But if there has been actual violence, it must be attended with danger to life, limb or health, or be such as to cause reasonable apprehension of future danger. *Ib.* 80.

25. Divorce for extreme cruelty is not generally granted when such cruelty is caused by the misconduct of the wife who applies. *Johnson v. Johnson*, 14 Cal. 460.

26. A wife divorced from her husband for extreme cruelty on his part is entitled to the custody of their female child of tender years—the wife being blameless.

## Divorce.—Domicil.

The father has a right to see the child at all convenient times. *Wand v. Wand*, 14 Cal. 517.

27. The refusal of the wife to accompany her husband on a change of residence, followed by actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, is evidence of desertion, and authorizes a divorce. *Hardenbergh v. Hardenbergh*, 14 Cal. 656.

28. Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with an intent to desert, in the mind of the offending party. *Ib.* 657.

29. Where the court dissolves the bonds of matrimony, it has no power to impose any restraint upon a second marriage in the absence of an express statute conferring it. *Barber v. Barber*, 16 Cal. 378.

## DOCUMENTS.

See INSTRUMENTS.

## DOMICIL.

1. Where the husband resided and had his domicile sometime in this State, and the wife followed him and arrived here and commenced an action for divorce before six months had elapsed after her arrival, it was held that the domicile of the husband is the domicile of the wife, and she must be considered as having been a resident of the State continuously since her husband arrived. *Kashaw v. Kashaw*, 3 Cal. 322.

2. The homestead is the family residence, and in order to constitute a homestead there must be an actual occupancy, with the intention of dedicating the premises to such purpose. Residence is prima facie evidence of such intention, and imparts notice.\* *Cook v. McChristian*, 4 Cal. 25; *Holden v. Pinney*, 6 Cal. 235.

3. Residence depends upon intention,

as well as fact, and mere inhabitancy for a short period against the intention of acquiring a domicile would not make a resident within the meaning of the law, so as to constitute an elector. *People v. Peralta*, 4 Cal. 175.

4. Occupancy by the family is presumptive evidence of the appropriation of a place as a homestead, and is consequently notice to all the world.\* *Taylor v. Hargous*, 4 Cal. 273.

5. In the case of the successive occupancy of several places as residences, the recovery of either one of them by the wife, as a homestead, would bar her recovery of any other as such.\* *Ib.*

6. The domicile of the husband is the domicile of the wife, in contemplation of law, and it is not necessary that she should be an actual resident in the State. *Beard v. Knox*, 5 Cal. 257.

7. In an action for a divorce, the desertion of the husband entitles the wife to her own domicile for the purpose of maintaining the action. *Moffatt v. Moffatt*, 5 Cal. 281.

8. Where a married man, whose wife had never resided in the State, purchased a lot of land and resided upon it, which he then mortgaged, his wife not joining therein, and subsequently his wife came to this State and resided with him on the mortgaged premises: held, that the character of a homestead was never impressed upon the premises until the actual residence of the family thereon, and therefore the homestead exemption cannot be sustained against the mortgage.\* *Cary v. Tice*, 6 Cal. 629; *Rix v. McHenry*, 9 Cal. 91.

9. In the application by the wife for a divorce, on the ground of willful neglect of her husband and his failure to provide her with the necessaries of life for the period of three years, the residence of the husband with the wife within the three years is no answer to the application, where it appears they were not living together at the commencement of the suit. *Washburn v. Washburn*, 9 Cal. 476.

10. In an action of divorce, the defendant cannot have a portion of the homestead set apart to him, where it is not shown that the property claimed as a homestead has been at any time during the existence of the marriage the residence of the family. *Elmore v. Elmore*, 10 Cal. 226.

\* The statutes of 1860, p. 311, require the homestead to be declared such, and the declaration to be recorded.

## DONATION.

1. Our statute does not seem to provide for property acquired by gift to the husband and wife jointly, but with that exception there is no substantial difference, unless perhaps the meaning of the term donation, under the Spanish and Mexican law, was more comprehensive than the term in our jurisprudence. *Scott v. Ward*, 13 Cal. 471.

2. A gift of fruit would not lose its character as a gift because accompanied with the condition that the donee should gather it; nor would a gift of land be less a donation because the beneficiary was required to measure the specific quantity given and designate it by metes and bounds. *Scott v. Ward*, 13 Cal. 474; *Noè v. Card*, 14 Cal. 598.

3. Concessions may be made, on consideration moving from the donee, which would take from them the character of a donation. But lands given by the king, without price paid for them, and not in remuneration of any services rendered, are certainly donations. *Scott v. Ward*, 13 Cal. 475; *Noè v. Card*, 14 Cal. 610.

4. Under all systems, donations are of three classes; pure, remuneratory and conditional. They are pure when made without condition in the exercise of a spirit of liberality, as charities. They are remuneratory when required by no legal obligation, but are made from a regard for services rendered. They are conditional when accompanied with provisions intended to secure the purposes for which they are made. *Noè v. Card*, 14 Cal. 610.

## DOWER.

1. Our statute has done away with the common law right of dower, and substituted in place a half interest in the common property. *Beard v. Knox*, 5 Cal. 256. *Scott v. Ward*, 13 Cal. 469.

## DRAFT.

See BILL OF EXCHANGE, CHECK.

## DUEL.

1. Fighting a duel with fatal result is not murder within our statutes, but a special offense under the act of 1855, over which the courts of sessions have jurisdiction. *People v. Bartlett*, 14 Cal. 653.

## DYING DECLARATIONS.

See DECLARATIONS, DYING.

## EJECTMENT.

- I. In general.
- II. Complaint in Ejectment.
- III. Parties to the Action.
- IV. Possession.
  - 1. Abandonment of Possession.
- V. Evidence in Ejectment.
  - 1. The Patent as Evidence.
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- VI. Title.
  - 1. Estoppel as to Title.
- VII. Judgment in Ejectment.
- VIII. Mesne Profits.
- IX. Defendant's Improvements.

## I. IN GENERAL.

1. To maintain ejectment under the American law, a party may rely upon the strength of his title, or simply on prior actual possession; and under Mexican

## In general.—Complaint in Ejectment.

law a party may have his possessory action, in which possession by the plaintiff and disturbance thereof by the defendant may be the sole questions at issue between the parties; or he may have his petitory action on his claim of undisputed title. *Sunol v. Hepburn*, 1 Cal. 259.

2. Indebtitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, or by one of the litigant parties claiming the land; this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson v. Shaeffer*, 3 Cal. 201.

3. In an action of ejectment, the purchaser of a homestead from the husband without the concurrence of the wife is not entitled to recover the excess of its value over \$5,000.\* *Cook v. McChristian*, 4 Cal. 26.

4. Ejectment is merely a possessory action, and is confined to cases where the claimant has a possessory title—a right of entry upon the lands; to support it four things are necessary, title, lease, entry and ouster. *Payne v. Treadwell*, 5 Cal. 311.

5. To enable a party to recover lands under the possessory act of this State, he must have complied with the provisions of the act. *Sweetland v. Froe*, 6 Cal. 147.

6. The fact that a suit in ejectment has been commenced against a judgment debtor by the real owner of the land, does not entitle the judgment debtor to enjoin the judgment recovered, on the ground that it was for a balance of purchase money of land under covenant for a good title. He can only avail himself of the covenants of his grantor when he has been evicted, unless he offers to surrender the land to his grantor. *Jackson v. Norton*, 6 Cal. 189.

7. The defense arising from a verbal contract for the sale of land, accompanied with acts of part performance, taking the contract from the operation of the statute, is permissible, under our practice, to an action of ejectment for the recovery of the premises. *Arguello v. Edinger*, 10 Cal. 160.

8. A vendor by a quit claim deed is a competent witness in an action of ejectment by the vendee against a third party

to recover possession of the premises. *Johnson v. Parks*, 10 Cal. 448.

9. In an action of ejectment, a juror who has formed an opinion adverse to the validity of the title under which defendants claimed, is an incompetent juror. *White v. Moses*, 11 Cal. 69.

10. An action of ejectment, raising the question whether a grant made by the Mexican government passed title to the tract within the limits of the grant, is not a case in which a writ of error lies under the judiciary act. *Ferris v. Coover*, 11 Cal. 181.

## II. COMPLAINT IN EJECTMENT.

11. In a possessory action, it is sufficient for the plaintiff to state that he was lawfully entitled to the possession of the premises, without setting out the evidence of his right. *Goodwin v. Stebbins*, 2 Cal. 105.

12. The allegation of possession at the time of the ouster complained of is a sufficient allegation of title to sustain the declaration. *Hutchinson v. Perley*, 4 Cal. 34; *Norris v. Russell*, 5 Cal. 250; *Garrison v. Sampson*, 15 Cal. 95; *Boles v. Cohen*, 15 Cal. 151; *Boles v. Weifenback*, 15 Cal. 144.

13. Where a complaint alleges that plaintiff was in possession of, and lawfully entitled to possession at the time of eviction: it was held, that the complaint must be treated as a declaration in ejectment. *Ramirez v. Murray*, 4 Cal. 293.

14. A claim for the possession of real property cannot be joined with a claim for consequential damages, arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

15. The allegation that the defendant is in possession and unlawfully withholds the premises, is insufficient; it is a conclusion of law drawn from the defendant's possession, the circumstances of which should be stated. *Payne v. Treadwell*, 5 Cal. 311.

16. In ejectment, it is necessary for the defendant to allege, and if traversed, to prove a seizin, either in himself or his ancestors, through whom he claims. *Id.* 312.

\* This decision is abrogated by the statute of 1860, p. 311, requiring a homestead to be ascertained by declaration recorded in the county recorder's office.

## Complaint in Ejectment.

17. In an action of ejectment to recover the possession of a tract of land, the plaintiff must aver either title or possession. The mere taking from the land a portion of the herbage growing thereon is not sufficient to give a right of possession. *Steinback v. Fitzpatrick*, 12 Cal. 296.

18. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass in the nature of waste, pending the action; but the grounds of equity interposition should be stated subsequently and distinct from those upon which the judgment at law is sought. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 548.

19. A complaint in ejectment, with general averments in the usual form, is sufficient, without a specific averment of the facts. To set out the facts connected with the title, and the wrongful acts of the defendant, would produce confusion, without benefit. *Garrison v. Sampson*, 15 Cal. 95.

20. A complaint in ejectment, averring that plaintiff was in the actual possession of the premises by inclosure and cultivation; that defendants, on a certain day, entered upon the same and ousted the plaintiff, and that defendant is still in possession, is sufficient. *Boles v. Weisenback*, 15 Cal. 144.

21. Complaint in ejectment, averring prior possession in plaintiff, entry and ouster by defendant, and that he is still in possession, sufficient. *Boles v. Cohen*, 15 Cal. 151.

22. Complaint in ejectment may be for two separate and distinct pieces of land; but the two causes of action must be separately stated, affect all the parties to the action, and not require different places of trial. *Ib.* 152.

23. Complaint in ejectment need not state the exact time of the alleged ouster, especially when no claim is made for damages, and no recovery had for them; the allegation in this case as to time of ouster being "on or about December 12th, 1857." *Collier v. Corbett*, 15 Cal. 185.

24. In ejectment, the only facts necessary to be alleged are, that the plaintiff is seized of the premises, or of some estate therein in fee, or for life, or for years, according to the fact, and that the defendant was in their possession at the commence-

ment of the action, and withholds the possession from plaintiff. The seizin is the fact to be alleged. It is a pleadable and issuable fact, to be established by conveyances from a paramount source of title, or by evidence of prior possession. *Payne v. Treadwell*, 16 Cal. 243.

25. An allegation that the possession of defendant is "wrongful or unlawful" is not the statement of a fact, but of a conclusion of law. The words are mere surplusage, and though they do not vitiate, they do no good. *Ib.* 244.

26. A complaint in ejectment, describing the premises as "lot No. 1, in block No. 23, as per plot of the town of Red Bluff, as laid out by the Red Bluff Land Corporation in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the alley;" and specifying the county in which they are situated by the terms "in said county," referring to the designation "county of Tehama" in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 433.

27. In actions to recover real property, the complaint need not state the residence of either of the parties; the statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Ib.*

28. A complaint in ejectment should not set out the mesne conveyances through which plaintiffs deraign title. These are matters of evidence, not of pleading, and should be stricken out from the complaint, on motion. *Coryell v. Cain*, 16 Cal. 571.

29. In this case, the complaint should only have averred that on some day designated plaintiffs were possessed of the land, describing it; that while thus possessed, defendant entered upon the same and ousted them, and has ever since withheld the possession from them, to their damage, specifying such sum as might cover the value of the use and occupation from the date of the ouster. *Ib.*

30. The fact that a complaint in ejectment, in addition to describing the premises by metes and bounds, also designates them as one-half of a certain preëmption



## Parties to the Action.—Possession.

claim taken up by one Morris—from whom plaintiffs traced title—in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential to plaintiffs' recovery as against a defendant in possession that they should allege in their complaint, and on the trial prove such facts as will bring them within the provisions of the preëmption laws of the United States, or the possessory act of this State. The designation of the property as part of a preëmption claim does not preclude the claimants from relying upon any other source of title than the United States or the State. *Ib.* 572.

31. Where in ejectment the ouster was alleged to have taken place in June, 1856, while the title of plaintiff was alleged to have accrued only in May, 1859: held, that if this was not a clerical error, it is a defect which cannot be taken advantage of after verdict. *Ib.* 574.

## III. PARTIES TO THE ACTION.

32. If it is intended to charge parties with taking possession of one or more parcels of land distinct from the lot sued for in the complaint, of which the defendant has possession, the claim against them should not be included in the same action. *Sunol v. Hepburn*, 1 Cal. 258.

33. If it is a joint action of ejectment on the part of the plaintiffs, all must recover or none can.\* *Sunol v. Hepburn*, 1 Cal. 260; *Dewey v. Lambier*, 7 Cal. 348.

34. Tenants in common cannot join in an action in ejectment; they must sue separately. *Johnson v. Sepulbeda*, 5 Cal. 151; *Throckmorton v. Burr*, 5 Cal. 401; *Covillaud v. Tanner*, 7 Cal. 40; *Welch v. Sullivan*, 8 Cal. 187.

35. A nonresident alien cannot inherit land in this State, and consequently cannot maintain ejectment.† *Siemssen v. Boffer*, 6 Cal. 252.

36. The code allows any person in possession of real estate to bring an action against any person who claims an estate

or interest adverse to him. *Merced Mining Co. v. Fremont*, 7 Cal. 319; *Smith v. Brannan*, 13 Cal. 113.

37. Ejectment is a possessory action and must be brought against the occupant. It determines no rights but those of possession at the time, and it matters not who has or claims to have the title of the premises. *Garner v. Marshall*, 9 Cal. 270.

38. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendants in such action who are in possession of such claim holding other undivided interests, and who claim no right to that sued for. *Waring v. Crow*, 11 Cal. 371.

39. In an action of ejectment against two persons, where two of the defendants had previously surrendered the premises to his codefendant, this fact is sufficient to support the finding of the court that the possession was in one and not in the other. *Burke v. Table Mountain Water Co.*, 12 Cal. 408.

40. In ejectment, suit must be brought against the terre-tenant, or party in possession. *Klink v. Cohen*, 13 Cal. 624.

## IV. POSSESSION.

41. The fact that horses and cattle of a person have roamed over and grazed upon a particular tract of land does not of itself alone make out his actual possession of the land. *Sunol v. Hepburn*, 1 Cal. 260.

42. If the plaintiff was not in possession at the time of the defendant's entry, he cannot maintain ejectment. *Ib.*

43. When the plaintiff seeks to recover upon the sole ground of prior possession, a clear and unequivocal possession should be proven. Taking possession and driving some surveyor's stakes and clearing away some brush for the purpose of erecting a dwelling house, but performing no other acts of ownership at that or any other time, are insufficient evidences of possession. *Woodworth v. Fulton*, 1 Cal. 310.

44. Courts will protect the rights of the actual possessor, and if the complaint avers possession by the plaintiff and is not denied by the answer, it will be assumed by the court as a conceded fact. *Folsom v. Root*, 1 Cal. 376.

\*The statute of March 6th, 1857, (Statutes, p. 62) enables one or more tenants in common or joint tenants to sue jointly or separately.

†The act of April 19th, 1856, enlarged the powers of inheritance and extended it to nonresident aliens. See *State v. Rogers*, 13 Cal. 165.

## Possession.

45. Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. *Hutchinson v. Perley*, 4 Cal. 34; *Hicks v. Davis*, 4 Cal. 69; *Winans v. Christy*, 4 Cal. 78; *Plume v. Seward*, 4 Cal. 96; *McMinn v. Mayes*, 4 Cal. 210; *Bequette v. Caulfield*, 4 Cal. 278; *Ramirez v. Murray*, 4 Cal. 293; *Russell v. Ford*, 5 Cal. 250; *Grover v. Hawley*, 5 Cal. 486; *Covillaud v. Tanner*, 7 Cal. 39; *McCarron v. O'Connell*, 7 Cal. 153; *Bird v. Lisbros*, 9 Cal. 5; *Naglee v. Macy*, 9 Cal. 427.

46. To constitute a possession sufficient to establish prima facie evidence of title, there must be an actual bona fide occupation or possessio pedis, and not a mere assertion of title. *Plume v. Seward*, 4 Cal. 96.

47. It is not for the jury to determine whether the fact of prior possession is evidence of title; it is so declared by law. *Castro v. Gill*, 5 Cal. 42.

48. A party's possession is not always confined to his actual enclosure. *Ib.*

49. Proof of possession, however short, will entitle a claimant to recover, unless the defendant can account for such possession, or show a prior possession or title in himself or a third person. *Potter v. Knowles*, 5 Cal. 88.

50. Where two parties rely upon possession merely as proof of title, the presumption of ownership is in favor of the first possessor. *Ib.*

51. To sustain an action of ejectment in favor of a party relying upon mere prior possession, the defendant in the action is treated as an intruder and wrong doer, who invades without right in the premises. *McClintock v. Boyden*, 5 Cal. 101.

52. Where the plaintiff claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of or marked and visible boundaries embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 166.

53. Prior possession is evidence of title, and this cannot by any system of reasoning be made to yield to mere color of title. *Norris v. Russell*, 5 Cal. 250.

54. The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. *Fitzgerald v. Urton*, 5 Cal. 309.

55. To enable the plaintiff in ejectment to recover on prior possession, he must allege and prove an actual ouster. *Watson v. Zimmerman*, 6 Cal. 47.

56. In an action for the recovery of a portion of a tract of land, both parties relying on possession and the defendant proving a prior possession by actual enclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the preëmption laws of the United States or the possessory law of this State. *Bradshaw v. Treat*, 6 Cal. 172.

57. Where a plaintiff in ejectment seeks to recover upon prior possession and does not show a compliance with the statute concerning possessory actions in this State, he can only recover upon proof of actual bona fide occupation. *Murphy v. Wallingford*, 6 Cal. 649.

58. Where the complaint called upon the defendant to answer not only the character of the possession but the fact of possession of it, a failure to deny the averment is an admission of it. *Burke v. Table Mountain W. Co.*, 12 Cal. 407.

59. Where a party takes possession of a tract of land, and encloses it with a fence consisting of posts seven feet apart, and one board six inches wide, nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract, under a deed to the whole. *Baldwin v. Simpson*, 12 Cal. 560.

60. A perfect equity united with possession is, under our system, equivalent for all purposes of defense to a legal title. *Morrison v. Wilson*, 13 Cal. 497.

61. The possession of a tenant is not notice of his landlord's title. *Smith v. Dall*, 13 Cal. 511.

62. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties as an independent fact not in issue by the pleadings but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 116.

63. The possession of agricultural land

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is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 14 Cal. 383.

64. Mere entry on public land, without enclosing it, does not give a right of action on the possession alone. *Wright v. Whitesides*, 15 Cal. 47.

65. A party claiming land under the possessory act of 1852, must show compliance with the provisions of the act. He must be a citizen of the United States; must file the affidavit required by section two; and make his improvements within ninety days, etc. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, etc., is not sufficient. *Ib.*

66. Merely going on waste, uninclosed public land, and building or occupying a house and corral, and even subsequently cutting hay on part of the land, does not give the party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the party claimed and entered under the possessory act of this State, and pursued the necessary steps prescribed by it; or, probably, if he had made his entry under the preëmption laws of the United States. *Garrison v. Sampson*, 15 Cal. 95.

67. Where, in such case—there being no claim under the possessory act, or the preëmption laws of the United States—plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession, to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy—there being no proof, except defendant's general consent, as above named, that defendant agreed to hold the whole tract for plaintiff. *Ib.*

68. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied

the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings. Held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 104.

69. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Ib.*

70. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and these certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs, to show their interest in the ground, and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved. The court instructed the jury—1st, that if they found that plaintiffs located their claim as now claimed, before the location of defendants' claim, then they should find for plaintiffs; and 2d, if they found that defendants

## Possession.—Evidence in Ejectment.

never located any claim adjoining plaintiffs' claim, then they should find for plaintiffs: held, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it until a prior and paramount right was shown in plaintiffs; that it was not essential to defendants' possession that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Pennsylvania Mining Co. v. Owens*, 15 Cal. 136.

71. There is no necessity, in a complaint in ejectment, in negating the possible rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense. *Payne v. Treadwell*, 16 Cal. 243.

72. On the trial in ejectment, plaintiff can rest his case, in the first instance, upon proof of his seizing, and of the possession by defendants. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in defendants. *Ib.* 244.

73. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Coryell v. Cain*, 16 Cal. 572.

74. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be an actual one, and not constructive; and the right it confers must be distinguished from the right given by the possessory act of the State. *Ib.*

75. A party relying on the possessory

act of the State, must show compliance with its provisions, and can then maintain an action for the possession of land occupied for cultivation or grazing, without showing an actual enclosure or actual possession of the whole claim. *Ib.* 573.

76. Where plaintiff relies not on the possessory act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Ib.*

#### 1. Abandonment of Possession.

77. Laying off land into town lots, selling the same, and exercising other acts of ownership over them, is no evidence of abandonment; but taken in connection with previous acts of ownership, furnishes additional evidence of possession. *Plume v. Seward*, 4 Cal. 97.

78. Where a party only shows prior possession, that reliance may fail, if it be shown that he voluntarily abandoned his possession, without the purpose of returning. *Bequette v. Caulfield*, 4 Cal. 279.

79. The removal of an enclosure of land, for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill*, 9 Cal. 557.

80. In ejectment it is not reasonable to hold that plaintiffs intended to abandon all rights to any other land, provided the official survey did not conform to the boundaries they indicated. *Moore v. Wilkinson*, 13 Cal. 489; *Moore v. Roff*, 13 Cal. 489.

#### V. EVIDENCE IN EJECTMENT.

81. To maintain ejectment, the plaintiff must establish, first, that he was in actual possession at the time of the intrusion complained of; second, that he is entitled



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to be reinstated in the possession from which he claims to have been illegally evicted. *Sunol v. Hepburn*, 1 Cal. 260.

82. The question as to the possession and identity of the land should be left to the jury. *Hicks v. Davis*, 4 Cal. 69.

83. Possession, coupled with color of title, must prevail, except where a better title is shown in the defendants; and where plaintiff pleads a fee simple, he is compelled to prove the same, but can also rely on prior possession. *Winans v. Christy*, 4 Cal. 79.

84. In ejectment, the plaintiff may offer in evidence a deed to the defendant, in order to explain the latter's possession. *McMinn v. Mayes*, 4 Cal. 210.

85. Where a plaintiff sets up his right to property, by virtue of a conveyance, which was shown by the testimony of a witness to be a mortgage; held, that the defendant, on cross-examination, could show that the mortgage had been satisfied. *Chenery v. Palmer*, 5 Cal. 132.

86. Under the old system of pleading, a former recovery could be given in evidence under the general issue in ejectment; but this is changed by our code. *Piercy v. Sabin*, 10 Cal. 27.

87. The lines of a quarter section of government land, which are distinctly marked by natural boundaries, and by stakes placed at convenient distances, so that the lines can be easily traced, are sufficient to authorize the occupant to maintain an action for a trespass thereon, under the provision of the act of April 11th, 1850. *Taylor v. Woodward*, 10 Cal. 91.

88. It has been held that the declarations of a tenant in possession of land, those declarations being made at the time of possession, may sometimes be given in evidence as a part of the *res gestæ* to qualify the possession, the possession being the transaction which the declarations illustrate. But in order, and prior to the introduction of these declarations, it must be proved that the tenant was in possession at the time the proposed declarations were made. *Ellis v. Janes*, 10 Cal. 458.

89. In an action of ejectment against several defendants, the plaintiff has the right to prove what part of the land in dispute was occupied by one of the defendants. *Ib.*

90. A decree of confirmation of a grant by the United States land commissioner

and the United States district court cannot be impeached in an action of ejectment between a party claiming under the grant and a third party. *Rose v. Davis*, 11 Cal. 140.

91. A private survey is no legal evidence of the facts it purports to contain, since, if it were, any man might recover the land of another, by including it in his own boundaries. *Ib.* 141.

92. In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he deraigns title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor is insufficient, as the plaintiff himself might have the possession or control of the original, and in the absence of other evidence, his affidavit should have been offered. *Fallon v. Dougherty*, 12 Cal. 105.

93. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right that plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute, prior to the defendant's entry," is insufficient in not setting forth the rules, etc. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

94. The decrees of the board of land commissioners and of the district court are not indispensable to a recovery in ejectment on a grant, but are admissible and conclusive against the government, and against those holding by its license or permission. *Gregory v. McPherson*, 13 Cal. 574.

95. An allegation in a verified complaint, that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiff, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiff, because such denial admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 92.

96. Where in ejectment the complaint avers title as administrator, a default admits it. *Curtis v. Herrick*, 14 Cal. 119.

97. The rule at common law, as to the necessity of proof in ejectment of a legal estate, and a right of entry in the plaintiff at the date of the demise laid in the



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declaration, has no application under our system. *Yount v. Howell*, 14 Cal. 468.

98. In ejectment, where the title is of record and wholly documentary, the court may declare the effect of the papers offered by plaintiff, and instruct the jury that plaintiff has made out his title, if they believe the land to be within the boundaries of a grant under which plaintiff claims. *McGarvey v. Little*, 15 Cal. 31.

99. Where the minutes of the court entered of record show that plaintiff offered in evidence the patent, and certain mesne conveyances to himself, but they do not appear in the statement for new trial, and the papers are not set out in the record, and the court charges as above, this court will not hold that the charge was an abstraction, or that it mistook the facts, when the motion for new trial fails to set forth the grounds relied on, and the statement does not show that the testimony therein was all the testimony offered. *Id.*

100. Under the allegation of ouster, a holding over by the defendant may be shown. *Garrison v. Sampson*, 15 Cal. 95.

101. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and these certificates constituted the only evidence of membership recognized by the company; transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs, to show their interest in the ground and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved: held, that the certificates, etc., were relevant to show possession in plaintiffs, but that their execution should have been proven. *Pennsylvania M. Co. v. Owens*, 15 Cal. 136.

102. In ejectment for an interest in a mining claim, the answer being a general denial, defendant cannot defeat the action by showing the claim to be partnership property. Any rights defendant may have

in the premises, growing out of the partnership, must be asserted in equity, particularly as the legal title in this case is in plaintiff. *Lowe v. Alexander*, 15 Cal. 302.

103. In ejectment, plaintiff offered to introduce in evidence an executory contract by which S. & Co. agreed to sell to Wooster the land sued for; and, when the purchase money was paid, to make a deed—W. to take possession at once, and to retain it so long as he complied with the contract. Plaintiff stated it to be his intention to show, in connection with the contract, that the defendant claimed under Wooster. The answer averred that Wooster mortgaged the premises to defendant, who foreclosed, and went into possession under the sheriff's deed: held, that the contract, with the other proof, was prima facie relevant to the issue, plaintiff's object being to show that Wooster had forfeited his rights under the contract, and that he, plaintiff, had succeeded to the right and title of S. & Co. *Palmer v. McCafferty*, 15 Cal. 335.

104. In ejectment, a variance between the alleged seizin and right of possession of plaintiff and the date of conveyance to him is immaterial, if the latter be previous to the commencement of the action. Right of possession in plaintiff, and occupation by defendant at that time, are sufficient. *Stark v. Barrett*, 15 Cal. 365.

105. The date at which plaintiff's right accrued, or defendant's occupation began, are material only with reference to the claim for mesne profits. *Id.*

106. In ejectment, the court having admitted in evidence, as sufficiently proven, the mesne conveyances through which plaintiff traced title—the defendants being mere trespassers—charged the jury that “the written evidence of title, together with the admissions of the parties, authorized them to find for plaintiff; since the execution of the papers had been passed upon by the court:” held, to be no objection to this instruction that it does not leave the execution and delivery of the conveyances to the jury; that the sufficiency of their execution was a matter addressed solely to the court; and that—no question being raised during the trial as to their delivery, and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an

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announcement of the law as to the effect of the conveyances, and of the admission of the defendants. *Ib.* 372.

107. In ejectment, the court having admitted in evidence, as sufficiently proven, the mesne conveyances through which the plaintiff traced title—the defendants being mere trespassers—charged the jury that “the written evidence of title, together with the admissions of the parties, authorized them to find for plaintiff; since the execution of the papers had been passed upon by the court:” held, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Ib.*

108. Ejectment for land as a homestead. The husband alone had executed a deed to defendant. There was evidence tending to show that the premises were never occupied by plaintiffs with the intention of making them the homestead; and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The court below submitted a series of questions to the jury, for a special verdict; the first of which was: “Did the plaintiffs ever dedicate and set apart the real estate described in the complaint as a homestead, by living upon it with the intention so to dedicate it?” and told the jury if they answered this question in the negative, the answer would constitute their entire verdict; but if they found in the affirmative, they should then proceed to answer the other questions: held, that such direction was proper, as a negative answer to this question was conclusive against a recovery; and that such directions are convenient in practice, and no abuse of discretion. *Broadus v. Nelson*, 16 Cal. 81.

109. Where the land granted by an alcalde is shown to be within the limits of the four square leagues thus measured, the presumption attaches that it was pueblo land, grantable as such; and that the alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the alcalde, or by

proof that this was land reserved as a fort site, etc., or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Payne v. Treadwell*, 16 Cal. 231.

110. A plaintiff suing for a lot in San Francisco may rest his case prima facie upon an alcalde grant in the usual form; and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square, in the manner directed by the ordinances. *Ib.*

111. Where a party in ejectment relies upon documentary evidence of title and prior possession, if he fail in the former, he may still rely on the latter. The failure to prove the paper title does not impair the just force and effect of the possession. *Morton v. Folger*, 16 Cal. 283.

112. In ejectment for land within Sutter's fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment “named New Helvetia,” and the grant in which is conceded the land referred to in the petition “named New Helvetia,” be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing “Sutter's Fort,” and the inclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his inclosures at the fort; the evidence would be prima facie evidence, if not conclusive proof, that the premises were covered by the grant. *Ib.*

113. In ejectment for land in Sacramento county, claimed under Sutter's grant, the grant by Micheltorna to Leidesdorff, in October, 1841, is competent evidence to show that the tract of country now embraced by that county is included within the boundaries of the grant to Sutter. *Cornwall v. Culver*, 16 Cal. 429.

1. *The Patent as Evidence.*

114. The survey and patent are conclusive upon it in actions of ejectment, except when in conflict with the prior rights of third persons, and then their inconclusiveness can be asserted only to the extent essential for the protection of such prior rights. *Moore v. Wilkinson*, 13 Cal. 486; *Moore v. Roff*, 13 Cal. 489; *Boggs v. Merced M. Co.*, 14 Cal. 361.

115. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights, so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent, not that it was void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3rd, 1851; and the patent would be like a second deed to premises previously granted, and pass as to the property no interest. *Boggs v. Merced M. Co.*, 14 Cal. 363.

116. Where the complaint in ejectment avers that the land sued for is known by the name of "La Jota," heretofore granted to plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings before the land commission and United States court for confirmation, these recitals in the patent support the averment of title through the grant. *Yount v. Howell*, 14 Cal. 467.

117. The action of the officers of government in the location of lands claimed under confirmed Mexican grants cannot be inquired into in an action of ejectment. The patent is conclusive upon these matters and implies a compliance with every prerequisite of the law to its issuance. *Ib.* 469.

118. A defendant in ejectment under the government of the United States as a mere preëmptioner cannot show that the land described in the grant from the Mexican government and petition to the land commissioners is different from that embraced in the patent. *Ib.*

See PATENT.

2. *Notice to quit.*

119. Notice to quit is not necessary where the relation of landlord and tenant does not exist. *Kilburn v. Ritchie*, 2 Cal. 148.

120. A mere naked trespasser without consideration under a mere permission and which has been revoked, is entitled to notice to quit or demand of possession before suit. *Godwin v. Stebbins*, 2 Cal. 105.

121. An objection to the sufficiency of a notice to quit should be first raised at nisi prius and not on appeal. *Castro v. Gill*, 5 Cal. 42.

122. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858 defendant, being in possession, denied plaintiff's title and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

3. *Disclaimer.*

123. In ejectment upon a disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon the only proper judgment is one of nonsuit. *Noe v. Card*, 14 Cal. 609.

124. Such disclaimer is a proper basis for a judgment for plaintiff only in actions

## Title.

by a party in possession to determine estates or interests asserted adversely to him. *Ib.*

## VI. TITLE.

125. A possessory action cannot be maintained under the Mexican law by a person who has acquired title subsequent to the intrusion complained of. *Sunol v. Hepburn*, 1 Cal. 260.

126. The plaintiff not having the real and actual possession of the premises, can adduce no proof of possession other than through the medium of his title, and the defendant is allowed to dispute the validity of his title and retain possession if he fails to show a title under which he could possess. *Ib.* 272.

127. A party cannot, by the Mexican law, acquire possession beyond the metes and bounds of his actual occupancy, unless he claims to hold under what is termed a just title, and a deed void upon its face is not a just title. *Ib.* 285.

128. *A grant from an American alcalde during the continuance of the Mexican war is not evidence of title sufficient to maintain an ejectment without a definite and positive possession.* *Woodworth v. Fulton*, 1 Cal. 308; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325; overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

129. A grant of a fifty vara lot at the Mission Dolores by a Mexican alcalde in 1842, where the grantee took possession and occupied the lot, is a title under which a party may maintain ejectment. *Brown v. O'Connor*, 1 Cal. 418.

130. Where the title is inchoate and incomplete one cannot sustain an ejectment, and the court should exclude such title as evidence. *Leese v. Clark*, 3 Cal. 27.

131. The defendant cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the United States, nor to impeach the validity of the conveyance to plaintiff collaterally as against third persons. *Winans v. Christy*, 4 Cal. 79.

132. The statute regulating sheriff's sales of real estate does not design to invest a purchaser with the title until six

months after the sale. *Duprez v. Moran*, 4 Cal. 196.

133. A claim of title by virtue of a sheriff's deed is insufficient without showing the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

134. An ordinary quitclaim deed is sufficient to enable the grantee to maintain ejectment if the grantor could have done so. *Ib.*

135. Where a plaintiff sues for a lot in a former pueblo of San Francisco, and deraigns his title from the city, it is prima facie evidence of title. *Seale v. Mitchell*, 5 Cal. 402.

136. A sale of land in the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be maintained. *Leonard v. Darlington*, 6 Cal. 124.

137. The writ of restitution obtained in an action of forcible entry and detainer does not determine either the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell v. Hagood*, 6 Cal. 148.

138. In an action of ejectment under a Mexican grant: held, that the State court is bound to regard the decision of the United States supreme court, establishing the rule that a conditional grant from Mexico conveys a good title without performance of the conditions sufficient to maintain ejectment, and admissible to qualify the plaintiff's actual possession. *Gunn v. Bates*, 6 Cal. 271.

139. The objection that the deeds, through which the plaintiff in ejectment deraigns title, are not properly acknowledged, cannot be maintained by one who has had no priority with the plaintiff's grantors. *Welch v. Sullivan*, 8 Cal. 187.

140. A sale of the municipal land in the city of San Francisco, in 1852, on an execution issued under a judgment against the city rendered in 1851, conveyed a legal title to the land, upon which ejectment can be maintained. *Ib.* 196; contra, *Hart v. Burnett*, 15 Cal. 616.

141. An outstanding title in a third person will defeat plaintiff's recovery in ejectment, although defendant does not connect himself with it. *Ib.* 198.

142. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title in a third



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person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird v. Lisbros*, 9 Cal. 5.

143. A mere trespasser cannot show title in a third party as a general rule, but it is not of universal application. *Bird v. Lisbros*, 9 Cal. 5; *Piercy v. Sabin*, 10 Cal. 30.

144. When the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good prima facie right may set up and show the true title to be in another party. *Bird v. Lisbros*, 9 Cal. 6.

145. Under our system probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendants. *Ortman v. Dixon*, 13 Cal. 37.

146. A grant being of three leagues within a much larger area, and no survey having been made, gives no title to any specific three leagues of land, which would enable him to defend against ejectment on a patent. *Waterman v. Smith*, 13 Cal. 422.

147. A mere trespasser cannot set up an outstanding title in a third person. *Bequette v. Caulfield*, 4 Cal. 279; *Gregory v. Haynes*, 13 Cal. 595.

148. A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person. *Id.*

149. S. and B., in 1854, execute a mortgage on their property to H. Subsequently, they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser; and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment

against defendant W. on his sheriff's deed; that defendant, claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown v. Winter*, 14 Cal. 33.

150. At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee, to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Merritt v. Judd*, 14 Cal. 73.

151. Where defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. *Busenius v. Coffee*, 14 Cal. 93.

152. In suits for the possession of land by ditch companies incorporated under the act of April 14th, 1853, by the fourth section of which they are authorized to "purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require," the defendant cannot question the necessity of such land for the purposes of the corporation. This is matter between the government and the corporation. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 552.

153. If, on an executory contract for the purchase of land made by plaintiff with the agent during the life of the principal, money due the principal was paid, after his death, to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers v. Crane*, 15 Cal. 20.

154. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier v. Corbett*, 15 Cal. 186.

155. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H.



## Title.—Estoppel as to Title.

The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the endorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 307.

156. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent. Defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: held, that plaintiff is entitled to recover, and that the denial of title and relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

157. R. & Co., defendants, had two mechanics' liens upon certain property; one filed October 30th, 1854, the other filed December 8th, 1854, against defendant V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property

subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from this decree. *Gamble v. Voll*, 15 Cal. 510.

158. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Hart v. Burnett*, 15 Cal. 516.

159. The general rule that, in ejectment, the claimant must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that his action will be defeated if defendant shows title out of him, and in a third party, has in this State been qualified and limited. *Coryell v. Cain*, 16 Cal. 572.

### 1. Estoppel as to Title.

160. If the plaintiff proves no title, the defendant, being in possession, cannot be ousted; but if defendant claims under the plaintiff, and in subordination to his title, he is estopped from questioning it. *Hoan v. Simmons*, 1 Cal. 120.

161. A person who enters into possession of land under another, cannot question the title of him under whom he holds. *Pierce v. Minturn*, 1 Cal. 472.

162. A defendant entering into possession under a bond for a deed from the plaintiff, cannot be considered as holding adversely from color of title. *Kilburn v. Ritchie*, 2 Cal. 148.

163. In an action of ejectment brought by a purchaser at sheriff's sale, under a decree of foreclosure and sale of mortgaged premises, to recover the same

## Estoppel as to Title.—Judgment in Ejectment.

against the mortgagor in possession, the mortgagor is estopped from setting up title in another as a defense to the action. *Redman v. Bellamy*, 4 Cal. 250.

164. In an action of ejectment, where the defendants acquired possession from the tenant of plaintiff, with a full knowledge of the tenancy, they are not in a position to deny plaintiff's title. *Anderson v. Parker*, 6 Cal. 199.

165. Where the plaintiff and defendant both derive title to land from the same person, the plaintiff is estopped by his purchase from denying the title of their common grantor, for the purpose of establishing title in himself by virtue of location of the land under school land warrants. *Ellis v. Jeans*, 7 Cal. 416.

166. In an action of ejectment, a tenant cannot deny the title of the vendor of his landlord. *McKune v. Montgomery*, 9 Cal. 576.

167. Where a defendant in ejectment brought upon a sheriff's deed executed upon a purchase made on a sale under a decree of foreclosure, was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that adjudicated against him. *Clark v. Boyreau*, 14 Cal. 637.

168. In this case, which was ejectment for a lot purchased by plaintiffs of B., it was held that defendant had so recognized the title of B. as to be estopped from now disputing it. *Downer v. Ford*, 16 Cal. 350.

## VII. JUDGMENT IN EJECTMENT.

169. The plaintiff in ejectment may sue one or more defendants, and they may answer separately or demand separate verdicts; unless they do so, however, they will be concluded by the general verdict. *Winans v. Christy*, 4 Cal. 80.

170. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 270.

171. In an action of ejectment to recover possession of a large tract of land, where the defendant failed to appear, and the case was submitted to the court, who found that plaintiff had title to the whole tract, and that the defendant was in pos-

session of a part, sixty or seventy acres of the tract, without right: held, that it was proper for the court to enter judgment for the plaintiff for the possession of the whole tract. *Vallejo v. Fay*, 10 Cal. 378.

172. Where in ejectment against several defendants, the judgment for damages is several instead of joint, the damages may be remitted, and the judgment for the land stand. *Curtis v. Herrick*, 14 Cal. 120.

173. Under our system, the judgment is only conclusive of two points: the right of possession in the plaintiff and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 468.

174. After judgment by default, in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billett*, 15 Cal. 26.

175. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Ib.*

176. If the defendant interposes no objection to trying the case on such subsequently acquired title, he cannot object after judgment. *Ib.*

177. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and defendant being in possession. *McGarvey v. Little*, 15 Cal. 31.

178. Where the complaint in ejectment avers the ownership and right of plaintiff and the possession and withholding by defendant in general terms, without stating any time when plaintiff's title accrued or existed, and without making any allegation as to damages for rents and profits, but simply praying judgment therefor in a given sum, and the complaint is demurred to as not stating facts sufficient, and a general judgment for possession, and \$2,250 damages is given: held, that damages cannot be recovered for any period preceding the commencement of the action; but that this point, to wit: that the complaint does not support the judgment for damages, cannot be raised for the first time on petition for rehearing in the supreme court—the defendant on the first hearing in this

## Mesne Profits.—Defendant's Improvements.

court having put his objection to the general judgment for damages on the ground of error in the charge of the court below to the jury, and of error in the admission of evidence as to the rents and profits; the point of his objection being, that a recovery for rents and profits beyond three years was barred by the statute, and this court having decided against him because the point was not properly presented by the record. *Payne v. Treadwell*, 16 Cal. 247.

179. Failure of defendant in ejectment to appear when the cause is called for trial—an answer being in—authorizes the court to try it without a jury. *Doll v. Feller*, 16 Cal. 433.

180. Where in ejectment the facts found by the court authorized a judgment for possession, but not for damages, the judgment being for possession and damages was affirmed in the supreme court, upon respondent's remitting the damages and paying the costs of appeal. *Ib.* 434.

## VIII. MESNE PROFITS.

181. Where the value of the premises was agreed upon, the offer of the defendant to prove that he could not rent it was properly refused. *Lord v. Sherman*, 2 Cal. 502.

182. Under our code, it is competent for the plaintiff to recover real property with damages for withholding it, and the rents and profits, all in the same action and as one cause of action. *Sullivan v. Davis*, 4 Cal. 292.

183. It is sufficient in our system if it appear that the plaintiff was entitled to possession of the premises at the commencement of the action, and the date of the alleged seizin or possession and ouster is only material when the question of mesne profits is involved. *Yount v. Howell*, 14 Cal. 468.

184. Such profits, when claimed in the ejectment suit, are limited to such as accrue subsequent to the ouster alleged—or in other words, the occupation of the defendant. When they are claimed in an independent suit, the record of recovery in the ejectment is as to the title only evidence of the right of possession of the plaintiff at the commencement of the ac-

tion in which the recovery was had. *Ib.*

185. The damages which a plaintiff can recover in an action of ejectment for the use and occupation of the premises are such as arise subsequent to the accruing of his right of possession, and when his right depends upon a sheriff's deed he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Clark v. Boyreau*, 14 Cal. 637.

## IX. DEFENDANT'S IMPROVEMENTS.

186. In an action of ejectment, where no proof is introduced to show damages, it is no error to prove the value of the improvements made by him on the property. *Ford v. Holton*, 5 Cal. 321.

187. The provisions of the settler's act of 1856 requiring the party recovering in ejectment to pay the defendant the value of his improvements does not discriminate between an innocent and a tortious possession, and applies to past as well as present cases, and is repugnant to the letter and spirit of the constitution. *Billings v. Hall*, 7 Cal. 3.

188. The value of improvements may be set off against the rents and profits thereof in an action of ejectment. *Welch v. Sullivan*, 8 Cal. 202; 511.

189. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 466.

## ELECTION.

1. The neglect of an officer to perform a mere ministerial act will not defeat an election, where there was actual notice, and no fraud or surprise. *Gorham v. Campbell*, 2 Cal. 137.

2. On an election of justices of the peace, as associate justices of the court of sessions, the county judge and clerk are ex officio officers of this convention; but they have no authority other than that of presiding over and recording its proceed-

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ings, and the dissolution of the convention by the county judge is illegal. *Ib.*

3. When the justices of the peace fail to elect from their number associate justices of the court of sessions, on the first Monday in October, the county judge may appoint associates for the then term; but the justices may convene at a subsequent time and elect associates. *Ib.*

4. The charter of San Francisco, of 1851, provided that the first election for city officers should be held on the fourth Monday of April, 1851, and thereafter annually at the general election for State officers. The general election is in September of each year: held, that the city officers elected in September are entitled to their offices, though no notice of the election was given, or other measures pursued by the council to call an election. *People v. Brenham*, 3 Cal. 485.

5. A district judge elected at the general election to fill a vacancy can qualify and supersede a judge who has been commissioned by the governor for the unexpired term of his predecessor. The latter commission expires after an election by the people. *People v. Mott*, 3 Cal. 504.

6. The words the "next election by the people," mean the next after the vacancy occurs, and not the next general election for a full term." *Ib.* 506.

7. Residence depends upon intention, as well as fact; and mere inhabitancy for a short period against the intention of acquiring a domicile, would not make a resident within the meaning of the law, so as to constitute an elector. *People v. Peralta*, 4 Cal. 175.

8. Judges of elections have no right to require the production of the certificate of naturalization by voters, as the statute expressly provides a lower standard of evidence as sufficient. *People v. Gordon*, 5 Cal. 236.

9. When the judges have once administered the oath, and it has once been taken, the right to vote is concluded, and it is error to deny it; the remedy is to prosecute for perjury. *Ib.*

10. Time and place are of the substance of every election, and the legislature cannot confer upon a county judge the power of designating the place and manner of holding an election; and an election thus held will be void. *Dickey v. Hurlburt*, 5 Cal. 344.

11. A person who claimed an office held by defendant, testified that his certificate of election was lost or destroyed, and there was no record of the same: held, that secondary evidence of the election and certificate were admissible. *People v. Clingan*, 5 Cal. 390.

12. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections; and the proclamation of the governor, required by statute, is necessary to the validity of a special election. *People v. Porter*, 6 Cal. 28; *People v. Weller*, 11 Cal. 65; *People v. Martin*, 12 Cal. 410; *People v. Rosborough*, 14 Cal. 187.

13. An election which was ordered by the board of supervisors, to fill a vacancy in the office of county judge, occasioned by the resignation of the incumbent, without proclamation of the governor, is invalid; and the office being vacant, can be properly filled by the appointment of the governor. *People v. Porter*, 6 Cal. 68; *People v. Martin*, 12 Cal. 411.

14. An act organizing a new county, and fixing a special day for the first election of county officers, and providing that they shall hold office for two years, and until their successors are elected and qualified, must be construed in connection with the general law requiring such officers to be elected on the same day throughout the State. *People v. Church*, 6 Cal. 78.

15. The officers first elected hold till the first general election of county officers throughout the State, after the expiration of the term of the two years fixed by the special act, and an election held before that time is void. *Ib.*

16. The words extending the incumbent's tenure "until his successor is appointed and qualified," were intended only to prevent a hiatus, or interregnum, occurring between the last day of the incumbent's term and the day on which his successor enters into office, during which time the incumbent is a mere locum tenens. *People v. Reid*, 6 Cal. 289.

17. The act to establish an insane asylum provides that the resident physician shall hold office for two years, and until his successor is appointed and qualified: held, that on the failure of the legislature to elect at the expiration of the term, the office becomes de jure vacant, and can be filled by the governor. *Ib.*



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18. Where an act by its own terms was not to go into effect till a certain day named, and one of its sections provides for an election, on a day prior to the time in which the law was to go into effect, the election so held was a nullity, there being no law then in existence authorizing it. *People v. Johnston*, 6 Cal. 674.

19. The term of office of the resident physician of the insane asylum never runs apart from the officer, and commences running only from the date of his election, the act fixing only the duration of his term, but not the exact time of its commencement. *People v. Langdon*, 8 Cal. 13.

20. The fact that any person holds a lucrative office under the government, creates an incapacity in that person to be elected to any office in this State, during that time, by our constitution. *People v. Whitman*, 10 Cal. 43; *Saunders v. Haynes*, 13 Cal. 154.

21. A certificate of election is not necessary to enable a party claiming to have been elected to bring his action by quo warranto. *Magee v. Supervisors Calaveras County*, 10 Cal. 377.

22. A certificate of election is only prima facie evidence of title to the office, not conclusive. Nor is it the only evidence by which the title may be established. It is the fact of election which gives title to the office, and this fact may be established, not only without, but against the evidence of the certificate. *Ib.*

23. An election cannot take place under the constitution without statutory regulation. All the efficacy given to the act of casting a ballot is derived from the law-making power and through legislative enactments, and the legislature must provide for and regulate the conduct of an election or there can be none. *People v. Weller*, 11 Cal. 67.

24. The object of the proclamation of the governor for an election to fill a vacancy is to give notice to the electors that such an election will be held. *Ib.*

25. A person duly elected district judge is entitled to hold office for the period of six years. *People v. Weller*, 11 Cal. 85; *People v. Burbank*, 12 Cal. 388.

26. It is unreasonable to suppose the legislature would authorize an election several years in advance of the time when the office was to be filled. *People v. Weller*, 11 Cal. 88.

27. Where an election for the office of district judge was held by the qualified electors of such district at the general election in 1858, and the term of the present incumbent of that office does not expire until January, 1861: held, that such election was unauthorized and the person elected is not entitled to a commission to such office. *Ib.*

28. At the general election held in Yuba county in September, 1855, W. was elected county treasurer of that county for two years from the date of his election and until his successor was chosen and qualified. On the twenty-eighth of April, 1857, a special act was passed, extending the term of this officer to the first Monday in January, 1858. On the seventh of May, 1857, W. resigned and S. P. W. was appointed by the board of supervisors in his stead. At the general election in September, 1857, F. received the majority of votes for that office for the unexpired term of W. and claimed the office: held, that the appointees held for the balance of the extended term, and there was no vacancy to be filled at the election in September, 1857. *People v. Wells*, 11 Cal. 338.

29. The failure of the officers conducting an election in a given district to be sworn as the election laws provide will not invalidate the entire election, without reference to its influence on the general result. *Whipley v. McKune*, 12 Cal. 357.

30. The rule is well settled, that the mere receiving and counting of votes improperly given does not invalidate an election. *Ib.*

31. The fact that the ballot box was temporarily out of the possession of the officers of the election will not invalidate the election, especially where no fraud, collusion or suspicious circumstance is shown. *Ib.* 361.

32. The returns of an election are prima facie evidence of the fact they import, and the returned candidate, after being commissioned, is prima facie entitled to his office. *Ib.* 362.

33. The legislature can direct the time and prescribe the mode of an election, but cannot change the tenure of an office prescribed by the constitution. *People v. Burbank*, 12 Cal. 392; *People v. Templeton*, 12 Cal. 401.

34. The office of county judge is not a "county office," within the meaning of the



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statute so as to authorize the supervisors to order a special election to fill its vacancy. *People v. Martin*, 12 Cal. 411.

35. A deed recorded January 30th, 1850, by a person acting as recorder by virtue of an election by the people, without authority of law, is not properly recorded. *Smith v. Brannan*, 13 Cal. 115.

36. The act giving jurisdiction over the subject of contested elections to the judge of the county court is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

37. Contested elections is one of the special cases for which the constitution has provided that the county judge may take cognizance of by legislative direction. *Ib.* 152.

38. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. *Ib.* 153.

39. A mandamus does not lie to compel the supervisors of a county to order a special election to fill vacancies in the office of assessor and sheriff. *People v. Supervisors of Santa Barbara County*, 14 Cal. 102.

40. When an act organizing a county provides for the election of a county judge, and limits the period of tenure to two years, the act is void pro tanto, but the election held under the act is good and entitles the incumbent to the office for four years. *People v. Rosborough*, 14 Cal. 187.

41. An election to fill a vacancy for county judge is a special election, and the governor's proclamation is essential to its validity. *Ib.*

42. The decision of the board of delegates of the fire department of the city of San Francisco, in the case of a contested election for chief engineer, is a judicial decision, and subject to a review by the courts on certiorari. The extent of such review is simply to inquire whether the board has exceeded its jurisdiction. *People v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 502.

43. When the contest before the board of delegates was on the sole ground of illegal votes, the board had no power to declare the election void. It should have decided for one or the other of the contestants and issued a certificate accordingly. *Ib.* 503.

44. Where the board, instead of so deciding, declared the election void, and ordered a new one, the contestants not objecting, the matter of the contested election must be considered finally dismissed, and the board ought to declare the result of the first election according to the returns then made, and issue a certificate of office. *Ib.* 504.

45. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People v. Riley*, 15 Cal. 49.

46. And a mere residence or sojourn in the county as a soldier does not make him a citizen, or prove him to be such. The rule, as fixed by the constitution, is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship—leaving the political status of the soldier where it was before. *Ib.* 50.

47. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. *Ib.* 50.

48. A controller must be elected biennially, at the same time and place and in the same manner with the governor and lieutenant governor; and an appointment of a controller by the governor before this biennial general election, whatever it effects otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. Nor will the election by the people had before the election fixed for filling the office of governor, etc., defeat this policy. *People v. Melony*, 15 Cal. 62.

49. It is a part of the constitutional policy of this State, that all elective officers connected with the executive department of the government shall be elected at the same time and place, and in the same manner. *Ib.*

50. In a proceeding by an elector to contest the right to an office of a party returned as elected thereto at a general election, the defendant first moved to dismiss the proceeding; his motion being overruled, he declined to answer the statement filed by the contestant, and the court, without proof by either party, annulled the election: held, that this was error, and that the proceeding should have been

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dismissed. *Searcy v. Grow*, 15 Cal. 119.

51. The public is interested in a contest of this character ; it is not a matter solely between the parties to the record, and the popular will is not to be set aside upon the mere failure of a party to respond to charges alleged against his right by an individual elector. It is not sufficient that ample cause of contest be set forth in the statement filed by a contestant ; their truth must be established by clear proof, before an election can be annulled. *Ib.*

52. Under the twenty-first section of article four of the constitution of this State, a person holding the federal office described in that section is incapable of being elected to a State office ; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word "eligible" in this section means capable of being chosen, the subject of selection or choice. The term "compensation," in sec. 21, art. 4 of the constitution of this State, means the income of the office, not the profits over and above the necessary expenses of the office. *Ib.* 121.

53. In suit under our statute by an elector, to contest an election, he becomes a party, and is responsible for costs if he fail. The court has no discretion to dismiss or entertain the case, as it deems the public interest requires. Nor has the State's attorney such discretion. The case is prosecuted like any other action instituted by a private citizen, subject only to the provisions of the statute. *Ib.* 122.

54. An ordinance was passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the board should appoint a person to superintend the cemetery, "annually, in October, who shall hold office for the term of one year ;" and further, that the board, at their first meeting after the passing of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 6th, 1858, and held the office until December, 1859, the Board having failed to appoint his successor before that time, when relator was appointed : held, that relator is entitled to the office ; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral

body—the time named being directory, and not of the essence of the power. *People v. Murray*, 15 Cal. 222.

## ELECTION, DOCTRINE OF.

1. When parties discover fraud, they should make their election and rely upon one remedy only, assumpsit or replevin. It often happens that a party has his election to pursue one of two or more remedies, but he should not pursue several at one and the same time. *Seligman v. Kalkman*, 8 Cal. 217.

2. In equity, a party is not bound to make an election until all the circumstances are known, and the state and condition and value of the funds are clearly ascertained ; for, until then, it is impossible for him to make a discriminating and deliberate choice, such as ought to bind him to reason and justice. *Wells v. Robinson*, 13 Cal. 142.

3. Where, in a bill of sale of all the cattle of a certain estate, estimated at 7,000 head, a total price being fixed, it was stipulated that the vendee, on arriving in Texas where the cattle were, might choose to take all the cattle of the estate without counting them, in which event he was to notify the agents of the vendors of his choice, and pay an additional \$4,000 ; but if count was had, and the cattle exceeded or fell short of the estimated number, the excess or deficiency should be paid for at the rate of eight dollars per head ; and no count was ever made, and no notification ever given by the vendee, that he took the cattle without a count ; held, that the vendor, on the facts, cannot recover the \$4,000 ; that the only obligation of the vendee, in the first instance, was to receive the cattle and pay for any excess over the estimated number, if counted ; that his liability for the \$4,000 depended entirely on his choice to take the cattle without a count, and that this choice was a mere privilege, to be exercised or not, at his option, and that the doctrine of election has no application here. *Norris v. Harris*, 15 Cal. 258.

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4. This doctrine only applies to cases where the party upon whom rests the performance stands in the same position to both alternatives presented, and is bound to indicate his choice between them. Here the vendee was bound to choose only in the event he desired to take the cattle without a count. If he did not so desire, he was not required to give notice to that effect. His obligation to pay for any excess was absolute, without any expression of choice; but his obligation to pay the \$4,000 was conditional, dependent solely upon the indication of his desire to dispense with the count. *Ib.*

5. Where the doctrine of election is applicable, the right of election upon failure of the party upon whom the performance rests to indicate his choice passes to the other side; as in this way only can the obligation become absolute and determinate. *Ib.*

6. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon the property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. If the party attempted to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce a mechanic's lien that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit had been dismissed, and nothing was realized by the attachment. *Brennan v. Swazey*, 16 Cal. 142.

## ELIZOR.

1. Where a substitute sheriff (elizor) was appointed, and the pleadings did not show that there was no sheriff and coroner, or that these officers were disqualified: held, that the appointment being made by a judge having competent jurisdiction, the presumption of law is that he faithfully performed his duty. *Turner v. Billagram*, 2 Cal. 522.

2. In the event of the disqualification of sheriff and coroner, a district court has

the right to appoint an elizor. And even if such authority was not conferred by statute, the court, by virtue of its original jurisdiction, has the power to appoint a special officer to execute its process. *Wilson v. Roach*, 4 Cal. 367.

3. In trespass against a sheriff, the court below, on plaintiff's motion, may order a special jury to try the case, instead of the regular panel. The sheriff being interested ought not to summon a jury; and there being no coroner, an elizor may be appointed to summon a jury. *Pacheco v. Hunsacker*, 14 Cal. 124.

## EMINENT DOMAIN.

1. The sovereign power may, in disposing of lands, annex such conditions to a grant as it sees fit; and in such a case a restriction against alienation, inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of the law. *Sumol v. Hepburn*, 1 Cal. 274.

2. If there was a vested title of the national domain in the pueblos of California, the alcalde, an alien enemy of Mexico, and without any authority from the American government, had no power or right to interfere with that vested estate and grant it to others. *Woodworth v. Fulton*, 1 Cal. 306; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325; overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

3. Lands lying within the corporate limits of San Francisco, which had not been granted by the Mexican government or its officers previous to the conquest of the country by the American forces, constitute a part of the public domain of the United States, and cannot be granted away, except under the authority of congress. *Woodworth v. Fulton*, 1 Cal. 307; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325; overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

4. The destruction of a building to stop the spread of a conflagration cannot, it seems, be deemed a taking of private

## Eminent Domain.—Encroachment.

property for public use, but it is the right of eminent domain. *Dunbar v. City of San Francisco*, 1 Cal. 357; *Correas v. City of San Francisco*, 1 Cal. 452; *Surrocco v. Geary*, 3 Cal. 73.

5. The State has an absolute right to control, regulate and improve the navigable waters within its jurisdiction as an attribute of sovereignty. *Gunter v. Geary*, 1 Cal. 467.

6. Laws of a ceded country remain in force until changed by the conquering or acquiring power; but this rule presupposes that the acquired country contains a population governed by well settled laws of their own. It would be unjust, therefore, to apply the Mexican law governing the few inhabitants of California to contracts made by the hordes of Americans who rushed hither just previous to the adoption of our laws. *Fowler v. Smith*, 2 Cal. 48.

7. The constitutional provision that requires payment for private property taken for public use does not apply in the case of destruction of private property to stop conflagration. This right belongs to a State, by virtue of its right of eminent domain. *Surrocco v. Geary*, 3 Cal. 73.

8. The mines of gold and silver in the public lands are as much the property of the State, by virtue of the sovereignty, as are similar mines in the hands of a private proprietor. *Hicks v. Bell*, 3 Cal. 227.

9. The State, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

10. The United States, as owner of land within the limits of the State, only occupies the position of any private proprietor, with the exception of exemption from State taxation. *Ib.*

11. Each State is supreme within its own sphere as an independent sovereignty. *People v. Coleman*, 4 Cal. 49.

12. By well settled rules of construction, the right of the State to regulate commerce is concurrent with that of congress, with the understanding always that all State regulations inconsistent with those of the federal government on this subject give way. *Ib.* 58.

13. The right of the State to lands under water, where the tide ebbs and flows,

is founded upon her sovereign control over the easement, or right of navigation; where, therefore, the easement is destroyed, the right of the State ceases, except to prosecute for prepresture, and have the easement restored. *Guy v. Hermance*, 5 Cal. 74.

14. The federal government has not only the right of eminent domain, but the fee and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty. "*People v. Folsom*, 5 Cal. 377.

15. Sovereignty can never be in abeyance, and until there was some local government organized, either by the people of the territory, or some other competent authority, the United States, upon the doctrine of necessity, succeeded to and represented the government of Mexico, as far as the same could be exercised, within the purview of the constitution. *Ib.* 378.

16. The government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon the lands they have mined for gold, constructed canals, built saw mills, cultivated farms, and practiced every mode of industry—has asserted no right of ownership to any of the mineral lands in this State. *Conger v. Weaver*, 6 Cal. 557.

17. Money is not the species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. *Burnett v. City of Sacramento*, 12 Cal. 83.

## ENCROACHMENT.

1. What is termed the "swinging of lots," a measure adopted in pursuance of a resolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of the grantee therein. The taking of a part of a lot from an individual for the purposes of a public street, though it may perhaps give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds v. West*, 1 Cal. 329.



Of a Bill of Lading.—Of a Certificate of Stock.—Of Bills and Notes.

## ENDORSEMENT.

- I. Of a Bill of Lading.
- II. Of a Certificate.
- III. Of Bills of Exchange and Promissory Notes.

### I. OF A BILL OF LADING.

1. The endorsement of a bill of lading, *prima facie*, vests the property in the goods maintained therein in the endorsee, who has no property, either general or special, in the goods, and no lien therein for advances or otherwise, to sue the master of a ship, in his own name, for the non-delivery of the goods, when it appears on the face of the complaint that the plaintiff, the endorsee, is a mere naked agent of the shippers. *Lineker v. Ayesford*, 1 Cal. 81.

### II. OF A CERTIFICATE OF STOCK.

2. Where a femme sole becomes the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an endorsement on the certificate of stock, purporting to sell the same to A, without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record: held, that such sale was void as against a subsequent purchaser under an instrument duly signed and acknowledged. *Selover v. American Russian Com. Co.*, 7 Cal. 270.

### III. OF BILLS OF EXCHANGE AND PROMISSORY NOTES.

3. In an action on a promissory note by a special endorsee against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied the genuineness under oath. *Grogan v. Ruckle*, 1 Cal. 159, 196; *Youngs v. Bell*, 4 Cal. 202.

4. Notes given for a gaming consideration are valid in the hands of a bona fide endorsee. *Haight v. Joyce*, 2 Cal. 66.

5. An endorsee after maturity takes the same interest that the endorser had, and his claim is subject to the same legal and equitable defense. *Folsom v. Bartlett*, 2 Cal. 164.

6. One who puts his name upon a promissory note out of the usual course of regular negotiability, is not an endorser—he is a guarantor. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139.

7. A name written on the back of a note gives to the writer his title of endorser, and fixes the character of his liability. *Riggs v. Waldo*, 2 Cal. 487.

8. The liability of a guarantor on a promissory note is strictly that of an endorser, and he is entitled to notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Brady v. Reynolds*, 13 Cal. 32; *Geiger v. Clark*, 13 Cal. 580.

9. The contract of an endorser is simply a guarantee or declaration that he will pay if the maker does not pay upon presentation, after he receives due notice. *Riggs v. Waldo*, 2 Cal. 488.

10. A promissory note was endorsed to a third person before delivery by the payee, which indorsement is *prima facie* an accommodation to the payee; but proof that his design was to become a guarantor would make him liable to the payee, and his default, with proper averments, dispenses with this proof. *Clark v. Smith*, 2 Cal. 606.

11. Whether a note is or is not payable at a bank, notice of its nonpayment may be given to an indorser on the evening of the day on which it is payable—in the first case after the close of banking hours, in the second after the close of the usual hours of commercial business. *McFarland v. Pico*, 8 Cal. 631; overruling *Toothaker v. Cornwall*, 4 Cal. 30.

12. Plaintiff sued upon notes regularly endorsed to him. Defendant admitted the genuineness of the notes, but denied the endorsement: held, that he should have objected to the introduction of the notes in evidence until the endorsement was proven, and not move for a nonsuit when they were already in, without giving the plaintiff an opportunity of proving it. *Pinkham v. McFarland*, 5 Cal. 137.

13. Where payment by the maker to the endorser is relied upon as an excuse for want of demand and notice, it must be



## On Bills of Exchange and Promissory Notes.

payment directly and specifically for the note, and not as security for all transactions in the aggregate. *Van Norden v. Buckley*, 5 Cal. 284.

14. Where the maker did not specify that the payment to the endorser was to meet the indorsed note, the endorser had a right to apply it to any indebtedness he held against the maker, and to stand upon his strict legal rights as to demand and notice in regard to the indorsed note. *Ib.*

15. A release which only applies to the indorsement of a note could by no rule of construction release the maker of the note. *Tomlinson v. Spencer*, 5 Cal. 293.

16. In an action by an endorsee against a maker of a note, the endorser, not being a party, is a competent witness for the plaintiff, where it does not appear that the suit is prosecuted for his immediate benefit. *Ib.*

17. Where a holder of a note accepts a draft or check in payment, he is not bound to give up the note before payment of the draft or check, or it will be a substitution of new security to discharge the endorser. *Smith v. Harper*, 5 Cal. 330.

18. Where a note was delivered to the maker long before it became due, upon his giving an order on the endorsers, which was dishonored, and thereupon it was returned to the holder, it did operate as a payment. *Ib.*

19. If the language of the notice conveys to the endorser, not the advice of his liability being fixed, but positive information which assures him necessarily of his release from liability, the object of notice would be defeated if it was insisted that he was still liable. The notice, in such case, instead of arousing him to immediate effort for his security, lulls him into false security. *Tevis v. Wood*, 5 Cal. 394.

20. A demand upon the makers of a note was made at maturity, but the notice to the endorsers stated the demand to have been made on a day subsequent to maturity: held, that the notice was insufficient to bind the endorsers. *Ib.*

21. The object of notice to the endorser of a note or bill is to advise him of his liability, so that he may take the earliest steps for his own security. Endorsers are a favored class of litigants, and the courts have always maintained their rights with great strictness. *Ib.*

22. The holder of negotiable paper en-

dorsed before maturity is supposed to be the bona fide owner of the same, and all intendments are in favor of his right. *Palmer v. Goodwin*, 5 Cal. 459.

23. A declaration by an endorser made to a third party not interested in the subject matter, "that the fact of notice not having been given at the proper time would make no difference with him—that he would do what was right," is not a sufficient waiver of presentment and notice to fix the liability of the endorser. *Olen-dorf v. Swartz*, 5 Cal. 482.

24. The defendant endorsed to the plaintiff the notes sued on, and assigned the mortgages given to secure the same: held, that the mortgages were not intended to indemnify the defendant against his liability as endorser, and would not excuse a presentment and notice to him as such endorser. *Ib.*

25. In an action against the endorser of note, where demand and notice are not averred, but where it is averred that the maker paid the endorser the value of the note and the endorser agreed to pay it, the maker of the note is not a competent witness to prove those facts. *Palmer v. Tripp*, 6 Cal. 83.

26. It is not material on what part of a note a secondary promisor places his name; if the character of his liability is made to appear, his rights are the same as those of an endorser. *Bryan v. Berry*, 6 Cal. 398.

27. Notice of demand or nonpayment of a note should be personally served on an endorser residing in the same city where the note is held, and service through the post-office is not effectual to charge them. *Vance v. Collins*, 6 Cal. 439.

28. An endorser of a note is incompetent as a witness to establish the lien of a holder of the note upon the property of the maker, being directly interested to have the lien established. *Soule v. Dawes*, 6 Cal. 475.

29. When F. sued on a note which had two endorsements signed by the payer, the first a receipt from F. for the amount due, the second in the words "without recourse to me:" held, that there was no presumption that the endorsements were made at different times, or that the payment was a voluntary unconditional payment. *Frank v. Brady*, 8 Cal. 49.

30. Where a party, in consideration of a conveyance of land to him, agrees to pay

an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability : held, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer v. Tripps*, 8 Cal. 97.

31. Notice may be given to the endorser or other parties entitled to notice, immediately after presentment to the maker or acceptor, and refusal to him to pay, although it is not necessary that notice should be given until the following day. *McFarland v. Pico*, 8 Cal. 636.

32. An endorsement or a guarantee of a note is wholly different from guaranteeing another's contract ; it is making a contract of his own. *Aud v. Mugruder*, 10 Cal. 289.

33. An endorsement or a guarantee of a note is wholly different. It is an agreement of itself, a new contract undertaken for another, that the latter will perform his contract. *Ib.* 290.

34. The difference between a maker and an endorser or guarantor, is that the contract of the first imports an unconditional obligation to pay money ; that of the last, by its terms, imports a conditional obligation. *Ib.*

35. Mere extension of time to the maker of a promissory note is not sufficient to discharge a surety or endorser. To operate as such discharge, the agreement with the maker must be founded upon a valuable consideration, and be such as will suspend the right of action against the maker. *Williams v. Covillaud*, 10 Cal. 425.

36. The endorser of a promissory note after maturity is entitled to demand and notice of nonpayment within a reasonable time, before he is liable to pay. *Beebe v. Brooks*, 12 Cal. 311.

37. Where a promissory note was made payable to S., and previously to its delivery to the payee, was endorsed for the accommodation of the maker by H. and brother and defendant, upon an agreement of the endorsers with each other that each would become surety if the other would : held, that the endorsers were guarantors, and jointly but not severally liable in a suit by the payee or a third person taking

the note after maturity. *Brady v. Reynolds*, 13 Cal. 32.

38. The decision of the supreme court, in *Riggs v. Waldo*, 2 Cal. 485, only goes to the extent of holding that a notice of protest is as essential to charge a guarantor as an endorser. *Brady v. Reynolds*, 13 Cal. 32 ; *Geiger v. Clark*, 13 Cal. 580.

39. In a suit against the maker of a note, or the acceptor of a bill, the endorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 87.

40. An outstanding liability as surety or endorser for another, together with an express promise to pay the debt as his own by the surety or endorser, is a sufficient consideration for an express promise to pay an equal amount on demand. *Gladwin v. Gladwin*, 13 Cal. 335.

41. At common law, a note payable to the wife would prima facie be the property of the husband, who could endorse it in his own name. *Tryon v. Sutton*, 13 Cal. 493.

42. A notice to the endorser of a note of nonpayment by the maker is sufficient, if it appear that the endorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it. And this, though the notice was verbal, and the note neither produced or described. *Thompson v. Williams*, 14 Cal. 162.

43. If much time intervenes between demand and notice in the transfer of notes after maturity, the question may arise whether the delay has not released the endorser. *Ib.* 163.

44. Where a note, due January, 1857, was endorsed by the payee to the present holder, November 26th, 1858, and he, November 29th, 1858, demanded payment of the maker, and verbally notified the endorser of such demand, and that he would be held on his endorsement, it is no objection to the notice that it did not state the time of demand. The demand was good if made within a reasonable time, and before the notice ; otherwise as to notes endorsed before maturity. In such case, the notice must state the time of demand. *Ib.*

45. A notice by the holder that he "had demanded payment of that note," implies that payment was demanded of the person liable to pay, to wit: the

## Of Bills and Notes.—Equalization.—Equity.

maker; and the declaration that he intended to look for payment to defendant, the endorser, implies the fact of nonpayment. *Ib.* 164.

46. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie v. Neville*, 14 Cal. 409.

47. It is no objection to recovery on a bill that, by special endorsement on it, title is shown out of the payee without any retransfer from the last endorsee to him, if there be proof that the endorsements were made simply for collecting the bill, and that the endorsee had no interest in it. *Naglee v. Lyman*, 14 Cal. 454.

48. An endorser of a note payable on demand, no demand being made until thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable; and the facts to excuse the delay are an essential part of the complaint, and if not averred therein it is insufficient. *Jerome v. Stebbins*, 14 Cal. 458.

49. A certificate of deposit for \$1,800, payable to the order of V., was endorsed, sold and delivered by V. to L. for four hundred dollars. Payment was then at once demanded of the maker, and notice of protest served on V. Subsequently L. transferred the certificate to plaintiff: held, that plaintiff can recover of V. only the four hundred dollars received by him, the certificate being subject, in the hands of plaintiff, to all the equities between the endorser and endorsee. *Coye v. Palmer*, 16 Cal. 159.

50. Where the consideration passing between the endorsee and his endorser is not equal to the amount of the paper, the endorsee, in an action against the endorser, can recover only the consideration he has actually paid. *Ib.* 160.

51. Notice left by a notary at the residence of an endorser of a note—he being absent at the time—describing the note, stating that it was protested by him for nonpayment, and that the holder looked to the endorser for payment, but not signed by any one, nor indicating in any way from whom it proceeded, is insufficient to charge the endorser. *Klockenbaum v. Pierson*, 16 Cal. 376.

52. Such notice having been left on Saturday, the day the note matured, the

record shows that on Monday, in a conversation between the endorser and the notary, "something was said about the note," and that the notary informed the endorser that plaintiff was "its owner and holder:" held, that as a verbal notice, this conversation was insufficient; that a notice must inform the endorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. *Ib.* 377.

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## EQUALIZATION.

1. The fact that the assessment for State and county taxes for 1855-6, in San Francisco county, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed in 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization, if aggrieved. *Merrill v. Gorham*, 6 Cal. 42.

2. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings. It is from the list made by the assessor, when duly corrected by equalization, that the auditor prepares the duplicate, which gives to the officer his authority to demand the tax, and to levy and sell the property of the delinquent. *Ferris v. Coover*, 10 Cal. 633.

3. The board of equalization of assessments have no power to raise the valuation of land, as fixed by the assessor, without notice to the owner. The general notice of the sitting of the board by publication does not amount to the notice required. *Patten v. Green*, 13 Cal. 329.

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## EQUITY.

- I. In general.
- II. Equity Trials.

## In general.

1. Miscellaneous.
2. On Issue Joined.
3. Jurisdiction.
4. Jury Trials.
5. New Trials.
6. On Appeal.
7. Parties in Equity.
- III. Relief in Equity.
  1. As to Mortgages.
  2. As to Decrees.
  3. As to Judgments.
  4. As to Corporations.
  5. As to Partnerships.
  6. Cancellation of a Deed.
  7. For Fraud or Mistake.
  8. Enforcement of a Contract.
  9. Specific Performance of a Contract.
- IV. Equitable Assignments.
- V. Equitable Liens.
- VI. Bill of Discovery.
- VII. Bill for an Account.
- VIII. The Equities of a Trust.
- IX. Evidence in Equity.
- X. Injunction.

## 1. IN GENERAL.

1. By our system of procedure, all distinctions between actions at law and suits in equity, and between the forms of such actions and suits, are abolished. *Rowe v. Chandler*, 1 Cal. 173; *Smith v. Rowe*, 4 Cal. 7.

2. To entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of the court of equity, and one in which he has no adequate or complete relief at law. *De Witt v. Hays*, 2 Cal. 409.

3. If a tax has been illegally imposed, or a valid objection appears on the face of the proceedings, the plaintiffs have a perfect remedy at law, and a court of equity has no power to interfere.\* *De Witt v. Hays*, 2 Cal. 469; *Robinson v. Gaar*, 6 Cal. 275.

4. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, or interference with the affairs of the concern. *Williamson v. Monroe*, 3 Cal. 385.

5. The allegations of ignorance in mak-

ing the necessary averment, or of insufficient conduct in the prosecution of a former suit, do not constitute ground of relief in chancery. *Barnett v. Kilbourne*, 3 Cal. 327.

6. To entitle a plaintiff in equity to subject the assets of an absent debtor to the payment of his claim, he must show that he is without a remedy in law, and if the bill discloses such a remedy, it will be dismissed on demurrer. *Lupton v. Lupton*, 3 Cal. 121.

7. Equity will not lend its aid to do an injustice, and assist a party in escaping from a joint liability which he has contracted. *Dillon v. Byrne*, 5 Cal. 457.

8. Where a power of attorney is coupled with an interest upon proper allegations, sustained by unequivocal proof, a court of equity will restrain its revocation, and enable the attorney to execute the trust. *Posten v. Rasette*, 5 Cal. 469.

9. Courts of equity unquestionably have the power to appoint receivers, and to order them to take possession of the property in controversy, whether in the immediate possession of defendant or his agent, and in proper cases, they can also order the defendant's agents or employers, although not parties to the record, to deliver specific property to the receiver. *Ex parte Cohen*, 5 Cal. 496.

10. The plaintiff, on a breach of a bond for title, can either resort to a court of equity to enforce its performance, or maintain an action at law. *Bagley v. Eaton*, 5 Cal. 501.

11. A party who has his remedy provided by law, but does not avail himself thereof, and fails to show wherein he is injured, is not entitled to relief in equity. *Merrill v. Gorham*, 6 Cal. 42.

12. Although a party may set up an equitable defense to an action at law, he is not confined to that proceeding. He may let the judgment go at law, and file his bill in equity for relief. *Lorraine v. Long*, 6 Cal. 453.

13. Where a simple contract creditor filed a bill against the assignee of his debtor, not attacking the assignment, and merely praying for a distribution, and the plaintiff subsequently filed a supplemental bill, setting forth that, in the meantime, he had become a judgment creditor, and attacking the assignment for fraud, since discovered, and praying that it be set aside, and that the moneys in the hands of

\*These decisions have become abrogated by the Act of 1897, p. 334, making tax deeds prima facie evidence of title. See *Palmer v. Boling*, 8 Cal. 388.



## In general.

the assignee be appropriated to plaintiff's judgment: held, that it is no objection to the supplemental bill, that it prays for a different relief, and fails to bring in all the other creditors, who are alleged by the defense to be entitled to a ratable distribution. *Baker v. Bartol*, 6 Cal. 486.

14. Where the complaint in an action of trespass, asks also for the equitable interposition of the court, if the law and equity are inseparably mixed together, it would be demurrable. *Gates v. Kieff*, 7 Cal. 125.

15. Defective deeds and acknowledgments cannot be reformed in chancery. *Selover v. American Russian Com. Co.*, 7 Cal. 275; *Barrett v. Tewksbury*, 9 Cal. 15.

16. Courts of equity generally follow the analogy of the law in cases where statutes of limitations are invoked; one of the defenses peculiar to equity being the lapse of time or staleness of the demand. *Dominguez v. Dominguez*, 7 Cal. 427.

17. Where the plaintiff filed a bill in equity in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription, under the Mexican law, and that the full period having run, he could not recover. *Dominguez v. Dominguez*, 7 Cal. 427.

18. A mere existence of cross demands will not justify a set-off in a court of chancery; there must be some peculiar circumstances based upon equitable grounds to warrant the court in interfering. *Naglee v. Palmer*, 7 Cal. 547.

19. Plaintiffs must come into a court of chancery with clean hands, otherwise they are not entitled to relief. *Gunter v. Laffan*, 7 Cal. 594.

20. Where a vendor of land has taken the notes of the purchaser in payment, and brings his action thereon at law, he should in that action, if at all, unite his equitable claim for a foreclosure of his lien; the same tribunal administering both law and equity. *Walker v. Sedgwick*, 8 Cal. 403.

21. The objection that proceedings may become too complex, by permitting different questions of law and equity to be settled in one suit, is not sufficiently strong to overcome the plain provisions of the statute and the substantial dictates of justice. *Ib.* 405.

22. A purchaser of the legal title has

notice of another in possession. *Bryan v. Ramirez*, 8 Cal. 468.

23. It is a favorite rule of equity, that when a court of chancery gains jurisdiction of a case for one purpose it will retain it for others, and not do justice by halves, and thus foster a multiplicity of suits. *Belloc v. Rogers*, 9 Cal. 129.

24. When a party has given a promissory note, and the payee assigns the note without recourse after maturity, and suit is brought upon the note by the assignee, the maker then files the bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an injunction and that the note be canceled: held, that the case was a proper one for equitable relief, and the maker had a right to have the note canceled so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 102.

25. If a surety desires to protect himself, he must pay the debt and proceed against the principal, or apply to a court of equity to compel the holder to proceed against the principal. *Hartman v. Burlingame*, 9 Cal. 561.

26. Courts of equity lean in favor of the right of redemption, and construe instruments as constituting a mortgage rather than a conditional sale. *Hickox v. Lowe*, 10 Cal. 207.

27. Equity will not give relief against the lapse of time, when there has been a very material change in the value of the property, making a great change in the condition of the parties. *Green v. Covillaud*, 10 Cal. 329.

28. The foreclosure of an equitable title takes the property subject to all existent equities. He is not within the rule which protects a bona fide purchaser for value and without notice of the real or apparent legal title. *Dupont v. Wertheman*, 10 Cal. 368.

29. Where the clerk of the district court improperly refuses to issue execution on a judgment rendered in a court of which he is clerk, on the ground that the judgment has been attached at the suit of another party, a bill in equity cannot be sustained to release the attachment and compel the clerk to issue the execution, as the party injured has his remedy on the officer's bond. *Miller v. Sanderson*, 10 Cal. 490.

30. Where the proof of the execution



## In general.

of the deed, and of its accidental destruction, is full and satisfactory, the jurisdiction of a court of equity to decree a reëxecution of the deed is unquestionable. *Cummings v. Coe*, 10 Cal. 530.

31. A court of equity will not exercise jurisdiction to compel the surrender and cancellation of a promissory note, where the party has a clear remedy at law. *Lewis v. Tobias*, 10 Cal. 575; *Smith v. Sparrow*, 13 Cal. 597.

32. A court of equity, upon bill filed, will compel an equitable set-off, when the parties have mutual demands against each other which are so situated that it is impossible for the party claiming a set-off to obtain satisfaction of his claim by an ordinary suit at law or in equity. *Russell v. Conway*, 11 Cal. 102.

33. The insolvency of the party against whom the set-off is claimed is sufficient ground for the exercise of the jurisdiction of the court of equity. *Ib.*

34. In equity, all persons materially interested in the subject matter of the suit ought to be made parties, in order that complete justice may be done and a multiplicity of suits avoided, and this requires subsequent incumbrancers, existing at the filing of the bill, to be made parties in a suit for a foreclosure of a mortgage. *Montgomery v. Tutt*, 11 Cal. 314.

35. An action can be maintained at law upon a decree in equity for a specified sum of money. *Ames v. Hoy*, 12 Cal. 20.

36. A bill to restrain vexatious litigation, upon the ground that the right to real property has been determined in former suits, must show that the title to the property was determined in a suit or suits in which all the claimants to the title were parties. *Knowles v. Inches*, 12 Cal. 214.

37. There is no equity in the claim asserted by a tenant in common to share in profits arising from the labor and money of his cotenant when he has expended neither and has never claimed possession, and never been liable for contribution in case of loss. There would be no equity in giving to a tenant, who would neither work himself nor subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks. *Pico v. Columbet*, 12 Cal. 422.

38. District courts as courts of chancery have assumed jurisdiction over probate

matters, and as probably rights have vested under their decrees, and the principle asserted is more convenient in practice, it is not permissible now to enjoin the jurisdiction. *Deck's Estate v. Gerke*, 12 Cal. 436.

39. By the common law, the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; but this equitable title, accompanied by possession, is sufficient under our system to give the right of possession. *Ortman v. Dixon*, 13 Cal. 36.

40. In a proceeding in equity, an equitable title is as good as a legal title, either for defense or recovery. *Ib.* 37.

41. To maintain a suit to quiet title by a party in possession, it is enough that he claims under a deed which creates an equitable estate, or even a right of possession. *Smith v. Brannan*, 13 Cal. 114.

42. A decree fairly entered by consent of an attorney is as binding upon his client as a decree entered after resistance. *Holmes v. Rogers*, 13 Cal. 200.

43. Where a decree is made by consent of the attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Ib.* 203.

44. An appeal lies from an order setting aside a final decree in equity and granting a rehearing. *Riddle v. Baker*, 13 Cal. 301.

45. A party to obtain the aid of chancery must show that he has exhausted all proper diligence to defeat at law, or to defend in chancery if the first suit was in that form. *Ib.* 304.

46. A perfect equity united with possession is, under our system, equivalent, for all purposes of defense, to a legal title. *Morrison v. Wilson*, 13 Cal. 497.

47. In equity, when the plaintiff's case, as made by his bill, shows that he is not entitled to relief, it is an incurable infirmity which follows the case everywhere; and no decree can be affirmed which is shown by the bill to be erroneous in substance. *White v. Fratt*, 13 Cal. 525.

48. If a chancellor takes general jurisdiction of the general subject of the litigation, he has power aside from the statute to order such undertaking, or to make any other order in the progress of the case for the furtherance of the objects of the litigation and the protection of its sub-

## In general.—Equity Trials.

ject matter. *Prader v. Purkett*, 13 Cal. 590.

49. Where a party in equity on a foreclosure suit is made a defendant, as claiming some interest in the land, sets up as a full defense a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 616.

50. A decree in an equity case is not vitiated because based on the verdict of a jury, even though it might have been made without a jury. *Pfeiffer v. Rhein*, 13 Cal. 649.

51. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ. *Gregory v. Ford*, 14 Cal. 142.

52. Relief from a judgment against an insolvent may be by motion to discharge it, unless there be suspicion of fraud in the release of the insolvent. The remedy at law being ample, equity will not aid. *Imlay v. Carpentier*, 14 Cal. 178.

53. He who asks equity must do equity. *Mitchell v. Hackett*, 14 Cal. 667.

54. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterward reversed. *Reynolds v. Harris*, 14 Cal. 679.

55. If, on an executory contract for the purchase of land made by plaintiff with the agent during the life of the principal, money due the principal was paid, after his death, to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers v. Crane*, 15 Cal. 20.

56. A county is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. If any objection is taken or can be taken to this contract, it must be by the county, which is a corporation; or, if the officers of the county exceed their powers, or are acting, or about to act with gross injustice and bad faith to the tax payers, and thereby subject them to unjust and unauthorized burdens, perhaps one or more of the tax payers thus burthened or threatened might, under pe-

culiar circumstances, invoke the remedial powers of a court of equity, to prevent irreparable injury. *People v. Myers*, 15 Cal. 34.

57. Generally, a receiver can pay out nothing except on order of Court, but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity. *Adams v. Woods*, 15 Cal. 207.

58. Warrants drawn by the controller of State, delivered to the payees thereof, and by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the Treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the bonds, in this case, constituted a payment of the warrants; and if the rule that voluntary payments are not recoverable be not applicable, still the equity of the defendants is equal to that of plaintiff, and courts will not interfere. *State of California v. Wells*, 15 Cal. 344.

59. There may be some cases of equitable relief, where the general ground of appeal will be that the decree is not warranted by the evidence. Still, in the majority of cases, this general ground will be subject to more particular specification. *Barrett v. Tewksbury*, 15 Cal. 358.

## II. EQUITY TRIALS.

### 1. Miscellaneous.

60. Where a party brought his separate actions, first at law upon mortgage notes, and then in equity for a foreclosure before the adoption of the rule to blend the actions in one: held, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit. *Walker v. Sedgwick*, 8 Cal. 404.

61. A rule of the district court requir-

ing a party, on motion for a new trial or judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell v. McKune*, 14 Cal. 232.

62. Section two hundred and fifty-four of the practice act enlarges the classes of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis v. Sutter*, 15 Cal. 262.

63. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. *Ib.* 263.

64. In such suit, the court sitting in equity may direct, when proper, an issue to be framed upon the pleadings and submitted to a jury, if questions of a purely legal character in relation to the title arise. *Ib.* 263.

65. The practice act applies as well to legal as equitable actions, so far as its provisions are consistent with the rights and remedies administered in courts of equity. And the only way in which the verdict of a jury on issues submitted can be reviewed, is by motion for new trial—except, probably, that the court, whether sitting in equity or on the trial of a common law action, may, of its own motion, set aside the verdict of a jury when clearly and palpably against the evidence. *Duff v. Fisher*, 15 Cal. 380.

66. Where a party gets into possession of property, as a water ditch, under a sheriff's suit on foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. It is, in its nature, an equity proceeding, at least to be disposed of according to equity practice, and it would be impracticable for a jury to settle the account, at least, without delay and embarrassment. *Raun v. Reynolds*, 15 Cal. 470.

## 2. On Issue Joined.

67. In chancery, when a cause is heard in bill and answer, all the material allegations of the answer, whether upon knowledge or information and belief, are to be assumed as true, provided the facts and circumstances disclosed by the answer are not wholly inconsistent with the general affirmation or denial contained therein. *Von Schmidt v. Huntington*, 1 Cal. 69; *Belt v. Davis*, 1 Cal. 142.

68. When, in equity, the court directed that special issues of material facts in the case should be framed or settled, and stated in writing, before proceeding to trial, held not to be in error. *Smith v. Rowe*, 4 Cal. 7; *Still v. Saunders*, 8 Cal. 286.

69. The court can order a reference without the consent of parties, in an equity suit, as the parties are not entitled to a jury trial. *Smith v. Rowe*, 4 Cal. 7.

70. In chancery cases, the judge is not required to find the facts separate from the law, nor are the parties entitled to a trial by jury. *Walker v. Sedgwick*, 5 Cal. 192.

71. In chancery cases, the parties have no right to demand a trial by jury; but in all cases at law it is a right which can be insisted on and enforced. *Cahoon v. Levy*, 5 Cal. 294.

72. It is the duty of a court of equity, when all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for future litigation if it can be helped. *Ord v. McKee*, 5 Cal. 516.

73. In a chancery case, a party has a right to insist that the legal conclusions to be deduced from the pleadings, whatever may be the proofs, shall be applied. *Tryon v. Sutton*, 13 Cal. 494.

74. In a chancery case, where all the proofs are in, and the case fully before the lower and the appellate court, the judgment of the latter is conclusive, where it passes upon the merits of the controversy, and on the reversal of the decree below that court can take no further proceedings, unless authorized by the appellate court, except such as are necessary to give effect to its judgment; the whole matter is res adjudicata. *Soule v. Dawes*, 14 Cal. 249.

75. In equity the general denials made

## Jurisdiction.—Jury Trials.—New Trials.

by traversing literally and conjunctively the statements of a sworn bill, are not legitimate for the purpose of putting in issue specific allegations; for, in this way, a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge or even the substantial fact. *Blankman v. Vallejo*, 15 Cal. 645.

### 3. Jurisdiction.

76. The district courts of this State have jurisdiction over the persons of minors, as well as their estates, by reason of equity. *Wilson v. Roach*, 4 Cal. 366.

77. It is perfectly competent for a judge sitting in the cause where exceptions had been filed to the report of the referee upon the facts, to take up the testimony reported by the referee, find the facts and render a decree in the cause. *McHenry v. Moore*, 5 Cal. 92.

78. A court of equity will not permit litigation by piece-meal. The whole subject matter, and all the parties should be before it, and their respective claims determined once and forever. *Wilson v. Lassen*, 5 Cal. 116.

See JURISDICTION.

### 4. Jury Trials.

79. In chancery, where a jury are summoned to find certain issues of fact, which, when found, are not obligatory, but simply obtained for the purpose of informing the conscience of the chancellor, there is no error in refusing to instruct the jury as to what would be law on a given state of facts. *Dominguez v. Dominguez*, 7 Cal. 426; *Branger v. Chevalier*, 9 Cal. 360.

80. Special issues framed by the court according to the established rules of chancery practice, may be tried by a jury in equity cases. *Brewster v. Bours*, 8 Cal. 505.

81. In equity the court trying the case may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 85.

82. A jury being waived, it is immaterial whether an action against an adverse claimant of land is an equitable or

a legal proceeding. *Smith v. Brannan*, 13 Cal. 113.

83. The findings of the jury on issues submitted to them in an equity case, if not objected to by motion for new trial, or if not set aside by the court on its own motion, become established facts in the case, and cannot be questioned in the supreme court for the first time. *Duff v. Fisher*, 15 Cal. 380.

84. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. This right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. *Koppikus v. State Capitol Commissioners*, 16 Cal. 254.

See JUROR, JURY.

### 5. New Trials.

85. Where in a chancery case certain issues of fact are submitted to, and determined by a jury, the granting of a new trial is entirely discretionary with the chancellor, and his action is not revisable. *Gray v. Eaton*, 5 Cal. 448.

86. In equity cases, although no motion for a new trial is made, this court will not hold the findings of fact by the court below conclusive. *Dewey v. Bowman*, 8 Cal. 148.

87. The court below may refuse a new trial, even though both parties consent to it. Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. Such refusal is no ground of error, particularly in an equity case, where there may have been no necessity for new trial, as upon application to the court, upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict; or, if refused, the error corrected by appeal. *Phelan v. Ruiz*, 15 Cal. 90.

See NEW TRIALS.



6. *On Appeal.*

88. The supreme court is authorized by statute to render such judgment as substantial justice shall require; but by this is intended substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual. *Stevens v. Ross*, 1 Cal. 97.

89. In equity, the supreme court on an appeal has full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape, or by whatever party the appeal is taken up. *Grayson v. Guild*, 4 Cal. 125.

90. The supreme court, in chancery cases, has to examine the facts, and is not concluded by the findings of the chancellor. *Walker v. Sedgwick*, 5 Cal. 192.

91. Chancery cases come before the supreme court upon the pleadings, testimony and decree, and we must look to the whole record, and see if there is any error in the final decree. *Still v. Saunders*, 8 Cal. 287.

92. In equity cases, the appellate court will not notice minor errors, if, on the whole record, the decree be right. *Goode v. Smith*, 13 Cal. 85.

93. In equity cases submitted by the court to a jury, the supreme court will not review the testimony if any proof sustains the verdict and judgment. *Pfeiffer v. Riehn*, 13 Cal. 648.

94. There is no distinction as to the manner in which a statement on appeal is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion of the evidence will be immaterial for the determination of these grounds in the supreme court. *Barrett v. Tewksbury*, 15 Cal. 357.

See APPEAL, SUPREME COURT.

7. *Parties in Equity.*

95. In equity cases, courts may add to and strike out parties, and render a decree against some defendants and in favor of others. *Rowe v. Chandler*, 1 Cal. 172.

96. An appeal does not lie from an

order of the chancellor making a new party defendant. *Beck v. City of San Francisco*, 4 Cal. 375.

97. A failure to join the proper parties must be taken advantage of by answer or demurrer in equity. *Whitney v. Stark*, 8 Cal. 516.

98. The thirteenth section of the code, which provides that any person may be made defendant who has or claims an interest adverse to the plaintiff in the controversy, or who is a necessary party to a complete determination of the questions involved, refers to cases in equity only. *Garner v. Marshall*, 9 Cal. 270.

See DEFENDANT, PARTIES, PLAINTIFF.

## III. RELIEF IN EQUITY.

1. *As to Mortgages.*

99. The usual and best method of proceeding in cases of foreclosure is to appoint a master to find and report the amount due, and then exceptions may be filed to the report upon which the judgment of the chancellor is given, and this may be afterwards assigned as error. *Guy v. Franklin*, 5 Cal. 417.

100. It is no error for the chancellor to make the calculations himself; but when he has done so, a mistake in the calculation must be brought to his notice in some form analogous to that of an exception to a master's report. *Ib.*

101. R., an unmarried man, executed two mortgages upon a lot of land. Subsequently he marries, and then executes a new mortgage to persons who pay off the first mortgages upon their being released. The release of the old and the execution of the new mortgages were on the same day. The wife did not sign the new mortgage: held, that in equity the transaction is an assignment of the first mortgages in consideration of the money advanced by the second mortgagees—not the creation of a new incumbrance, but changing the form of the old. *Dillon v. Byrne*, 5 Cal. 456; *Birrell v. Schie*, 9 Cal. 107; *Carr v. Caldwell*, 10 Cal. 385; *Swift v. Kraemer*, 13 Cal. 530.

102. A purchaser of a second note secured by mortgage, taking therewith an



## Relief as to Mortgages.

assignment of the mortgage, takes with notice of the equity of the holder of the first note, when informed of its existence by the mortgage itself. *Phelan v. Olney*, 6 Cal. 483.

103. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand, but ask that a certain sum be retained in the hands of the court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in the hands of the court. *Bell v. Walsh*, 7 Cal. 87.

104. Where the plaintiff, being the owner of an undivided one-half of a tract of land, mortgaged his interest therein to A, and subsequently, with his cotenant, conveyed the land to B and C—two-thirds to one and one-third to the other—by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due, the plaintiff filed his bill against B and C to compel a foreclosure and payment: held, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay off the mortgage before bringing his action. *Abell v. Coons*, 7 Cal. 109.

105. An action to foreclose a mortgage is peculiarly an equity proceeding; and when the district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief. *Belloc v. Rogers*, 9 Cal. 129.

106. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one, to whom the other had meanwhile sold, the new mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere, and give the mortgagee priority over intervening liens. *Dingham v. Randall*, 13 Cal. 513.

107. S. & B., in 1854, execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells

to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. If plaintiff has any remedy against defendant, because of the recital in deeds named, it is in equity. *Brown v. Winter*, 14 Cal. 34.

108. A mere stranger who voluntarily pays money due on a mortgage and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity and in the absence of fraud, accident or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee. *Guy v. Du Uprey*, 16 Cal. 198.

109. A tenant of the mortgagor is not interested either in the claim secured or in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made a party to the foreclosure. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *McDermott v. Burke*, 16 Cal. 590.

See MORTGAGE.

2. *As to Decrees.*

110. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property or the estate sold; provided, application be made to them in the suits in which such decrees are entered within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 566.

111. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply—and from such courts of equity seldom relieve. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 565.

112. In this case relief cannot be granted, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure suit. And further, this action is not brought directly for relief from the sale, but for a sale of the property, an account as incident to a partition, and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 565.

See JUDGMENTS.

3. *As to Judgments.*

113. A judgment will be set aside in

equity which was improperly obtained; there being no cause of action, and no notice to the parties. *People v. Lafarge*, 3 Cal. 133.

114. A party may in any event resort to a court of equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 407.

115. A creditor must resort to a court of chancery to set aside a confession of judgment alleged to be fraudulent. *Arrington v. Sherry*, 5 Cal. 514.

116. In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud. *Robb v. Robb*, 6 Cal. 22.

117. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. *Pico v. Sunol*, 6 Cal. 295; *Domingo v. Getman*, 9 Cal. 103.

118. Courts of equity will only interfere to enjoin a judgment at law rendered against him by reason of fraud or accident, unmixed with any fault or negligence in himself or his agents. *Phelps v. Peabody*, 7 Cal. 52.

119. Equity will not entertain jurisdiction of an action to set aside a judgment by default, on the ground that the demand may be unconscientious, and that injustice may have been done; provided, it was competent for the party to have placed the matter before the court in the original action, either upon issue joined, or upon motion, or upon motion to set aside the verdict of judgment. *Borland v. Thornton*, 12 Cal. 445.

120. Equity has jurisdiction to vacate a judgment fraudulently altered so as to include a defendant who was not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 560.

121. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 202.

122. Equity interferes with judgments and proceedings at law only in peculiar cases, not to correct errors and irregularities. It seldom or never interferes to enforce a mere technical right. There must

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Relief as to Judgments.—As to Corporations.—As to Partnerships.

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be substantial merit. *Gregory v. Ford*, 14 Cal. 141.

123. If a judgment by default be void, because entered by the clerk without authority, that fact constitutes no ground for equity to interfere. *Chipman v. Bowman*, 14 Cal. 158.

124. Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 226.

125. In suit in equity, to set aside a judgment by default, on a return by the sheriff of personal service, on the ground that defendant, in fact, was not so served, and never had any notice of the proceedings, and that he had a valid defense to the action, the allegations relative to this defense showed that it was based upon an executory agreement, by the terms of which certain things were to be done by plaintiff, and in consideration thereof, he was to be released from the debt for which the action was brought: held, that the allegations are insufficient in this, that they do not state that any of these things were performed by him, or that he ever offered, or was, or has been, at any time, ready or willing to perform the same. *Gibbons v. Scott*, 15 Cal. 286.

See JUDGMENT.

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#### 4. As to Corporations.

126. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation until the further order of the court; collect money due or to become due on it; sell certain stock and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 148.

127. A court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to ac-

count for any breach of trust, but the jurisdiction for this purpose is over the officers, personally, and not over the corporation. *Ib.* 150.

128. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all of the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. *Ib.* 151.

See ACCOUNT, II; CORPORATIONS.

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#### 5. As to Partnerships.

129. Where a bill was filed for the purpose of securing the assets of a partnership, and having them distributed among the creditors, the court of chancery will carry out this decree without regard to any attempt on the part of the partners to evade or defeat it. *Adams v. Haskell*, 6 Cal. 116.

130. One of the rules of equity jurisprudence is, that the individual property must go to the individual creditors, in priority to the firm creditors, and firm assets must go to the firm creditors, in priority to the individual creditors of a partner. *Forbes v. Scannell*, 13 Cal. 287.

131. In an action of conflict between the individual and firm creditors, and their liens upon partnership property, equity has jurisdiction. *Conroy v. Woods*, 13 Cal. 634.

132. Voluntary associations for mutual relief in sickness or distress, by funds raised by initiation fees, fines, dues, etc., are partnerships, and may be dissolved by a court of equity, if they improperly exclude a member. *Gorman v. Russell*, 14 Cal. 539.

See ACCOUNT, II; PARTNERSHIP.

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## Cancellation of a Deed.—For Fraud or Mistake.

6. *Cancellation of a Deed.*

133. Where one has an outstanding deed which improperly clouds the title of the true owner, on the application of the latter, equity will amend and cancel the deed, and will, on like application, interfere and prevent a sale, and the consequent execution of an improper deed. *Shattuck v. Carson*, 2 Cal. 589.

134. An equitable action to set aside a fraudulent deed to real estate, when the effect would be to restore the possession to the defendant party, is an action for the recovery of real estate, and governed by the statute of limitations. *City of Oakland v. Carpentier*, 13 Cal. 535.

See DEED.

7. *For Fraud or Mistake.*

135. Equity will, as against a mortgagor, correct a mistake in the description of the mortgaged premises, as a matter of course, and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Woodworth v. Guzman*, 1 Cal. 205.

136. Courts of equity, in the absence of statutes, will set aside awards for fraud, mistake or accident, either in fact or in law. *Muldrow v. Norris*, 2 Cal. 77.

137. Where parties stipulate not to appeal, a court of equity will, nevertheless, interfere to correct fraud or mistake appearing on the face of the record. *Ib.* 78.

138. Where in the settlement of a partnership a mistake occurs, and both parties were ignorant, or had equal knowledge of, or equal opportunities of knowing the mistake, and there had been no fraud or concealment, equity will not correct the mistake. *Belt v. Mehen*, 2 Cal. 159.

139. A bill filed by a creditor asking relief against fraudulent transfers and concealment of his property by the debtor, is a substantial ground of equity jurisdiction. *Swift v. Arents*, 4 Cal. 391.

140. The district judge, while sitting in an equity case, is possessed of all the powers of a court of chancery, and can, where fraud and collusion are charged against a judge, in entering an order or

decree, review the same and annul it, if the facts justify such a conclusion. *Sanford v. Head*, 5 Cal. 298.

141. To maintain a creditor's bill in chancery, in order to reach equitable assets which are alleged to be fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent; but facts and circumstances must be set out and shown which will reasonably sustain the bill. *Kinder v. Macy*, 7 Cal. 207.

142. The jurisdiction of courts of equity, originally embracing all cases involving all questions of fraud, accident or confidence, is not altered or impaired, because the courts of law now exercise similar jurisdiction in many similar cases; such jurisdiction is concurrent. *People v. Houghaling*, 7 Cal. 351.

143. Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterwards fraudulently attached, in a suit brought by the real, though not the ostensible purchaser, against the husband alone: held, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 286.

144. It would be a fraud, which no court of equity could tolerate, to hold that the vendor of land, on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large amounts of money in improving the property, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid, and all the improvements, and deny all obligations on his part to comply with his engagements. *Farley v. Vaughn*, 11 Cal. 237.

145. A court of equity will relieve against mistakes, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show it, if it be denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

146. Fraud in the use of instruments is as much a ground for the interposition of equity as fraud in the creation of them. *Pierce v. Robinson*, 13 Cal. 127.

147. Fraud, accident and mistake are special grounds of equity jurisdiction, and



## For Fraud or Mistake.—Enforcement of a Contract.

may be shown by satisfactory evidence, written or verbal, with reference not only to mortgages but to all written instruments. *Ib.*

148. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors subsequently attaching cannot complain that the suit was prematurely brought. The debt is equitably due, and there being no actual fraud against subsequent creditors, they cannot be preferred in equity, even if the action could have been defeated by the debtor. *Patrick v. Montader*, 13 Cal. 442.

149. If a party, by conspiracy with others, procured them and himself to be elected to the board of trustees of a town, for the purpose of defrauding the town of its property and franchises for his benefit, the whole transaction is illegal and equity will grant relief. *City of Oakland v. Carpenter*, 13 Cal. 551.

150. If a defendant, as a member elect of a board of trustees, neither resigning nor qualifying, took advantage of his position to advance his personal interests at the expense of those of the corporation, it was a fraud, for which equity will hold him responsible. *Ib.*

151. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 499.

152. R. & Co., defendants, had two mechanics' liens upon certain property; one filed October 30th, 1854, the other filed December 8th, 1854, against defendant V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to

the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale, on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, the plaintiff having acquired no right which it would be inequitable to disturb; that such rescission is no evidence of fraud, and the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed: but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from this decree. *Gamble v. Voll*, 15 Cal. 510.

153. Mrs. L., a defendant, when a femme sole, contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit against her was brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her, the judgment of the supreme court being conclusive so long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding, impeaching for fraud. *Bastic v. Love*, 16 Cal. 72.

See FRAUD, MISTAKE.

### 8. Enforcement of a Contract.

154. Where there has been such a part performance of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him unless the verbal agreement should be enforced, equity will decree a specific performance of the contract. *Tohler v. Folsom*, 1 Cal. 212.



## Enforcement of a Contract.—Specific performance of a Contract

155. A party cannot ask a court of equity to rescind a contract against the wishes of the respondents, when the only obstacle to its completion and fulfillment was caused by his own default, and the other party entirely without blame. *Salmon v. Hoffman*, 2 Cal. 143.

156. An unwritten contract for the sale of land is void by the statute, and courts of equity have no power to enforce a specific performance. *Abell v. Calderwood*, 4 Cal. 91.

157. To entitle a party to a fair decree in a court of equity, it must appear that the contract was fair, just and reasonable, and founded upon an adequate consideration. *Dunlap v. Kelsey*, 5 Cal. 181.

158. When courts are called upon to set aside contracts, there must be some substantial reasons shown; and a court of chancery, particularly, will not act when it is kept in the dark as to the reasons or purposes of a transaction, in reference to which relief is sought. *Scanlan v. Gilman*, 5 Cal. 183.

159. Equity can relieve a party by granting a rescission of the contract upon the allegation of the insolvency of the grantor and his inability to respond in damages to an action upon the covenant, a paramount outstanding title in another, and an offer to redeliver possession and account for the rents and profit. *Norton v. Jackson*, 5 Cal. 265.

160. Where a verbal contract had been so far performed by one of the parties, relying upon the good faith of the other that he could have no adequate remedy except by complete performance, courts of equity decreed its execution, upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute having for its object the prevention of a fraud could not be used as an instrument for its perpetration. *Arguello v. Edinger*, 10 Cal. 158.

161. Any contract executed which passes the equitable right to a ditch and use of the water appurtenant to or connected with the ditch as the property of the grantee, is enough to insure him the right for which he stipulated as against an adverse claimant. *Ortman v. Dixon*, 13 Cal. 36.

162. The general principle that a party asking to rescind a contract must restore the other party to the condition to which he was before the contract was made, is

unquestionably correct, but equity will not require him to pay money to a party who owes him in order to enable him to urge his rights against his debtor. *Watts v. White*, 13 Cal. 323.

See CONTRACT.

### 9. Specific performance of a Contract.

163. A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. *Morrison v. Rossignol*, 5 Cal. 66.

164. Lands held by no other tenure than possession may be the legitimate subjects of control; and sometimes, in equity, chattel interests or personal property are made the subject of specific performance. *Johnson v. Rickett*, 5 Cal. 219.

165. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for his execution, but tender of the unpaid purchase money must be proven. *Goodale v. West*, 5 Cal. 341.

166. A court of equity will not enforce a specific performance of an agreement to convey lands, when the plaintiff shows no compliance, or offer of compliance on his part with the agreement, nor any excuse therefor, for any length of time from which he bound himself to perform. *Brown v. Covillaud*, 6 Cal. 571; *Green v. Covillaud*, 10 Cal. 324.

167. A bill quia timet and to enforce the specific execution of an agreement lies only where there is no adequate remedy at law. *White v. Fratt*, 13 Cal. 523.

168. Where damages resulting from the breach of an agreement to enforce specific execution are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances. *Ib.*

169. Whether equity will enforce the specific performance of a contract depends, not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded

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Equitable Assignments.—Equitable Liens.

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by a recovery of damages in an action at law. *Duff v. Fisher*, 15 Cal. 381.

See SPECIFIC PERFORMANCE.

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IV. EQUITABLE ASSIGNMENTS.

170. An order drawn upon a defendant for an amount due from the defendant is a prima facie assignment of the debt due. Even if it was only for part of the debt, no one could make the obligation but the defendants. *McEwen v. Johnson*, 7 Cal. 260; *Wheatley v. Strobe*, 12 Cal. 97; *Pope v. Huth*, 14 Cal. 408.

171. A party on whom an order is drawn for a certain fund is not unlike that of a party summoned as garnishee after receiving notice of an assignment by his creditor of the demand. *Wheatley v. Strobe*, 12 Cal. 98; *Pope v. Huth*, 14 Cal. 408.

172. Between the parties, the assignee of equities stands in the place of his assignor, with no better rights; but as to the claim of third persons, the purchaser of an equity stands unaffected by fraud of which he is ignorant, expressly or constructively. *Wright v. Levy*, 12 Cal. 263.

173. An agreement between the mortgagor and mortgagee that the land and its proceeds were to be held, not only as security for the debt due the latter, but for debts due third persons—as laborers on the land—operates as an equitable assignment of the surplus as soon as any exists which does not pass to the administrator of the mortgagee as general assets for the benefit of creditors at large, but is subject in his hands to the same trust which attached to it before the decease of the intestate. *Pierce v. Robinson*, 13 Cal. 121.

174. Equity upholds assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in probabilities, provided they are fairly made, and not against public policy; and an agreement for such interests will take effect, as such assignments, when the subjects to which they refer have ceased to vest in possibility, and have ripened into reality. *Pierce v. Robinson*, 13 Cal. 123; *Pope v. Huth*, 14 Cal. 407.

175. An order in the following words: "Messrs. F. Huth & Co.: Please hold to

the order of William Pope & Sons, of Boston, five hundred pounds sterling of insurance, effected on cargo of bark *Elvira*, and oblige," etc., is an equitable assignment of the funds in the hands, or to come into the hands of the drawees, to the payees. *Pope v. Huth*, 14 Cal. 407.

176. And the drawees, having notice of such assignment, are liable to the payees for the amount, without an express promise to pay it. *Ib.*

See ASSIGNMENT.

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V. EQUITABLE LIENS.

177. Where a party to enforce a claim for the balance of the purchase money unpaid, instead of resorting to his lien in equity, commenced an action at law for the recovery of money, and sold the land on execution subject to a mortgage, the purchaser, to enforce the subrogation to any equitable lien, must file his bill to that effect; but cannot set up his right in an action to enjoin the mortgagee from foreclosing his mortgage thereupon. *Allen v. Phelps*, 4 Cal. 259.

178. Equity raises no lien in respect to real estate, except that of a vendor for the purchase money. *Ellison v. Jackson Water Co.*, 12 Cal. 554.

179. The lien of mechanics for labor performed and materials furnished toward the erection or repair of a building attaches, even though the employer has but an equitable interest in the land and building. *Crowell v. Gilmore*, 13 Cal. 56.

180. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by vendee. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of its property for its satisfaction, and execution for its deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Sparks v. Hess*, 15 Cal. 193.

## VI. BILL OF DISCOVERY.

181. A bill in the nature of a bill of peace, and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession claiming title to the land, nor where the party has a plain, speedy and adequate remedy at law. *Ritchie v. Dorland*, 6 Cal. 37, 40.

See DISCOVERY.

## VII. BILL FOR AN ACCOUNT.

182. A bill for an account is the proper remedy for the settlement of the proceeds of a joint adventure where, in consideration of outfit and advances made by plaintiff, the defendant agreed to account for and pay over a proportion of the proceeds of his labor, although the parties may not have been technically partners. *Garr v. Redman*, 6 Cal. 576.

183. Where a judgment debtor remains in possession of a water ditch after sheriff's sale, and collects the rents and profits during the six months following, he is a trustee of the fund for the purchaser at the sale, and if the fund be in danger of loss, a bill in equity to account will lie. *Harris v. Reynolds*, 13 Cal. 518.

184. M. and B., the plaintiffs, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back; B. agreeing to pay certain firm debts. The sale and agreement were afterwards canceled, and B. sold M. one-half of the ranch. Defendant, Myers, agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase O. and M. knew of B's title: held, that a bill in equity by B. against M., O. and Myers for an account of the partnership between M. & B., and for a decree establishing plaintiff's right to the half of the ranch, does not lie; that his remedy at law for his half of the ranch, against M. or any one claiming under him with notice of his title, is clear, and that M. would be estopped from disputing the title, and as

M. makes no defense to the bill, it is good against him for an account. *Brush v. Maydwell*, 14 Cal. 209.

185. Equity will not set off the claim of an individual creditor of one joint owner of a judgment against the judgment. And if the judgment be partnership assets, the individual creditor has no claim to any part of it until adjustment of the firm accounts. *Collins v. Butler*, 14 Cal. 230.

186. Where stock is transferred to secure a debt and is still in the hands of the transferee, and the plaintiff avers that the stock is worth more than the debt, and that defendant has received from dividends more than enough to pay it, equity has jurisdiction to compel an account, prevent a transfer and direct a retransfer and delivery of the stock. *Smith v. '49 & '56 Quartz Mining Co.*, 14 Cal. 247.

See ACCOUNT, II; COMPLAINT.

## VIII. THE EQUITIES OF A TRUST.

187. Equity will enforce the stipulation of a deed of separation whenever it affects the rights to property or income, and sometimes where the jurisdiction has attached on account of questions relating to property it will even lend its aid collaterally to enforce the stipulation for a separation. *Joyce v. Joyce*, 5 Cal. 164.

188. Where a bill alleges a parol trust it seems that it must be denied, and a general demurrer will not lie. *Peralta v. Castro*, 6 Cal. 358.

189. A party seeking to enforce a trust against an administrator of a trustee, is compelled from the complex nature of the cause to ask relief in a court of equity. *Gunter v. Janes*, 9 Cal. 658.

190. A trustee should never be permitted to defeat the rights of the cestui que trust so long as it is in the power of the court of equity to enforce them. *Ib.* 660.

191. Trustees, when they act with good faith and without any selfish motive, are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel. *Ellig v. Naglee*, 9 Cal. 695.

192. In mortgages, the form of the contract is one of conveyance; while in truth the contract is only one of security, and equity gives effect to the intention of

the parties. *Koch v. Briggs*, 14 Cal. 263.

193. Relief in equity would be limited to the contract and a sale could only be made by enforcing the trust. *Ib.*

194. In a deed of trust given to a third party not a creditor, to secure a note, authorizing the trustee to sell the land at public auction and execute to the purchaser a good and sufficient deed of the same upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, etc., is not a mortgage, and there can be no forfeiture of the estate and hence no equity as against such forfeiture to foreclose as in England. *Ib.*

See TRUST.

#### IX. EVIDENCE IN EQUITY.

195. Equity will not relieve against a judgment at law, for newly discovered evidence, unless the evidence alleged in the bill appear incontrovertible and conclusive. *Buckelew v. Chipman*, 5 Cal. 400.

196. Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particulars, it can only be altered by a direct proceeding in chancery for the purpose of reforming it. *Osborn v. Hendrickson*, 8 Cal. 32.

197. Parol evidence is admissible in equity to show that a deed, absolute on its face, was intended as a mortgage. *Pierce v. Robinson*, 13 Cal. 126, overruling *Lee v. Evans*, 8 Cal. 424; *Low v. Henry*, 9 Cal. 548; *Gray v. Palmer*, 9 Cal. 640.

198. In an action of foreclosure brought by an administrator upon a note and mortgage given to the intestate in his lifetime, a witness, whose wife is a sister and heir of the deceased, is incompetent upon the ground of interest. *Lisman v. Early*, 12 Cal. 283.

199. In equity cases where the evidence is conflicting, the findings will not usually be disturbed. *Ortman v. Dixon*, 13 Cal. 40.

200. An answer responsive to and denying the charges in a bill of equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 169.

201. The practice act, as to evidence at least, governs all cases legal or equitable by the same rules. *Ib.*

See EVIDENCE.

#### IX. INJUNCTION.

202. Where an assessment was made for the purpose of improving a street, thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and the improvement was completed without the plaintiff's interposing in the outset to prevent it, and he then files an injunction bill to stay the sale of his land by virtue of an ordinance of the city, for the purpose of avoiding the payment of his portion of the assessment: held, that the injunction ought to be dissolved, on the ground that he who asks equity must do equity; that the city should be permitted to proceed and sell the plaintiff's land for the purpose of satisfying the assessment, leaving him after the sale to the technical right which he set up by reason, as he claimed, of some irregularities in the mode of taking the assessment. *Webber v. City of San Francisco*, 1 Cal. 456.

203. It is incumbent on him who asks the interposition of a court of equity to restrain an erection, that not only his possession, but all his conduct in relation to the purchase is in good faith. *Conrad v. Lindley*, 2 Cal. 175.

204. In all cases involving simply the question of taxation, the issue is strictly one at common law and equity can take no cognizance of it; in such case to grant an injunction is error. *Minturn v. Hays*, 2 Cal. 591.

205. A court of equity will take jurisdiction of a bill for an injunction filed by attaching creditors of an insolvent, to restrain proceedings on execution against the property attached under a judgment against a debtor, in favor of another, alleged to have been obtained by fraud, where all the material allegations of the bill, except fraud, are admitted. *Heyne-man v. Dannenberg*, 6 Cal. 380; *Walker v. Sedgwick*, 8 Cal. 403.

206. A party aggrieved by another interfering with his bridge or ferry franchise is entitled to relief in chancery and



may be protected by injunction. *Norris v. Farmers' and Teamsters' Co.*, 6 Cal. 594; *Severance v. Ward*, 7 Cal. 129.

207. The entire equity of the bill in this case being denied in the answer, and there being no support of the bill, the injunction was dissolved. *Burnett v. Whitesides*, 13 Cal. 159.

208. Where in such suit an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved, on filing an answer setting up paramount title in defendants: held, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. *Curtis v. Sutter*, 15 Cal. 263.

209. Upon the verdict, if a new trial be not granted, the court can act by dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and awarding a perpetual injunction against its assertion to the property in question. *Ib.*

See INJUNCTION.

## ERASURE.

1. No alteration or erasure will defeat the recovery upon a bond, unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent interest to effect the same object. *Turner v. Billagran*, 2 Cal. 522.

2. A bond was made to the sheriff instead of to the party to be protected by it, by mistake; after the mistake was discovered, the name of the sheriff was erased and that of the party inserted; held, that this did not invalidate the bond. *Ib.*

3. Where the judgment of the court recites that summons was served on defendant, the fact that years afterwards there appears some erasure or interlineation on the sheriff's return is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud, or forgery, or alteration. *Gregory v. Ford*, 14 Cal. 144.

See ALTERATION, MISTAKE.

## ERROR, WRIT OF.

1. Neither a writ of error nor appeal lies to take a case from a State court to the supreme court of the United States. *Johnson v. Gordon*, 4 Cal. 374.

2. A writ of error will only lie in cases where no appeal is given by statute. *Haight v. Gay*, 8 Cal. 300.

3. On application for a citation on production of a writ of error from the clerk of the United States court, and for a stay of proceedings in the supreme court of this State, the duty and power of issuing the citation devolves on the chief justice, as a chamber proceeding, and he must see when he is required to act, or is authorized to proceed under the federal law, that he is within that law. *Ferris v. Coover*, 11 Cal. 179.

4. An action of ejectment, raising the question whether a grant made by the Mexican government proved title to the tract within the limits of the grant, is not a case in which a writ of error lies under the judiciary act. *Ib.* 181.

5. No provision of our constitution delegates to the legislature the power to enlarge the jurisdiction of the federal courts, and the act of 1855 authorizing writs of error from the State courts to the federal courts is void. *Ib.* 185.

See APPEAL.

## ERRORS.

1. A judgment will not be reversed by an error by which the rights of the parties are not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148.

2. Where some errors have been committed by the court below, that do not materially affect the merits of the case, and where from the whole case it appears that justice has been done, the court will not disturb the judgment. *Clayton v. West*, 2 Cal. 382. *Paige v. O'Neal*, 12 Cal. 492; *Smith v. Brannan*, 13 Cal. 116.

3. Error which is relied on, must be shown clearly and affirmatively. *Rabe v. Wells*, 3 Cal. 151.



## Errors.—Escheat.—Escribano.—Escrow.

4. The naked direction of the court, unaccompanied with any statement of facts, cannot support allegations of error; they may be in reference to the facts merely abstract or inapt to mislead the jury. *White v. Abernethy*, 3 Cal. 426.

5. To disturb a judgment of a court of original jurisdiction, it is not sufficient that error may have intervened; but it must be affirmatively shown by the record. *White v. Abernethy*, 3 Cal. 426; *Brooks v. Townsend*, 4 Cal. 286.

6. The mere fact that the plaintiff's counsel read, in his address to the jury, a portion of an answer which had been stricken out, is not error of itself. *Morgan v. Hugg*, 5 Cal. 409.

7. The admission of one of the witnesses to explain his evidence after he had once testified, under the circumstances, can hardly be called an irregularity, much less a serious ground of error. *People v. Roberts*, 6 Cal. 217.

8. In chancery cases the appellate court will not notice minor errors, if on the whole record the decree be right. *Goode v. Smith*, 13 Cal. 84.

9. Where a decree is made by the consent of an attorney, it is no ground of error that the decree embraces land not in the complaint; and even if error, the remedy is by appeal. *Holmes v. Rogers*, 13 Cal. 203.

10. If no motion be made in the court below to correct a clerical error disclosed by the proceedings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

11. Errors in the computation of interest should be corrected by motion, in the court below. *Whitney v. Buckman*, 13 Cal. 539.

12. Every error in the court below, in the rejection of evidence, is prima facie an injury, and it rests with the other party clearly to show that no hurt would have been, or was done by the error. *Jackson v. Feather River Water Co.*, 14 Cal. 25.

13. An appellant cannot complain of error, when the record shows it was not to his prejudice. *Thompson v. Lyon*, 14 Cal. 42.

14. Where the error of a decree is apparent by reference to the bill and decree, the party aggrieved may assign error, though no demurrer be interposed. *Gregory v. Ford*, 14 Cal. 143.

15. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court or the court below, on motion. *Browner v. Davis*, 15 Cal. 11.

See APPEAL, IV, V; MISTAKE.

## ESCHEAT.

SEE FORFEITURE.

## ESCRIBANO.

1. By the civil law an escribano may act in the double capacity of escribano and witness in the execution of a will. *Pan-aud v. Jones*, 1 Cal. 505.

2. By the civil law every conveyance of land was required to be made before an escribano, or if there was none, then before the judge of the first instance. *Hayes v. Bona*, 7 Cal. 159.

## ESCROW.

1. Where W., in consideration of \$1,500, made a deed to B. of an undivided interest in certain mining claims, upon certain conditions of payment of dividends and proceeds of wages due for his labor above his board expenses, until the sum paid shall equal \$1,500 with interest; then this bill of sale to be given unto the said B. by him who may have it in his possession, thereby giving unto the said B. full possession and control of said claims: held, that B. was to contribute his labor as agreed upon, and that the deed was but an

escrow in the hands of the third party and B. was only entitled to a delivery of it upon strict compliance with the stipulations therein contained. *Beem v. McKusick*, 10 Cal. 540.

## ESTATES OF DECEASED PERSONS.

1. Treaties made by the United States removing the disability of aliens to inherit, are valid and constitutional. *People v. Gerke*, 3 Cal. 382.

2. Upon a death, the law casts a descent and makes distribution of all property, or interests in, or right of enjoyment of property on some one, and the right of enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or administrator, and the right of deceased may be conveyed by a sale to another. *Grover v. Hawley*, 5 Cal. 486.

3. The probate court has no power to direct that a portion of an estate of an intestate originally allotted to one of the heirs at law, a nonresident, shall be distributed among the other heirs, if the nonresident heir shall fail to appear and claim it within a year. *Pyatt v. Brockman*, 6 Cal. 419.

4. In this State all the property, both real and personal, belonging to the estate of a deceased person, goes into the possession of an administrator, who is therefore a necessary party to all suits affecting it. *Beckett v. Selover*, 7 Cal. 215; *Harwood v. Marye*, 8 Cal. 580; *Belloc v. Rogers*, 9 Cal. 127; *Haynes v. Meeks*, 10 Cal. 120; *Carr v. Caldwell*, 10 Cal. 385; *Curtis v. Sutter*, 15 Cal. 264.

5. In the act to regulate estates the words claimant and claim are used as synonymous with the words creditor and legal demand. *Gray v. Palmer*, 9 Cal. 636.

6. Where D. had a running account with L. from 1838 to 1849, when L. died intestate, and no administration was had on his estate until 1857; and D., within one year after the granting of letters of administration, commenced his action on

said account against said estate: held, that the action was commenced in time. *Danglada v. De la Guerra*, 10 Cal. 387.

7. A legatee who has been represented by counsel at the allowance of accounts against an estate will not be permitted, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams v. Price*, 11 Cal. 213.

8. The district court may take jurisdiction of the settlement of an estate when there are peculiar circumstances of embarrassment to its administration, and when the assuming jurisdiction would prevent waste, delay and expense, and thus conclude by one action and decree a protracted and vexatious litigation. *Deck's Estate v. Gherke*, 12 Cal. 437.

9. It seems that the affidavit to a claim against an estate must be made by the claimant in person and not by his attorney in fact. *Macoleta v. Packard*, 14 Cal. 180.

10. If, on an executory contract for the purchase of land, made by plaintiff with the agent during the life of the principal, money due the principal was paid after his death to the agent, who settled the amount with the estate so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers v. Crane*, 15 Cal. 20.

11. The proceedings for the settlement of an estate, and matters connected therewith, are not civil actions within the meaning of sections eighteen to twenty-one of the practice act. *Estate of Scott*, 15 Cal. 221.

12. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on

the papers being filed therein, refused to take jurisdiction of the cause and ordered the papers back: held, that on these facts, the probate court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction. *Ib.*

13. The act of May, 1850, regulating the settlement of the estates of deceased persons, (sec. 198) provides as follows: "When there was any partnership existing between the testator or intestate at the time of his death and any other person, the surviving partner shall have the right to continue in possession of the effects of the partnership and to settle its business, but the interest of the deceased shall be included in the inventory and appraised as other property. The surviving partner shall proceed to settle the affairs of the partnership without delay, and shall account with the executor or administrator, and pay over such balances as may from time to time be payable to him in right of his testator or intestate. Upon the application of the executor or administrator, the probate judge may, whenever it may appear necessary, order the surviving partner to render an account, and in case of neglect or refusal may, after notice, compel it by attachment. And the executor or administrator may maintain against him any action which his testator or intestate could have maintained." This section vests in the surviving partner the exclusive right of possession and the absolute power of control and disposition of the assets of the partnership. *People v. Hill*, 16 Cal. 118.

See ADMINISTRATOR AND EXECUTOR, ADMINISTRATOR, PUBLIC, DEATH, PROBATE COURT, WILL.

## ESTOPPEL.

- I. In general.
- II. By admission.
- III. As to Title in Real Estate.

### IN GENERAL.

1. Although want of, or illegality of consideration may be inquired into in an action upon a bill or note between the original parties by the general mercantile law, the maker is estopped from setting up this defense where the securities have passed into the hands of innocent third parties, unless made void by statute. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

2. A party may be estopped on grounds of good faith and public policy from repudiating his nonrepresentations. *Hostler v. Hays*, 3 Cal. 306.

3. To a bill for specific performance, defendant alleged fraud in the contract, but admitted payment of price under protest: it was held, that the payment was no waiver of the defense of fraud, and the defendant was not estopped from showing fraud, and that it was error in the court not so to instruct the jury when requested. *Russell v. Amador*, 3 Cal. 402.

4. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams v. Gorham*, 6 Cal. 71; *Goodwin v. Scannell*, 6 Cal. 543.

5. The doctrine of estoppel has always been construed with great strictness, because loose statements or recitals may often, so far from expressing the truth, which no one should be permitted to deny, exclude the party from setting it up. *Osborne v. Endicott*, 6 Cal. 153.

6. When a defendant permits a party to act for himself and to hold out to plaintiff that he is a false character, and having enjoyed the supposed advantage of this conduct, he is estopped to deny that character. *Osborn v. Hendrickson*, 7 Cal. 285.

7. A drew his order on B to pay C or order the balance due him, and B was garnisheed in a suit against C the day be-

## In general.

fore he endorsed it with the amount of balance due, but failed to inform C thereof, and C, for a valuable consideration, sold the draft as endorsed to D, an innocent purchaser: held, that B, having made the order negotiable and put the same in circulation, is estopped from setting up against it any antecedent matter, and is liable to D for the full amount thereof. *Garwood v. Simpson*, 8 Cal. 105.

8. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, and is estopped from denying the want of such knowledge. *Barroilhet v. Battelle*, 7 Cal. 454.

9. Where a litigant has received the benefit of a statutory bond, he is estopped from denying its legality. *Baker v. Bartol*, 7 Cal. 554.

10. Where a party purchased real estate at an execution sale upon the faith of the representations of the judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it for more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from its own misrepresentations. *Webster v. Haworth*, 8 Cal. 25.

11. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 29.

12. Where a party stands by and sees a ditch owner appropriate the water of a creek to his own use at a great expense, and does not inform him of his claim to the waters, he and his vendee are estopped from afterwards claiming the water. *Parke v. Kilham*, 8 Cal. 79.

13. Where a party pursues a certain line of conduct, by which he has induced others to act, he is estopped from afterwards avoiding the consequences of his conduct. *Burritt v. Dickson*, 8 Cal. 115; *Mitchell v. Reed*, 9 Cal. 205; *McGee v. Stone*, 9 Cal. 606.

14. Before a party can urge an estoppel against another, he must be misled by the conduct of the party, in a case where

he is ignorant of facts known to the party against whom the estoppel is alleged. *Burritt v. Dickson*, 8 Cal. 117.

15. Where the sheriff, as ex officio tax collector, received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

16. Although a man may not execute an instrument freely, in point of fact, yet, if he make the acknowledgment properly, he is afterwards estopped to deny it as against subsequent innocent parties. *Bryan v. Ramirez*, 8 Cal. 466.

17. A corporate act is not essential in all cases to fasten a liability upon a corporation; and if it were necessary, the law would sometimes presume, in order to uphold fair dealing and prevent gross injustice, the existence of such act, and estop the corporation from denying it. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 472.

18. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself, because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known his claim to the officer before he gives the receipt. *Bleven v. Freer*, 10 Cal. 177.

19. But if he fails to make known his claim, and this influences the conduct of the officer, he is estopped from afterwards asserting it, provided that the facts and circumstances relating to his claim were then known to him. *Ib.*

20. An attaching creditor of a bailee, levying on money in the hands of a stakeholder with whom it has been deposited by the bailee, cannot claim that the bailor is estopped by having allowed the bailee to use the money in his own name, when the specific money was in question and could be distinguished. The creditor had not been misled by acts or declarations of the bailor, nor had he given credit to the



In general.—By Admission.

bailor by reason thereof. *Hardy v. Hunt*, 11 Cal. 348.

21. Where parties are brought into an action on the petition of plaintiff, and are directly affected by the judgment, the plaintiff is then estopped to set up that they are not parties to the action, and have no right to appeal. *Jones v. Thompson*, 12 Cal. 197.

22. A party dealing with a femme covert is bound to inquire into her rights and powers. The fact that papers are drawn directly to the wife does not estop either husband or wife from refusing effect to her sole act. *Tryon v. Sutton*, 13 Cal. 493.

23. A party who appears and contests a motion in the court below cannot object on appeal that he had not notice of appeal. *Reynolds v. Harris*, 14 Cal. 677.

24. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 148.

## II. BY ADMISSION.

25. A party is estopped from controverting the declaration he has made by deed. *Tarter v. Hall*, 3 Cal. 266.

26. Although it is generally true that estoppel binds only parties and privies, yet even parol admissions may be conclusive where they have had the effect of inducing another to alter his condition. *Hostler v. Hays*, 3 Cal. 306.

27. Where one of the issues was the condition of the goods in question when they left New York, and defendant had admitted on the trial that "if merchantable when they left New York he made no claim:" held, that he was concluded thereby. *Burritt v. Gibson*, 3 Cal. 399.

28. To make this doctrine apply, the defendants must show that the declarations of plaintiffs' vendor were inducements to the defendants' purchase and to the plaintiffs' labor, and that plaintiffs acted mainly upon such representations. *Duell v. Bear River M. Co.*, 5 Cal. 85.

29. The statement of a witness when in his senses in relation to his sanity at the time of a sale is conclusive, and the

party introducing him is estopped from denying his sanity. *Montgomery v. Hunt*, 5 Cal. 268.

30. Where an express declaration to a third party about the ownership of goods is not confidential, but general, and this is afterwards acted on by others, the party making the declaration is estopped. *Mitchell v. Reed*, 9 Cal. 205; *McGee v. Stone*, 9 Cal. 606.

31. In this State the wife can appear in and defend an action separately from her husband. To enable her to do so, she must possess as defendant all the rights of femme sole, and be able to make as binding admissions, in writing, in the action as other parties. *Alderson v. Bell*, 9 Cal. 321.

32. Silence cannot be urged as an estoppel by one acquainted with his own rights, or who had the means of ascertaining them. *Ferris v. Coover*, 10 Cal. 631.

33. A party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury; but it must appear first, that the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly on such, and will be injured by allowing its truth to be disproved. *Boggs v. Merced Min. Co.*, 14 Cal. 367; *McCracken v. City of San Francisco*, 16 Cal. 626.

34. The brother of deceased being entitled to letters of administration on the estate, gave D., a stranger, a writing, requesting the court to appoint him administrator. D. applied for letters, annexing to his petition said writing. At the hearing the brother asked leave to withdraw the writing, opposed the appointment of D., and prayed letters to himself: held, that the brother waived his right, and that, having encouraged D. to go to the expense and trouble of applying for letters of administration, he is estopped from withdrawing his assent and waiver, or renunciation. *Estate of Kirtlan*, 16 Cal. 165.



## As to Title in Real Estate.

## III. AS TO TITLE IN REAL ESTATE.

35. If the plaintiff prove no title, the defendant being in possession, cannot be ousted; but if defendant claims under the plaintiff, and in subordination of his title, he is estopped from questioning it. *Hoen v. Simmons*, 1 Cal. 120; *Walker v. Sedgwick*, 8 Cal. 402; *Henderson v. Grewell*, 8 Cal. 584.

36. A person who enters into possession of land under another, cannot question the title of the one from whom he holds. *Pierce v. Minturn*, 1 Cal. 474; *Ellis v. Jeans*, 7 Cal. 416; *McDevitt v. Sullivan*, 8 Cal. 596; *Stephens v. Minsfield*, 11 Cal. 366.

37. The owner of land, who stands by and sees another sell it, and silently permits another who believes his title good to expend money upon the land, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. *Goddefroy v. Caldwell*, 2 Cal. 492.

38. The relation of landlord and tenant exists where the landlord is an alien nonresident, and is obligatory upon the tenant; and he cannot be allowed to controvert the title of the lessor. *Ramirez v. Kent*, 2 Cal. 560.

39. The defendant bought of plaintiff land, and gave a mortgage to secure the payment of the purchase money, and on the foreclosure pleaded a want of consideration: it was held, he was estopped in his defense by the terms of the mortgage. *Tartar v. Hall*, 3 Cal. 266.

40. A technical estoppel is only required to be specially pleaded, which is only by deed to the party pleading, or to one under whom he claims, or by matter of record. *Hostler v. Hays*, 3 Cal. 306.

41. If the evidence shows without doubt that the mortgagor stood by and saw the assignee of a mortgage sell the property in fee without interposing, and a knowledge of this could be brought home to the mortgagor's subvendee, he, and those under him would be estopped from asserting title. *Ferguson v. Miller*, 4 Cal. 102.

42. An action of ejectment brought by a purchaser at sheriff's sale, under a decree of foreclosure and sale of mortgaged premises, to recover the same against the mortgagor in possession, the mortgagor is

estopped from setting up title in another, as a defense to the action. *Redman v. Belamy*, 4 Cal. 250.

43. A widow who has once applied to the probate court to have the last residence of her husband and herself set aside as a homestead, and has acquiesced for eighteen months in the order so setting it aside, is estopped by her own acts from afterwards claiming a lot on which they formerly resided, merely because she ascertained that there are liens on the lot first set aside. *Holden v. Pinney*, 6 Cal. 236.

44. The fact that plaintiff stood by and permitted defendant to settle on the land, will not warrant an instruction that the plaintiff is thereby estopped from asserting his title. *Gunn v. Bates*, 6 Cal. 272.

45. Estoppels, in such cases, proceed upon the ground of fraud or culpable silence, which are facts for the jury, and not matters of legal construction by the court. *Id.*

46. Where A did not obtain possession from B, he is not estopped from showing that the attornment to B was made under a mistake of fact. *McDevitt v. Sullivan*, 8 Cal. 596.

47. Where the Mexican government by a solemn decree declared that the original title was in the ancestor, it is estopped from denying such admissions or regranteeing the premises to another. *Nieto v. Carpenter*, 7 Cal. 533.

48. Where plaintiff and her husband occupied and cultivated a town lot, in 1849, and her husband died, leaving her in possession, and she laid off one hundred and sixty acres of land, and laid the same out into town lots, and in 1850 the defendant entered upon one of the lots and built thereon, and subsequently, in the same year, she consented to the appointment of defendant, as administrator of her husband's estate, including the hundred and sixty acres: held, that such consent did not operate as an estoppel against plaintiff's claim to such lot as was occupied by defendant, before he was appointed administrator. *Taylor v. Woodward*, 16 Cal. 92.

49. The fact that the plaintiff in ejectment stood by and saw the defendant erect improvements on the land, cannot be plead as an estoppel by a trespasser, where the fact of title is open and notorious or can

## As to Title in Real Estate.

be easily ascertained by reference to the recorder's office. *Ferris v. Coover*, 10 Cal. 631; *McGarity v. Byington*, 12 Cal. 431.

50. The rule of estoppel, which prevents a tenant from disputing the landlord's title, extends to all persons who enter upon premises under a contract for a lease, and to all persons who by purchase, fraud or otherwise, obtain possession from such tenant. *Rose v. Davis*, 11 Cal. 141.

51. We apprehend that when parties go into a partition of property, upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual release, itself is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises, and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. *Tewksbury v. Provizzo*, 12 Cal. 25.

52. In a deed of conveyance, release and partition, it is not material whether the several parties were owners or had merely liens, as the deed, taking effect on the happening of the event, and purporting to release and convey all title of the grantor, the grantor would be estopped to deny that he had title at the time, *Ib.*

53. In an action for a division of the common property after a divorce, where it appeared that the property in question had been in the possession of the husband before marriage without title, and that he purchased property and obtained deeds therefor after marriage, the purchase money being paid with the common funds: held, that it was common property, and that the defendant is estopped from denying that he acquired a good title by the purchase as far as the plaintiff is concerned. *Johnson v. Johnson*, 11 Cal. 205.

54. Where the declarations of the grantor controlled the conduct of the grantee in the purchase of land, the grantor and those subsequently claiming under him are estopped from the assertion of any interest in the land in opposition to the title of such grantee. *Stanley v. Green*, 12 Cal. 163.

55. Where defendants conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subse-

quently made an agreement fixing the line: held, in an action of trespass by the plaintiff against the defendant for cutting timber on the land previous to such agreement, the defendant was not estopped from showing title in himself previous to the agreement, and that the deed did not embrace the locus in quo. *Stockton v. Garfrias*, 12 Cal. 316.

56. The mortgagor having mortgaged land as his own property is estopped, as are also his privies in estate, from saying it is public land. *Haffley v. Maier*, 13 Cal. 14.

57. If one man make a bargain with another for land, the latter claiming the title and right to sell it, and this is done in the presence and at the instigation of a third party who has a title, the latter is estopped from setting up the title as against the purchaser; and all persons in privity with such third persons are likewise estopped, unless they are purchasers for valuable consideration without notice. *Snodgrass v. Ricketts*, 13 Cal. 362.

58. Where claimants of land had, prior to the issuance of their patent, published a notice that they had become owners of the grant, specifying their bounds and warning off trespassers: held, that they were not estopped from claiming under their patent, land outside of these boundaries. *Moore v. Wilkinson*, 13 Cal. 489; *Moore v. Roff*, 13 Cal. 489.

59. The doctrine of estoppel in pais has no application to the estates of married women, for the act of 1850 is enabling, the estate vesting only after compliance with the mode of conveyance prescribed by the statute. *Morrison v. Wilson*, 13 Cal. 497.

60. The title of a married woman cannot be divested by an estoppel based upon the fact of her taking possession under a bad title. *Ib.* 499.

61. The possession of premises by the husband and wife is no estoppel for their mortgage to show that the premises were not homestead. *Swift v. Kraemer*, 13 Cal. 531.

62. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up as a full defense a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 616.

63. M. & B., the plaintiffs were part-

## As to Title in Real Estate.

ners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back, B. agreeing to pay certain firm debts. The sale and agreement were afterward canceled, and B. sold M. one-half of the ranch. Defendant Myers agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole from M. At the time of this last purchase O. and M. knew of B's title: held, that a bill in equity by B. against M., O. and Myers, for an account of the partnership between M. & B., and for a decree establishing plaintiff's right to the half of the ranch, does not lie; that his remedy at law for his half of the ranch against M. or any one claiming under him with notice of his title, is clear, and that M. would be estopped from disputing the title. *Brush v. Maydwell*, 14 Cal. 209.

64. The private survey of Fremont to "Las Mariposas," in 1849, and his presentation of the same to the board of land commissioners as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him at the time the defendant took possession of the premises in controversy in 1851, and afterward up to July, 1855, of any title or claim to the property, and of any title or claim to any land within the exterior bounds of the grant to Alvarado, except that designated in his survey; and the fact that he knew of the occupation and improvements of the defendant from the time the possession was taken, without forbidding the same or claiming the premises until July, 1855, do not estop him from claiming the premises under his patent, there being no proof that he made such declarations and disclaimers willfully, or that he intended to deceive or defraud defendant or influence his conduct. *Boggs v. Merced Mining Co.*, 14 Cal. 373.

65. By the patent, the government is estopped from asserting title to the premises; and if Fremont is estopped from asserting title against defendant, then it would have, by merely occupying the land as public land, rights superior to both, and that, too, in the face of an express prohibition of the sale by the government of the mineral lands. *Ib.*

66. A covenant of nonclaim in a deed

amounts to the ordinary covenant of warranty, and operates equally as an estoppel. *Gee v. Moore*, 14 Cal. 474.

67. If the grantor in a conveyance would be estopped from asserting against his own deed a title subsequently acquired, the mortgagor would be equally estopped from asserting such title against the force of the lien created by his mortgage. *Clark v. Baker*, 14 Cal. 626.

68. Where it distinctly appears upon the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate, the grantor will be estopped from denying the operation of the deed according to such intent. *Ib.* 629.

69. A deed with a covenant of warranty operates upon future acquired interest, not as in fact passing such interest, but by way of estoppel upon the grantor against its assertion. *Ib.* 630.

70. A mortgagor is under obligation from the nature of the mortgage contract to preserve the property pledged for the purposes of the original security; and on grounds of public policy, to insure good faith and fair dealing, he is estopped, independent of covenants of warranty, from denying the existence of the lien which he has attempted to create, or defeating its enforcement against the property on which it was placed; and those claiming under the mortgagor are equally estopped. *Clark v. Baker*, 14 Cal. 631; *Clark v. Boyreau*, 14 Cal. 636.

71. Where a party purchases a bridge, toll-house, stables and out-houses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser nor those claiming under him with notice can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. *Sparks v. Hess*, 15 Cal. 197.

72. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person, who does not complain.

As to Title in Real Estate.—Eviction.—Evidence.

Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. The doctrine of estoppel has no application to the facts of this case—which see. *Treadwell v. Payne*, 15 Cal. 499.

73. The acceptance of a deed does not, in favor of a stranger—that is, one neither party nor privy to the deed—estop the grantee in fee from showing that the grantor had no title at the date of the deed. *Schuman v. Garratt*, 16 Cal. 102.

74. Estoppels are mutual, and bind both parties or neither; and as a person neither party nor privy to a deed is not bound to acknowledge a title under it, so the grantee in the deed is not bound by it in favor of such person. *Ib.* 103.

75. Whether this principle would be affected by the fact that the grantee in such case obtained actual possession under his deed, not determined. *Ib.*

76. In this case, which was ejectment for a lot purchased by plaintiffs of B., it was held that defendant had so recognized the title of B. as to be estopped from now disputing it. *Downer v. Ford*, 16 Cal. 345.

77. The city of San Francisco is not estopped from denying the sale made under ordinance No. 481, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance No. 493, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance No. 493, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance No. 493, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *McCracken v. City of San Francisco*, 16 Cal. 626.

78. Even if the city would be estopped from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or

conduct; not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.* 627.

## EVICTIOIN.

1. It seems by the civil law a party cannot maintain a possessory action when he has no title, unless he has been evicted by force, fraud, violence or artifice; but if he has been thus evicted, he will be entitled to be returned to possession, without inquiring whether he has title. *Sunol v. Hepburn*, 1 Cal. 268.

See EJECTMENT, FORCIBLE ENTRY AND DETAINER.

## EVIDENCE.

- I. In general.
- II. Under Issue joined.
- III. Admission of Evidence.
  1. On Appeal.
  2. Objections to Evidence.
- IV. Declarations as Evidence.
  1. Of an Agent.
- V. Of Agency.
- VI. Of an Account.
- VII. Of Abandonment.
- VIII. Of Copartnership.
- IX. Answer as Evidence.
- X. In Ejectment.
- XI. Of Parties in Interest.
- XII. Of Jurymen.
- XIII. Instruments offered in Evidence.
  1. In general.
  2. Account Books.
  3. Conveyance.
  4. Judgment.
  5. Notarial Certificate.
  6. Of a Will.
- XIV. Evidence of the execution of an Instrument.
- XV. For the production of Instruments.
- XVI. Of Experts.
- XVII. Of a Demand.
- XVIII. In Criminal Cases.



## In general.

## 1. As to Character.

XIX. Evidence to Impeach a Witness.

XX. Presumptive Evidence.

XXI. Newly discovered Evidence.

XXII. Evidence on Continuance.

XXIII. Evidence on New Trial.

XXIV. Depositions.

XXV. Cross Examination.

XXVI. Conflicting Evidence.

XXVII. Evidence reviewed.

## I. When insufficient.

XXVIII. Evidence of Lost Instruments.

XXIX. Secondary Evidence.

XXX. Parol Evidence.

1. To explain Consideration.

2. To explain a Contract.

3. To explain an Instrument.

## I. IN GENERAL.

1. Courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government and of the local divisions of the country into States, counties, etc. *People v. Smith*, 1 Cal. 13.

2. Proof of customs in force in California previous to the formation of the State government is admissible. *Von Schmidt v. Huntington*, 1 Cal. 64; *Castro v. Castro*, 6 Cal. 160; *Tevis v. Pitcher*, 10 Cal. 477.

3. Where it appears by the plaintiff's testimony at the trial that there is a non-joinder of persons who should have been made plaintiffs, and a motion for a non-suit is made on this ground, the court may permit an amendment by adding the name of a coplaintiff on such terms as may be just. *Acquital v. Crowell*, 1 Cal. 192.

4. If a retainer be an absolute retainer upon its face, but did not specify in what manner and by whom the fees were to be paid, evidence should be admitted to show whether the fee was contingent or not. *Dwinelle v. Henriquez*, 1 Cal. 391.

5. In an action on an attachment bond, it is improper to admit evidence of depreciation in value of real estate attached. *Heath v. Lent*, 1 Cal. 412.

6. The owner of a ship chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its pro-

visions. *Brooks v. Minturn*, 1 Cal. 482.

7. It is competent to show that one or both of the contracting parties were agents for other persons and acted as such agents in making the contract on the one hand so as to give the benefit of the contract, and on the other to charge the unnamed principals with liability. *Ib.*

8. Referees should exclude items barred by the statute of limitations, if objected to. *De la Riva v. Berreyesa*, 2 Cal. 196.

9. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Bailey v. Steamer New World*, 2 Cal. 273.

10. In an action on contract, if evidence is offered to prove compliance with the contract on the part of the plaintiff, and premeditated design to evade it on the part of the defendant, it should go to the jury. *Folgar v. Buckelew*, 2 Cal. 318.

11. When the value of premises was agreed upon, the offer of the defendant to prove that he could not rent it was properly refused. *Lord v. Sherman*, 2 Cal. 501.

12. Where the sheriff had an execution against C. and levied and sold the property of F., who sued him for the trespass and conversion, proof that C., the defendant in the execution, had made a settlement with F., raises no presumption that the settlement included the claim of F. upon the sheriff for the trespass, or operated as a satisfaction of it. *Fitch v. Brockman*, 2 Cal. 578.

13. Where questions asked by the plaintiff, which might have produced answers showing acts of ownership on the part of plaintiff, and tending to prove her possession of the property (which was disputed) were evidence, they should not have been excluded. *Fitch v. Brockman*, 3 Cal. 362.

14. The admission of testimony to prove the speculative profits of the plaintiffs, in an action to recover damages for non-delivery of goods, is error, and where the contract was for the cargo, it is error to prove what the goods were worth in broken parcels. *Tobin v. Post*, 3 Cal. 375.

15. Where the evidence and the reasonable presumptions tend to establish the fact in controversy, a nonsuit is improper. The case should be given to the jury. *DeRo v. Cordes*, 4 Cal. 119.



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16. Where a wife claims property as her separate estate, it must be shown to have been conveyed to her before marriage, or if afterwards, it must have been by gift, devise or descent. *Bessie v. Earle*, 4 Cal. 200.

17. Chinese and negroes are prohibited by statute from giving evidence in a cause wherein a white man is a party. *People v. Hall*, 4 Cal. 404; *Spear v. See Yup Co.*, 13 Cal. 73.

18. Evidence may be introduced to rebut the final settlement of an administrator in a probate court, in an action by one not a party to the settlement. *Clarke v. Perry*, 5 Cal. 60.

19. Where the plaintiff's case does not depend alone on the evidence mentioned in an instruction requested by the defendant, it is proper to refuse it. *Pearson v. Snodgrass*, 5 Cal. 479.

20. A mortgage is a mere incident to a debt, and in order to maintain an action founded on a mortgage, the debt must first be proven. *Bennett v. Taylor*, 5 Cal. 502.

21. A state has the most perfect right to determine what shall constitute evidence of title, as between her own citizens, to all lands within her boundaries, and congress has no power to interfere therein. *Nims v. Palmer*, 6 Cal. 13.

22. Inadequacy of price is a fact which is admitted to be given in evidence in proceedings to establish fraud in the officer making a sale of land on execution. *Smith v. Randall*, 6 Cal. 52; *Argenti v. City of San Francisco*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

23. In a suit to foreclose a mortgage, it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties, by which an assignment of the rents of the mortgaged premises until full payment of the mortgaged debt is made by the mortgagor and accepted by the mortgagee. *Angier v. Masterson*, 6 Cal. 62.

24. Evidence of the professional reputation of the physician who was employed for plaintiff, to dress his wounds and effect a cure, is inadmissible; but it would be competent to prove that plaintiff's injuries were wholly or partially the result of improper treatment on the part of the physician. *Thorne v. California Stage Co.*, 6 Cal. 233.

25. The good faith of an assignment

being questioned, evidence going to show a previous pledge of the funds is admissible. *McEwen v. Johnson*, 7 Cal. 260.

26. An officer who seizes property in the hands of the debtor may justify under the execution or process; but when he takes property from a third person, who claims to be the owner thereof, if on execution, he must show in evidence the judgment and execution, and if on attachment, the writ of attachment, and as we think, the proceedings on which it was based. *Thornburgh v. Hand*, 7 Cal. 561.

27. In the absence of the testimony taken in the case, every legal intendment is no favor of the action of the court below. *People v. Quincy*, 8 Cal. 89.

28. Proof of the fraudulent intent on the part of the donor is sufficient to avoid a deed as against an innocent donee, and in determining the fraudulent intent, he must be considered as knowing the law and the state of his own affairs. *Swartz v. Hazlitt*, 8 Cal. 126.

29. A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself alone is not sufficient; taken with other acts, it amounts to sufficient evidence. *Thompson v. Lee*, 8 Cal. 280.

30. An error committed by the introduction of improper testimony will be cured when the objecting party himself afterwards introduces proper evidence, clearly establishing the same fact. *Turner v. McIlhany*, 8 Cal. 579.

31. Defect of proof may be cured by testimony introduced by the adverse party. *Ib.*

32. Possession of personal property is prima facie evidence of ownership. The possession of the servant is the possession of the master. *Goodwin v. Garr*, 8 Cal. 617.

33. In an action of slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply plaintiff offered to prove at the trial and the court refused to hear such proof: held, that such ruling of the court was error, as the reply might have been qualified, or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. *Bradley v. Gardner*, 10 Cal. 372.

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34. Where two mules are claimed as exempt from forced sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. *Calhoun v. Knight*, 10 Cal. 394.

35. In matters of evidence, as in the mode of remedy, the law of the forum governs. *Tevis v. Pitcher*, 10 Cal. 478.

36. A private survey is no legal evidence of the facts it purports to contain, since if it were, any man might recover the land of another by including it in his own boundaries. *Rose v. Davis*, 11 Cal. 140.

37. The burden of proof of the quantity of water one is entitled to devolves on the party who mingles the water belonging to him with that appropriated by others. *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 152.

38. In an action to recover the value of certain buildings, standing on certain lots, proof that one C., through whom plaintiff claimed, on the day of his entry applied to one of the defendants for his consent to the erection of the buildings, is sufficient evidence to authorize the jury to infer knowledge on the part of C. of defendants' title at the time of such entry. *Kneeland v. Wilson*, 12 Cal. 243.

39. The judgment between the holder and maker of the note cannot be evidence between the holder and endorser in a subsequent suit between the endorser and maker. *Bryant v. Watriss*, 13 Cal. 87.

40. To admit evidence of notice of a prior unrecorded deed to defeat a subsequent deed, there must first be proof of the prior deed. There can be no notice where there is no title. *Smith v. Branman*, 13 Cal. 115.

41. Upon plaintiff's statement of his case, the court intimates that, conceding the facts, he cannot recover, and the plaintiff then offers to prove his allegations; whereupon defendant admits they could be proved, and demurs to the evidence: held, that this is not a demurrer to the evidence, but rather deciding the case on demurrer, as on a demurrer to the complaint, or as on motion for nonsuit. *Snodgrass v. Ricketts*, 13 Cal. 360.

42. Where a party cancels a mortgage and executes a new one, the last mortgagees are in equity assignees of the debt

paid, and will be subrogated to the rights of the assignees; for in equity the substance of the transaction would be an assignment of the old mortgage in consideration of the money advanced, and evidence is admissible to show this fact. *Dillon v. Byrne*, 5 Cal. 456; *Birrill v. Schie*, 9 Cal. 107; *Carr v. Caldwell*, 10 Cal. 385; *Swift v. Kraemer*, 13 Cal. 530.

43. In a suit on an injunction bond, defendant, to show that the injunction suit was still pending, offered in evidence an order from the supreme court directing the court below to fix the amount of a suspensive appeal bond, that court having dissolved the injunction: held, that the order was properly rejected, the defendant not offering to show that the bond and notice of appeal were given and the transcript filed in the appellate court. *Woodbury v. Bowman*, 13 Cal. 635.

44. When a suit is pending in the supreme court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue even between the parties. *Ib.*

45. Every error in the court below, in the rejection of evidence, is prima facie an injury, and it rests with the other party clearly to show that no hurt could have been, or was done, by the error. *Jackson v. Feather River and Gibsonville Water Co.*, 14 Cal. 25.

46. A certificate of the judge who tried the cause, made eight years after the trial, that he believed the exceptions taken were correctly noted in the clerk's minutes of the evidence, cannot supply the place of a bill of exceptions. *Castro v. Armesti*, 14 Cal. 39.

47. Where plaintiff was nonsuited on the ground that the allegations of the complaint were not sustained by the evidence, and judgment for costs rendered against him, no motion for a new trial is necessary. *Darst v. Rush*, 14 Cal. 83.

48. Where on plea of abatement to the entire action, that another suit for the same cause of action was pending at the time of suit brought, the proof shows that the first suit is only for part of the same matter sued for in the second suit, the plea fails. *Thompson v. Lyon*, 14 Cal. 42.

49. The fact that fire was communicated from the engine of defendants' cars to plaintiff's grain, with proof that this result was not probable from ordinary working

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of the engine, is prima facie proof of negligence sufficient to go to the jury. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

50. Dedication is a conclusion of fact to be drawn by the jury from the circumstances of each case, and the quantum and kind of evidence of the intention to dedicate depends somewhat upon the peculiar circumstances of the country. *Harding v. Jasper*, 14 Cal. 646.

51. Stronger proof of dedication is required in cases of roads in the country than in cases of streets or lands in a town or city. *Ib.* 647.

52. An order of the board of supervisors of a county that "all roads now traveled by wagons and pack mules within the limits of the county be and the same are hereby declared public highways," though not valid as transferring the title of the land of the public, still may be good evidence in connection with other proof, to show a control on the part of the county over a road as a public highway, and a knowledge of such control on the part of the owners of the land, and thus furnish a circumstance from which dedication may be inferred. *Ib.* 648.

53. A sheriff, under his general powers, cannot take anything but legal currency in satisfaction for an execution; and where he takes a note, endorses it on the execution, and then returns it satisfied, the return is not conclusive and perhaps not prima facie evidence of satisfaction unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 666.

54. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestants. *People v. Riley*, 15 Cal. 49.

55. Under certain circumstances, proof of the custom of miners in other districts may be proper—at least, this court is not satisfied to the contrary. But in this case, the admission of such testimony, if error, was immaterial, as the case was tried by the court and the judgment placed on independent ground, upon which it can stand. *Brown v. '49 & '56 Quartz M. Co.*, 15 Cal. 161.

56. In suit against plaintiff in execution, for the value of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third

person, to be sold for the benefit of said defendant, the creditor; held, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. *Haswell v. Parsons*, 15 Cal. 267.

57. Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. Plaintiff sues for the seizure and conversion of the coin. Defendants give in evidence three judgments and executions, in favor of three of their number, and against Alfred A. Green, brother of plaintiff, and offered to prove that the bag of coin was the property of Alfred, and was seized under these executions, and applied to their satisfaction. The court excluded the proof: held, that such exclusion was erroneous; that plaintiff could claim no exemption from the seizure of coin held, as this was, in his hand, as he might, perhaps, in reference to money upon his person. The coin in the hand was, like a horse held by the bridle, subject to seizure on execution against its owner. *Green v. Palmer*, 15 Cal. 418.

See EQUITY, IX.

## II. UNDER ISSUE JOINED.

58. In chancery, when a cause is heard on bill and answer, all the material allegations of the answer, whether upon knowledge or upon information and belief, are to be assumed as true, provided the facts and circumstances disclosed by the answer are not wholly inconsistent with a general affirmation or denial contained therein. *Von Schmidt v. Huntington*, 1 Cal. 69.

59. The complaint contained averments against defendants as common carriers, and the action was for damage done to merchandise in their transportation: held, it was indispensable for plaintiff to prove that defendants were common carriers, and that the goods were delivered to and received by them as such for the purpose of being transported for hire. *Ringgold v. Haven*, 1 Cal. 116.

60. Where there is no evidence upon some material point necessary to be proven in order to sustain the complaint, equally

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as where there is no evidence at all upon any point, it becomes the duty of the court upon the motion of the defendant to order a nonsuit. *Ringgold v. Haven*, 1 Cal. 116; *Dalrymple v. Hanson*, 1 Cal. 127.

61. Where defendant moved for a nonsuit, and afterwards introduced evidence supplying the defect, in the plaintiff's testimony on which the motion for nonsuit was founded: held, that the defendant waived his motion and could not insist upon it on appeal. *Ringgold v. Haven*, 1 Cal. 117; *Smith v. Compton*, 6 Cal. 26; *Turner v. McIlhany*, 8 Cal. 579; *Perkins v. Thornburg*, 10 Cal. 190.

62. Where a bill was filed to set aside and vacate a judgment on the ground that it was obtained through fraud, venality and corruption, and these charges were all sufficiently denied in the answer, and the cause was heard on the pleadings: held, that the effect of the denial in the answer was the same as if the charges in the bill had been disproved by testimony. *Belt v. Davis*, 1 Cal. 142.

63. In an action on a promissory note by a special endorser against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied the same under oath. It need not be proven in an action against the endorsers, if they fail to deny the genuineness of the endorsement. *Grogan v. Ruckle*, 1 Cal. 159.

64. Unless the defendant sets forth the counter claim upon which he relies in his answer, he cannot introduce evidence to prove the same. *Bernard v. Mullot*, 1 Cal. 368.

65. Where there was a special contract to build a corral, and it was proposed by defendants at the trial to prove that the corral would not answer the purpose for which it was intended, and the district judge excluded the evidence: held, that it was correct, as the question was not whether the corral would answer the purpose for which it was intended, but whether it was built according to the terms of the contract. *Kendall v. Vallejo*, 1 Cal. 373.

66. A fact set forth in the complaint, and admitted by the defendant's answer, requires no proof. *Brooks v. Minturn*, 1 Cal. 483.

67. A denial that defendant is indebted to the said plaintiff, in the manner and

form set forth, is a plea of nil debet at common law, and under it the defendant may prove an eviction, payment, release and other matters of discharge. *McLaren v. Spaulding*, 2 Cal. 512.

68. A promissory note was endorsed by a third person before delivery by the payee: such endorsement is prima facie an accommodation to the payee, but proof that his design was to become a guarantor would make him liable to the payee, and his default with proper averments dispenses with this proof. *Clark v. Smith*, 2 Cal. 606.

69. Where the plaintiff declared upon a note made by one McKinlay and one Campbell, and gave in evidence a note signed by H. C. McKinlay and C. Campbell & Co.: held, that the variance was important and substantial, and the evidence could not be admitted. *Cotes v. Campbell*, 5 Cal. 191.

70. The plaintiff who waives a tort as against factors and sues for an account, may show the manner in which defendants became possessed of them wrongfully; it will be sufficient to maintain an action against them, as consignees or factors. *Lubert v. Chauviteau*, 3 Cal. 462.

71. Under our practice, as well as at common law, a specific denial of one or more allegations is held to be an admission of all others well plead. *DeRo v. Cordes*, 4 Cal. 120.

72. In an action of forcible entry and unlawful detainer, the holding over the land is the foundation of the action, and must necessarily be proven like any other substantial fact. *Reed v. Grant*, 4 Cal. 176.

73. Objection should be taken by demurrer or answer to the misjoinder of parties defendant. An answer will not be treated as a plea in abatement for a misjoinder of parties defendant, after the testimony has disclosed a proper cause of action against them. *Warner v. Wilson*, 4 Cal. 313.

74. Evidence of the discharge of the debt sued on, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment puis darrein continuance. *Jessup v. King*, 4 Cal. 331.

75. In an action against a sheriff for refusing to levy an attachment on certain property, as belonging to the attachment debtor, testimony that the property had



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been claimed by a third party, and the right of property tried before a sheriff's jury and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 157.

76. A general allegation in a complaint for the diversion of water, that plaintiffs were entitled to all the water flowing into the cañon at the head of their ditch, entitled them to prove a diversion of water from the smaller branches of the cañon supplying water to that point. *Priest v. Union Canal Co.*, 6 Cal. 171.

77. Where there was evidence before the jury connecting a defendant not served with process with the trespass: held, that a motion by the other defendants to strike his name from the record was properly overruled. *Gates v. Nash*, 6 Cal. 195.

78. A cognovit is good evidence as an admission in pais after answer filed. *Hirschfield v. Franklin*, 6 Cal. 609.

79. Testimony showing a fraudulent design in a vendor of goods is inadmissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud or show that he was cognizant of such fraudulent design. *Landecker v. Houghtaling*, 7 Cal. 392; *Visher v. Webster*, 8 Cal. 113.

80. In order to sustain the allegations of fraud and deceit in contracting a debt, it is necessary to prove that the representations, alleged to have been fraudulent and deceitful, were not true. *Belden v. Henriquez*, 8 Cal. 88.

81. There is no necessity of a finding by the court of a fact admitted by the pleadings. A finding is only required when the allegation of a material fact in the complaint is controverted by the answer so as to raise an issue. *Swift v. Muygridge*, 8 Cal. 445.

82. The denial of any indebtedness without a denial of any of the facts from which that indebtedness follows, as a conclusion of law, raises no issue. *Curtis v. Vantine*, 9 Cal. 38.

83. The simple denial by the defendants of all right in the plaintiff, only puts in issue the right of the plaintiff to recover as against the defendants. *Humphreys v. McCall*, 9 Cal. 63.

84. Under the old system of pleading,

a former recovery should be given in evidence under the general issue, in assumpsit, trover, case and ejectment, but under our code, only two classes of defense are allowed, a simple denial or an allegation of new affirmative matter, and these two classes of cases must be the same in all cases. *Piercy v. Sabin*, 10 Cal. 27.

85. It is unnecessary to decide whether the facts as alleged constitute a title sufficient to maintain this action, as against mere trespassers, as there is no sufficient denial in the answer of the allegation of actual and peaceable prior possession. *McCormick v. Bailey*, 10 Cal. 232.

86. A court of equity will relieve against mistakes as well as fraud in a deed or contract in writing, and parol evidence is admissible to show it, if it be denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

87. Where the answer of defendants stated that the consideration of a note, sought to be impeached by creditors, was money loaned at the time of its date, and at various times *subsequently*, and the note drew interest from its date upon the whole amount, it admits fraud in the judgment on the note. *Scales v. Scott*, 13 Cal. 78.

88. In order to charge attorneys with negligence in failing to set up a defense, the plaintiff must show by evidence the existence of such facts, and that they were susceptible of proof, at the trial, by the exercise of proper diligence on the part of his attorneys. *Hastings v. Halleck*, 13 Cal. 209.

89. A specific allegation of a contract in a verified complaint is not sufficiently controverted by an answer stating that defendant has no knowledge or information respecting the same, and therefore denies the same; and no evidence of the contract would be necessary. *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

90. Pleadings in justices' court are not held to much strictness, and where plaintiff avers he is administrator in fact of the intestate, and this is not denied in the answer, no further proof of plaintiff's right to sue is requisite. *Liening v. Gould*, 13 Cal. 599.

91. Where an attorney sues for professional services, anything which shows that plaintiff has no right of recovery at all, or to the extent claimed on the case as he makes it, may be given in evidence



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upon an issue joined by an allegation in the complaint, and its denial in the answer. *Bridges v. Paige*, 13 Cal. 641.

92. Admissions of an agent, to bind the principal, must constitute part of the res gestæ; that is, they must be made with reference to the subject matter, and at the time of the act done. *Ib.*

93. Where a paper, purporting to be an admission by an agent, is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

94. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but shows it affirmatively, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties as an independent fact, not in issue by the pleadings, but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 116.

95. Where plaintiff avers defendant is indebted to him for cattle sold and delivered, and the answer denies the averment, defendant may show anything disproving the contract as averred; as that another party, who in fact sold the cattle, sold them as his own, and not as agent of plaintiff, or that defendant was not to pay until the cattle were fattened and slaughtered. *Hawkins v. Borland*, 14 Cal. 414.

96. Where on suit against defendants, as members of a quartz company, one defendant plead that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company, the finding supports a judgment for plaintiff. *Parke v. Hinds*, 14 Cal. 417.

97. If in a justification by the sheriff under an attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Walker v. Woods*, 15 Cal. 69.

98. Defendants answered to an action on a note, by pleading payment, and averring payment at divers times of money to

plaintiffs intestate, which he promised to apply on the note. Plaintiff put the note in evidence and rested. Defendants offered receipts to prove payment. To rebut this, plaintiff offered proof tending to show that these payments applied to an open account against defendants. Defendants then proposed to rebut, by showing that there was no such account made or existing—court refused to permit it: held, that the court erred; that the burden of proof was really on defendants to prove payments under the issue, and that they were entitled to close the proofs, at least, to rebut new matter set up by plaintiff. *Lisman v. Early*, 15 Cal. 200.

99. To sustain forcible entry and detainer, plaintiff must have been in actual possession; and where the land is public land, not taken up under our possessory act, nor under the federal laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient. In such action, proof of forcible detainer does not prove forcible entry. *Preston v. Kehoe*, 15 Cal. 318.

100. Where the complaint avers forcible and unlawful entry, and that defendants forcibly detained the premises so unlawfully taken, forcible entry must be proven—the averment of detainer not being stated as an independent ground of relief. *Ib.*

101. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres). "The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point." Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the com-

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plaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

102. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance; and he cannot, against defendant's objection, recover on another and different title. *Eagan v. Delaney*, 16 Cal. 87.

103. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Ib.*

See ANSWER, COMPLAINT, PLEADING.

### III. ADMISSION OF EVIDENCE.

104. The court may, of its own motion, strike out improper evidence, and instruct the jury to disregard it, to preserve the rights of litigants. *Parker v. Smith*, 4 Cal. 105.

105. It rests in the discretion of the court to allow further evidence to be introduced after the testimony is closed. *Mowry v. Starbuck*, 4 Cal. 275.

106. Where a referee admits testimony objected to, and then, after the case is submitted, rejects it, he should permit the party to supply the excluded testimony otherwise, *Monson v. Cooke*, 5 Cal. 436.

107. A court may in its discretion allow a plaintiff, after defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence; nor is such action any ground for reversal, unless it appear that injustice has been

done by an abuse of discretion. *Priest v. Union Canal Co.*, 6 Cal. 171.

108. The admission of a witness to explain his evidence after he had once testified, under the circumstances, can hardly be called an irregularity, much less a serious ground of error. *People v. Roberts*, 6 Cal. 217.

109. The order in which testimony shall be admitted is within the discretionary powers of the court before whom the case is tried. *Gordon v. Searing*, 8 Cal. 50.

110. Where a reference is had to take an account, it is without the discretion of the referee to open the case, after it has been once closed, for the purpose of receiving further testimony. *Marziou v. Pioche*, 10 Cal. 546.

111. There is little, if any, practical difference between the court ruling out testimony upon the strength of a fact proven, and denying effect to such testimony upon proof of the same fact; and the failure of the defendants to except to this order and mode of proof must be considered a waiver of objection of it. *Tryon v. Sutton*, 13 Cal. 493.

112. If the ends of justice require, it is both the right and the duty of the court to permit a witness to be recalled after a party has closed his case. *Fairchild v. California Stage Co.*, 13 Cal. 605.

113. The admission of evidence, even after the party has had an opportunity to offer it, and has failed, is matter of discretion, and the court ought generally, whenever the ends of justice require it, to admit the testimony. *Lisman v. Early*, 15 Cal. 199.

114. A party may introduce his proof in his own order, and is not required to exhibit the whole of it before he can introduce any particular item. It suffices if the item of proof offered tend to establish any one point involved in the issue: *Palmer v. McCafferty*, 15 Cal. 335.

115. A court may reject the most positive testimony, although the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief. *Blankman v. Vallejo*, 16 Cal. 645.

## On Appeal.—Objections to Evidence.

1. *On Appeal.*

116. On appeal, where the record contains none of the proceedings of the court below except the pleadings and judgment, and they were sufficient, no portion of the evidence being returned: held, that the appellate court would presume, nothing appearing to the contrary, that sufficient evidence was adduced at the trial to warrant the judgment. *Gonzales v. Huntley*, 1 Cal. 33; *Palmer v. Brown*, 1 Cal. 42; *Folsom v. Root*, 1 Cal. 376.

117. It is the business of each party, upon the settlement of the bill, to see that all the evidence material for him in assisting in sustaining or reversing the decision appealed from is spread upon the record. *Ringgold v. Haven*, 1 Cal. 116.

118. On appeal, the supreme court will not consider the testimony as sent up, unless it appears in the way of a statement of facts, settled by the parties. *Bunting v. Beideman*, 1 Cal. 182.

119. A mere transcript of the evidence taken down by the clerk is no part of the record, unless made so by bill of exceptions. *Wilson v. Middleton*, 2 Cal. 56.

120. The supreme court cannot receive evidence otherwise than through the statement or the record. *Visher v. Webster*, 13 Cal. 60.

121. Where there is no bill of exceptions, and no statement, the ruling of the court upon questions of law during the trial cannot be sought from the evidence as taken down by the clerk, neither from the act of 1850 nor 1851. *Castro v. Arnesti*, 14 Cal. 38.

122. A reference in a statement on appeal to the evidence as taken by the clerk, with the consent of parties, is sufficient, the evidence being in the transcript. The statement need not contain the evidence. *Darst v. Rush*, 14 Cal. 84.

See APPEAL, SUPREME COURT.

2. *Objections to Evidence.*

123. A party need not object to the illegality of the testimony before the cross-examination of a witness, if the illegality only appears at that time. *Parker v. Smith*, 4 Cal. 105.

124. Evidence taken before a referee must be embodied in a bill of exceptions and certified by a referee. *Goodrich v. City of Marysville*, 5 Cal. 431.

125. Exceptions as to the admissibility of a deed must be taken advantage of at nisi prius, or it will be deemed admitted without objections. *Posten v. Rasette*, 5 Cal. 468; *Pearson v. Snodgrass*, 5 Cal. 479.

126. Objections to the introduction of evidence must be taken on the trial below, and unless so taken, cannot be assigned as error on appeal. *Covillaud v. Tanner*, 7 Cal. 39.

127. A general objection to the admissibility of evidence is insufficient. *People v. Apple*, 7 Cal. 290; *People v. Glenn*, 10 Cal. 37; *Kiler v. Kimball*, 10 Cal. 268; *Martin v. Travers*, 12 Cal. 245.

128. Objections to evidence must be stated in the court below; they cannot be taken in this court for the first time. *Potter v. Carney*, 8 Cal. 574.

129. Where the defendant's objection to the admission of evidence on the trial is general, he cannot be permitted to make it special, for the first time in the appellate court. *People v. Glenn*, 10 Cal. 37.

130. Where plaintiffs, having excepted to the ruling of the court excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. Objections to the introduction of evidence confined, in the appellate court, to the grounds taken below. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 549.

131. Objections to evidence will not be noticed in the supreme court, unless taken in the court below in the first instance, if they be of a character which might there have been obviated by the production of other evidence, or the release of the interest of witnesses, or an amendment to the pleadings, or in any other way. *Mott v. Smith*, 16 Cal. 555.

132. Where objections to evidence, though not made in the court below, could not be, under any circumstances, there obviated, such objections may be taken for the first time in the supreme court—as for example, objections to the substantive cause of action, not to its technical form of statement, and to the jurisdiction of the court below, may be presented to the su-

## Declarations as Evidence.

preme court for the first time, or may be considered by the court, whether its attention be directed to them or not. *Ib.*

See EXCEPTIONS.

## IV. DECLARATIONS AS EVIDENCE.

133. Parties may sometimes, in ignorance of the law, make confessions of record prejudicial to their rights. But courts should put at least a favorable construction upon such admissions, and not force them to a greater admission than is clearly intended. *Sublette v. Melhado*, 1 Cal. 306.

134. Declarations of third persons, not parties to the record, cannot be admitted in testimony, except where they have a joint interest with the plaintiff or defendant, or where some legal relation, such as that of partner, existed. *Kilburn v. Ritchie*, 2 Cal. 148.

135. Where declarations of third persons, prima facie inadmissible, are sought to be introduced, the party offering them must establish their admissibility by showing the time and circumstance under which they were made. *Ib.*

136. Where one who had acted as interpreter and attorney in relation to the execution of a deed by the grantor and defendant in the action, on being called by the plaintiff as a witness, testified that he had read the deed to the grantor and was present at the time of the execution, and who the next day received a conveyance of a part of the land from the plaintiff: it was held, that the defendant might prove that the witness had made to other persons a different statement of facts, and it was error to reject such evidence offered. *McDaniel v. Baca*, 2 Cal. 338.

137. Although it is generally true that estoppel binds the parties and privies only, yet even parol admissions may be conclusive where they have had the effect of inducing another to alter his condition. *Hostler v. Hays*, 3 Cal. 306.

138. The words of an acknowledgment of paternity of an illegitimate child, for the purpose of making it an heir, must be clear, and exclude all but one interpretation. *Estate of Sandford*, 4 Cal. 12.

139. An express notice of waiver of non-payment of a bill or note is equivalent

to an admission that it has been presented, or need not be presented. *Matthey v. Galley*, 4 Cal. 63.

140. Where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of indebitatus assumpsit, and not upon the contract; but the contract may be introduced in evidence by either party, as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. *Reynolds v. Jourdan*, 6 Cal. 111.

141. A conversation between the claimant of goods seized on process, and the officer's bailee, in which the former asserted that the goods were his, cannot be held as notice to the officer. *Taylor v. Seymour*, 6 Cal. 514.

142. Fraud in the vendor would not of itself vitiate the sale to an innocent purchaser without notice, and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case whether the purchaser participated in the fraud. *Landecker v. Houghtaling*, 7 Cal. 392; *Visher v. Webster*, 8 Cal. 113; 13 Cal. 61; *Cohn v. Mulford*, 15 Cal. 62.

143. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Howe v. Scannell*, 8 Cal. 327.

144. Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the admissions of the vendor are admissible, and a fortiori, his sworn statement. *Ib.*

145. The statute does not require an admission of service to designate the place where the service was made. The object of such designation, when required, is to determine the period within which the answer must be filed, or when default must be taken. *Alderson v. Bell*, 9 Cal. 321.

146. Where the declarations of a party in a conversation are given in evidence, the whole conversation must be taken together, but the jury are not bound to give the same weight to all parts of it; they



## Declarations as Evidence.

are at liberty to consider how much, under the circumstances, is entitled to credit. *Thrall v. Smiley*, 9 Cal. 537.

147. In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of the parties claiming the homestead, the admissions of the alleged wife to the effect that she is not married are admissible in evidence. *Poole v. Gerrard*, 9 Cal. 595.

148. Where property has been dedicated as a homestead, the husband and wife become joint owners thereof, with the right of survivorship, and their declarations of intention to sell and remove from the premises will not constitute an abandonment. *Dunn v. Tozer*, 10 Cal. 171.

149. Our statute of divorce has not altered any of the ordinary rules of pleading, except that nothing can be taken by admission or default. *Conant v. Conant*, 10 Cal. 254.

150. Declarations of a tenant, being made at the time of possession, may sometimes be given in evidence as a part of the *res gestæ* to qualify the possession, this being the transaction which the declarations illustrate. *Ellis v. Janes*, 10 Cal. 458.

151. Declarations of the grantor of land are admissible, not only as against himself, but against parties claiming under him. It matters not whether they relate to the limits of the party's own premises, or the extent of his neighbor's, or to the boundary line between them, or to the nature of the title he asserts. If their purport is to restrict his own premises, or lessen his own title, they are admissible. *Stanley v. Green*, 12 Cal. 162.

152. The failure to deny a material averment is an admission of the facts contained in such averment, and such admission is conclusive against the pleader. *Burke v. Table Mountain Water Co.*, 12 Cal. 409.

153. The object of the rule requiring proof in corroboration of defendant's confession in an action for divorce, is to guard against collusion; and when the entire testimony, confessions and circumstances repel all suspicion of collusion, and leave no doubt of the truth of the confession, the court should act upon them. *Baker v. Baker*, 13 Cal. 94.

154. The marriage of parties is regarded as an admission by the husband that the

child born to the wife is his; but, as in all cases of acknowledgment, to be effective, there must be knowledge at the time of the fact admitted. *Ib.* 99.

155. In support of an action upon an account stated, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be express or in terms. *Terry v. Sickles*, 13 Cal. 429.

156. An affidavit by defendant, admitting the debt sued for, is admissible in evidence for plaintiff, though made in a former suit between the parties. *Whitney v. Buckman*, 13 Cal. 539.

157. In an action for mesne profits, plaintiff offered in evidence the record of an action by defendant against a third person, for the use and occupation of the same premises for a time prior to the time sued for in this action, in which defendant, under oath, fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other: held, that the evidence was admissible as a solemn admission by a party to the record, in relation to a particular fact; that such admissions are not irrelevant, whether made directly or incidentally. *Shafter v. Richards*, 14 Cal. 126.

158. Every voluntary admission of a material fact by a party to the record is competent evidence against such party of the existence of such fact. *Ib.*

159. Trespass against the sheriff for levying on certain goods as the property of G. & Co., under an execution on a judgment in favor of *Crafts v. G. & Co.* Plaintiff claims to have been the owner of the goods, by purchase from G. & Co. before the levy. Defense was, fraud in such purchase. On the trial, defendants, to prove the fraud, offered to show that before this sale, "about a year past, plaintiff had bought G. & Co. out before, for the purpose of proving fraud," and the court rejected the testimony: held, that this was not error; that there was nothing on the face of the exception to show the materiality or relevancy of the testimony, there being no offer to show even that the first sale was fraudulent. *Cohn v. Mulford*, 15 Cal. 52.

160. The rule allowing distinct frauds to be proven in such cases is limited to



## Of an Agent.—Of Agency.

frauds which are contemporaneous, or nearly so, and does not embrace dealings at a remote time. *Ib.*

161. Statements made by a vendor of personal property subsequent to his sale, are not admissible to defeat the title of his vendee, either when used as proof of fraud, or any other fact in avoidance of the deed. *Ib.*

162. *Landecker v. Houghtaling* (7 Cal. 391) and *Vischer v. Webster* (8 Cal. 109) only hold, that the admissions of the vendor, made before the sale is completed, are admissible to show his own fraud. And thus far the rule is approved. *Ib.*

See ADMISSIONS.

## 1. Of an Agent.

163. The declarations of an agent or servant are admissible in evidence against the principal only when they form a part of the *res gestæ*; and the declaration of a barkeeper to a third person as to the contents of a package left by a guest in the charge of an innkeeper, when not made in any way in the discharge of his duty as barkeeper, are not admissible in an action against the innkeeper to prove the contents of the package. *Mateer v. Brown*, 1 Cal. 225.

164. The declarations of an agent, when but the bare narrator of an act which has already taken place and was fully ended, do not form a part of the *res gestæ*, and are inadmissible in evidence against his principal. *Innis v. Steamer Senator*, 1 Cal. 461.

165. Where the master of a vessel was in possession and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 273.

166. An incorporated company is not bound by the acts or admissions of its members, unless acting by its express authority. *Shay v. Tuolumne County Water Co.*, 6 Cal. 74.

167. The declarations of the master of a steamboat, whilst running on the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the

crop was consumed, are admissible to establish the liability of the owners in an action against them to recover damages for the destruction of the crop. *Gerke v. California Steam Navigation Co.*, 9 Cal. 255.

168. The declarations of an agent will bind the principal if made during the continuance of the agency, and at the very time of the transaction. These transactions, when thus made, are considered as part of the *res gestæ*. *Ib.* 256.

169. Admissions of an agent, to bind the principal, must constitute part of the *res gestæ*; that is, they must be made with reference to the subject matter, or at the time of the act done. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

See AGENCY.

## V. OF AGENCY.

170. It is competent to show that one or both of the contracting parties were agents for the other persons, and acted as such agents in making the contract on the one hand so as to give the benefit of the contract on the other to charge the unnamed principals with liability. *Brooks v. Minturn*, 1 Cal. 482.

171. Query, whether parol evidence is admissible to prove the knowledge by a principal of the acts of the agent; and if so, whether a deed from the principal to the purchaser of the land is not necessary to pass the title. *Billings v. Morrow*, 7 Cal. 175.

172. The principle upon which the infant is allowed to collect his wages is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Swartz v. Hazlett*, 8 Cal. 124.

173. Where a paper purporting to be an admission by an agent is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry Water Co.*, 14 Cal. 37.

174. The person entitled to recover the legal penalty against a telegraph company for not transmitting a message, is the

## Of Agency.—Of an Account.—Of Abandonment.

party who contracts or offers to contract for the transmission of the dispatch. He may probably do this by his agent or servant; but when the contract is made by a party as agent of another, in order to give a right of action to the principal, the fact of agency must be shown. *Thurn v Alta Telegraph Co.*, 15 Cal. 475.

175. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 109.

176. Where, in such case, proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney was shown, and that therefore the possession was not sufficiently proven. *Ib.*

## VI. OF AN ACCOUNT.

177. It is error to admit evidence of the value of the goods sold in an action of account, where no charge is made of fraud, nonperformance or negligence. The strict measure of damages in such case is the net proceeds of sale. *Lubert v. Chauviteau*, 3 Cal. 463.

178. Where in an action on an account stated the only evidence was that of a witness who said defendant, on presentation of the account, admitted to him it was correct and promised to pay it, and the court charged the jury that if they believed the evidence they must find for the plaintiff the amount claimed, and they so found; held, that the instruction did not prejudice defendant, as but one verdict could have been rendered under the evidence. *Terry v. Sickles*, 13 Cal. 429.

179. Under the mechanics' lien act it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars v. McKay*, 14 Cal. 128.

180. In a suit on account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm, by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. *Landis v. Turner*, 14 Cal. 575.

181. In suit on an account against B. & S. as a firm, a receipt to B. alone, signed by plaintiffs "in full for accounts and demands due us to date," was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on: held, that the parol proof was admissible; that the term "all accounts" may be shown to cover firm as well as personal indebtedness. *Hawley v. Bader*, 15 Cal. 46.

See ACCOUNTS..

## VII. OF ABANDONMENT.

182. To suffer the tailings of a mining claim to flow where they list, without obstructions to confine them within the proper limits, is conclusive evidence of abandonment, unless there is some peculiarity in the locality constituting an exception to the rule. *Jones v. Jackson*, 9 Cal. 244.

183. The removal of an enclosure of land for the purpose of replacing it with a better one, so far from being evidence of an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill*, 9 Cal. 557.

184. The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, nor does his refusal to pay, or his delay in paying the expenses of the business, or the assessments, create of itself a forfeiture; there must be clear or unequivocal proof of abandonment. *Waring v. Crow*, 11 Cal. 371.

185. The question of abandonment of a mining claim should be left to the jury upon the facts adduced in evidence. *Ib.*

See ABANDONMENT.

## VIII. OF COPARTNERSHIP.

186. It is error to admit evidence to prove copartnership by general reputation. *Sinclair v. Wood*, 3 Cal. 100.

187. When proof has been given that a newspaper containing notice that a dissolution of a partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by them, by way of establishing the publicity of the notice and raising the presumption of their actual knowledge of the fact. *Treadwell v. Wells*, 4 Cal. 259.

188. Partnership must be proved like any other fact, and cannot be established by mere surmise or innuendo. *Hudson v. Simon*, 6 Cal. 455.

189. In an action against a partnership, and in order to prove that one of the defendants was a partner, it is incompetent to ask a witness, whether from what he saw while working for the firm, and from the acts of the particular defendant during that time, he was a partner. *Turner v. McIlhenny*, 8 Cal. 579.

190. Common report can only be admissible to prove a partnership first in corroboration, and second to prove knowledge of it on the part of plaintiff. *Ib.*

191. Parties may form universal partnerships, but the same would not be held to exist unless the intention was clearly expressed. The evidence to establish such a partnership after the death of one of the alleged partners should be clear and full, not doubtful. *Gray v. Palmer*, 9 Cal. 639.

192. As the relation sustained by the tenant purchasing the fee to his cotenant or partners is one of confidence, the proof that the latter had waived his right must be clear, and the burthen of proof rests upon the tenant purchasing. *Laffan v. Naglee*, 9 Cal. 682.

193. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership or the authority of the party making the note to bind all, and one of the parties is nonsuited and judgment taken against the other two: held, that there is no error in such judgment. *Stoddard v. Van Dyke*, 12 Cal. 438.

See COPARTNERSHIP.

## IX. ANSWER AS EVIDENCE.

194. The mere fact that plaintiff's counsel had read upon trial a part of the answer which had been stricken out, would not of itself be error on appeal; the defendant could have asked the court to rule out the answer as testimony, and charge the jury to disregard it. *Morgan v. Hugg*, 5 Cal. 409.

195. An answer responsive to, and denying the charges in a bill of equity, is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 169.

196. An answer under our statute is not proof for defendant, but an admission in the answer of a fact stated in the complaint is conclusive evidence against him. *Blankman v. Vallejo*, 15 Cal. 645.

197. The equity rule, requiring two witnesses to controvert an answer under oath, does not prevail in this State. The answer is only a pleading, and is not evidence for defendant. *Bostic v. Love*, 16 Cal. 72.

See ANSWER.

## X. IN EJECTMENT.

198. A grant of land by a Mexican Alcalde before the war, will be presumed to have been made in the course of his ordinary and accustomed duties and within the scope of his legitimate authority, and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer and in the form prescribed by law. *Reynolds v. West*, 1 Cal. 326.

199. Where the title is inchoate and incomplete one cannot sustain an ejectment, and the court properly excluded such title in evidence. *Leese v. Clark*, 3 Cal. 27.

200. Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a naked trespasser. *Hutchinson v. Perley*, 4 Cal. 34; *Hicks v. Davis*, 4 Cal. 69; *Winans v. Christy*, 4 Cal. 78; *Plume v. Seward*, 4 Cal. 96; *McMinn v. Mayes*, 4 Cal. 210; *Bequette v. Caulfield*, 4 Cal. 278; *Ramirez v. Murray*, 4 Cal. 293.

## In Ejectment.

201. The defendant cannot produce evidence to show that the title is in a third party, or that the fee of the land in question is in the United States, nor to impeach the validity of the conveyance to plaintiffs collaterally as against third persons. *Winans v. Ohristy*, 4 Cal. 79.

202. Where the defendant claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of, or marked and visible boundaries embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 166.

203. Prior possession is evidence of title, and this cannot by any system of reasoning be made to yield to mere color of title. *Norris v. Russell*, 5 Cal. 250.

204. Under the old system of pleading a former recovery could be given in evidence under the general issue in ejectment, but this is changed by our code. *Piercy v. Sabin*, 10 Cal. 27.

205. In an action of ejectment against several defendants the plaintiff has the right to prove what part of the land in dispute was occupied by one of the defendants. *Ellis v. Janes*, 10 Cal. 458.

206. The rule of the common law as to the necessity of proof in ejectment, of a legal estate and a right of entry in the plaintiff at the date of the demise laid in the declaration, has no application under our system. *Yount v. Howell*, 14 Cal. 468.

207. It is error for the court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of the line is of no moment. *McGarvey v. Little*, 15 Cal. 31.

208. A lot may be shown to be within a city, without proof of the precise location of one of its boundary lines. *Ib.*

209. Where the land granted by an alcalde in San Francisco is shown to be within the limits of the four square leagues thus measured, the presumption attaches that it was pueblo land, grantable as such, and that the alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the alcalde,

or by proof that this was land reserved as a fort site, etc., or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Payne v. Treadwell*, 16 Cal. 231.

210. A plaintiff suing for a lot in San Francisco may rest his case, prima facie, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinances. *Ib.*

211. San Francisco having been constituted by a public political act of the former government a pueblo, courts will take judicial notice of its existence, powers and rights, and among these last its general boundary and jurisdiction. *Ib.*

212. The land upon which the city of Sacramento is situated is within the exterior limits of the grant to Sutter of June, 1841. *Cornwall v. Culver*, 16 Cal. 427.

213. *Morton v. Folger*, (15 Cal. 275) holding that the deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties, after his death, as hearsay evidence of the location of such lines, affirmed. *Ib.*

214. The evidence in this case, showing that the land within Sacramento county was in possession of Sutter, by permission of the former government, for years previous to the cession of the United States; that it was subjected by him to such uses as he desired; that he had absolute control over it, without disturbance by any one, exercising the rights of a proprietor to the knowledge of the government, and with its recognition of their existence; that he asserted ownership of the land under the grant from Alvarado, and that for years after the conquest and treaty his claim and possession were unquestioned; his title, whether it be regarded as a legal or equitable one, is sufficient, under these circumstances, to enable him and those holding under him to recover or maintain possession in the courts of the State, at least until the United States intervene and determine, through the appropriate departments, that his claim under his grant shall be satisfied by land elsewhere selected. *Ib.* 429.

See EJECTMENT, V.



## Of Parties in Interest.

## XI. OF PARTIES IN INTEREST.

215. When the defendant calls the plaintiff as a witness, and the plaintiff testifies to new matter not responsive to the inquiries, the defendant may offer himself as a witness in his own behalf, but his testimony must be limited to an explanation or contradiction of such new matter. *Dwinelle v. Henriquez*, 1 Cal. 389.

216. Unless the record shows that the interest of the witness was sufficient under our statute to disqualify, the appellate court will deem the parties entitled to the benefit of his testimony. *Johnson v. Carry*, 2 Cal. 36.

217. A defendant may be examined as a witness on behalf of his codefendant, if their interests are divisible. *Beach v. Covillaud*, 2 Cal. 239.

218. Where the plaintiff was the assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor before the assignment, it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith v. Truebody*, 2 Cal. 347.

219. One defendant cannot testify on behalf of his codefendant where the evidence would inure to his benefit. *Johnson v. Henderson*, 3 Cal. 369; *Sparks v. Kohler*, 3 Cal. 301; *Hotaling v. Cronise*, 2 Cal. 63; *Buckley v. Manife*, 3 Cal. 442.

220. The evidence of a witness is to be excluded when the witness would be directly benefitted by it. *Jones v. Post*, 4 Cal. 15; *Griffin v. Alsop*, 4 Cal. 408; *Adams v. Woods*, 8 Cal. 321.

221. The confidential counselor, solicitor or attorney, or their clerk, cannot give evidence of communications made to them professionally. *Landsberger v. Gorham*, 5 Cal. 451.

222. A plaintiff or defendant cannot be permitted to give evidence on the part of his coplaintiff or defendant. *Gates v. Nash*, 6 Cal. 194; *Lucas v. Payne*, 7 Cal. 96; *Turner v. McIlhaney*, 8 Cal. 579.

223. In an action where the defense set up is the negligence of the plaintiff's servant, the servant's evidence cannot be admitted for the employer. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 255.

224. A party who calls an adverse party to testify makes him a witness and

waives his incompetency to be heard for himself or for his codefendant or coplaintiff. *Turner v. McIlhaney*, 8 Cal. 580.

225. The rule which excludes the testimony of persons has reference to the matters in issue, and not to incidental questions involving matters auxiliary to the trial of the cause which are addressed solely to the court. *Bagley v. Eaton*, 10 Cal. 146.

226. In an action of foreclosure of a mortgage, brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness whose wife is a sister and heir of the deceased is not competent upon the ground of interest. *Lisman v. Early*, 12 Cal. 283.

227. If in any case one partner can assign to another partner his interest in a firm claim and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand under the code, and his evidence is inadmissible. *Cravens v. Dewey*, 13 Cal. 42.

228. In a suit against the maker of a note or the acceptor of a bill, the indorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 87.

229. Where goods are seized by the sheriff on an execution against G., and the owners of the goods so in the sheriff's hands assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 219.

230. A witness is not disqualified because of a mere expectation of deriving from a suit some advantage to which he is not legally entitled. *Ib.*

231. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this State, as a stockholder, and holds the office of secretary—to which no person but a stockholder is eligible—is not a competent witness for the company in an action against it for overflowing plaintiff's mining claim. He is liable for the debts of the company and therefore interested. The fact that the stock was held in his name in trust for another—the transfer having been made simply to enable him to become an officer of the company—does not relieve him from responsibility.



Of Parties in Interest.—Of Jurymen.—Instruments offered in Evidence.

*Wolf v. St Louis Independent Water Co.*, 15 Cal. 320.

232. Von S., deputy United States surveyor, was called as a witness on behalf of plaintiffs in ejectment on a patent, to prove that the premises in controversy were within the calls of the patent and in the occupation of the defendant, and on his voir dire stated that he was married to a daughter of plaintiff, and had, about two years previously and after the patent was issued, purchased in his own name land covered by the grant upon the confirmation of which the patent issued. Defendant objected to the witness as interested in the grant as part owner, and on the ground that his wife was interested, and hence that he was disqualified: held, that the ownership of the witness in parcels of land covered by the grant other than the premises in controversy did not disqualify him; that he could not, from such ownership, gain or lose by the direct legal operation and effect of the judgment, nor could the judgment be legal evidence for or against him in any other action. *Mott v. Smith*, 16 Cal. 556.

See PARTIES.

## XII. OF JURYMEN.

233. It is a settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen cannot be received to impeach his own verdict. *People v. Baker*, 1 Cal. 405; *Wilson v. Berryman*, 5 Cal. 46; *People v. Backus*, 5 Cal. 276.

234. It seems that the evidence of the sheriff is competent to disclose what transpires in the jury room. *Wilson v. Berryman*, 5 Cal. 46.

See JURORS.

## XIII. INSTRUMENTS OFFERED IN EVIDENCE.

### 1. In general.

235. Where a written or printed instrument—as for instance, a “card” published in a newspaper by a witness in the cause without the knowledge of either of the parties to the suit—was offered in evi-

dence, the court properly excluded the same. *Dwinelle v. Henriquez*, 1 Cal. 389.

236. Where a written or printed instrument—as for instance, a “card” published in a newspaper—is proposed to be given in evidence and is rejected by the court, such evidence, or the substance of it, must be returned with the record, or the appellate court will not review the decisions of the court below. *Ib.*

237. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of the vessel. *Brooks v. Minturn*, 1 Cal. 482.

238. It is error to admit letters in evidence without proving that they were written by the party intended to be charged by their contents. *Sinclair v. Wood*, 3 Cal. 100.

239. A party is not required to deny an indorsement under oath, and an endorsee cannot give the notes in evidence without proof of their indorsement. *Youngs v. Bell*, 4 Cal. 202.

240. A joint contract cannot be given in evidence where the pleadings set up a several contract alone. *Stearns v. Martin*, 4 Cal. 229.

241. A survey may be detailed from memory by a witness as well as defined by a diagram, and be excluded unless the witness be the county surveyor, or be introduced to rebut or explain a survey of the county surveyor. *Vines v. Whitten*, 4 Cal. 230.

242. Where a paper is introduced in evidence as payment and no objection is made at the trial at nisi prius to its sufficiency to prove the payment, the want of such objection admits its sufficiency. *Goodale v. West*, 5 Cal. 339.

243. In a controversy as to the location of a mining claim, receipts of a water agent for water purchased can go to the jury to show the existence of the claim, and that it was actually located and in operation at that time. *Lone Star Co. v. West Point Co.*, 5 Cal. 447.

244. In an action for the specific performance of a contract, it may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a sound conclusion. *Reynolds v. Jourdan*, 6 Cal. 111.

245. Mining laws, when introduced in

## Instruments offered in Evidence.

evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued, is a question of law, and cannot therefore be properly submitted to the jury. *Fairbanks v. Woodhouse*, 6 Cal. 435.

246. A map by a county surveyor, with protractions of certain lines made by his deputy, is admissible in evidence when both officers swear to the correctness of the protractions. *Gates v. Kieff*, 7 Cal. 126.

247. Instruments are sometimes admissible for one purpose and inadmissible for another, and when objected to, the grounds of the objection should be stated; and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost v. Piper*, 9 Cal. 553.

248. A general objection will not exclude a paper offered in evidence, unless on its face inadmissible and void. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 231.

249. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved *all* of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker v. Woods*, 15 Cal. 69.

250. But even if any proof aliunde of C.'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judg-

ment was *prima facie* sufficient to admit the attachment papers in proof. *Ib.*

251. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Ib.*

252. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by plaintiff. *Ib.*

253. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and these certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs, to show their interest in the ground, and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved: held, that the certificates, etc., were relevant to show possession in plaintiffs, but that their execution should have been proven. *Pennsylvania Mining Co. v. Owens*, 15 Cal. 136.

254. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859, in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property as-

## Instruments offered in Evidence.—Account Books.—Conveyance.

sessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *People v. Downer*, 16 Cal. 344.

255. Such a law, making the assessment prima facie proof, merely affects the remedy, and is not therefore liable to any constitutional objection. *Ib.*

256. In suit for mining claims, the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiffs had attached: held, that admitting plaintiffs' rights could not be affected by such rules, still, as defendants claim under them, they were competent evidence to determine the nature and extent of defendants' claim—the effect of such rules upon preëxisting rights being sufficiently guarded by instructions of the court. *Roach v. Gray*, 16 Cal. 384.

See INSTRUMENTS.

## 2. Account Books.

257. A private account book kept by the plaintiff, and containing only an account of money paid, is not evidence to charge the defendant. *Collin v. Card*, 2 Cal. 421.

258. It is error to reject the books of defendants offered to prove an account of the sales. *Lubert v. Chauviteau*, 3 Cal. 463.

259. Though an account book of a tradesman as a general rule is not admissible to prove a charge for money loaned, yet, where it was shown that plaintiff had procured and paid for certain articles for defendant and charged it as money loaned, the book is admissible. *Le Franc v. Hewitt*, 7 Cal. 186.

260. Admitting that a trader's book is not admissible to prove a single item, yet, when the evidence shows that defendant bought goods at various times, for which only one charge was entered, after the order was filled, it seems that the account book is admissible in evidence. *Ib.*

261. In equity, where creditors are seeking to set aside a judgment alleged to be fraudulent, the books of the judgment creditor are not admissible as evidence for the defense to show an entry of the original transaction on which the judg-

ment is based, where the only predicate laid is evidence that the judgment creditor was possessed of capital sufficient to have loaned the amount of the judgment to the judgment debtor. *Heyneman v. Dannenberg*, 6 Cal. 380.

262. The books of account kept in the office of an alcalde are admissible in evidence, as a register of the acts of that officer belonging to the office. *Kyburg v. Perkins*, 6 Cal. 675.

263. In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books; and had no clerk—the book was sufficiently proved to be admitted in evidence. *Landis v. Turner*, 14 Cal. 574.

264. And being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and of their value, and of the specific materials furnished and their price; it not appearing that any higher evidence was attainable. *Ib.* 575.

265. The fact that the charges are first made on a slate and then transferred to the book does not affect the character of the book as one of original entries—the charges on the slate being mere memoranda, not intended to be permanent. *Ib.*

266. But the transfer must not be long delayed, otherwise the book will be rejected, unless the delay be satisfactorily explained. A delay of three days is not unreasonable. *Ib.* 576.

See ACCOUNT BOOKS.

## 3. Conveyance.

267. Where an assignment does not in terms convey real estate, and cannot be

## Conveyance.

fairly construed to do so, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land in question. *Lord v. Sherman*, 2 Cal. 502.

268. Where a plaintiff set up his right to property by virtue of a conveyance, which was shown by the testimony of a witness to be a mortgage: held, that the defendant could on cross-examination show that the mortgage had been satisfied. *Chenery v. Palmer*, 5 Cal. 133.

269. Our statutes make tax collectors' deeds prima facie evidence of title. *Norris v. Russell*, 5 Cal. 250; *Ford v. Holton*, 5 Cal. 321.

270. A deed defective in the acknowledgment should not be rejected as evidence for that reason, but should be admitted with instructions to the jury as to its effect in giving notice to third persons. *Hastings v. Vaughn*, 5 Cal. 319.

271. Evidence of a demand for a conveyance is not necessary where the party refuses to make title, and at the same time gives the reason for his refusal, which is other than that of requiring a deed to sign. *Goodale v. West*, 5 Cal. 341.

272. Exceptions to the admissibility of a deed in evidence must be taken advantage of in the court below, and not on appeal, for the first time. *Posten v. Rasette*, 5 Cal. 467; *Pearson v. Snodgrass*, 5 Cal. 479.

273. In an action to foreclose a mortgage, it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties, by which an assignment of the rents of the mortgaged premises, until full payment of the mortgage debt, is made by the mortgagor and accepted by the mortgagee. *Angier v. Masterson*, 6 Cal. 62.

274. A grant is admissible in evidence in ejectment to show the extent of the plaintiff's possession, when he has entered under it, and to show the animus with which he entered. *Gunn v. Bates*, 6 Cal. 272.

275. A constable's deed under an execution sale of the premises in controversy, where the execution was against a third party, cannot be read in evidence in an ejectment suit, unless title is shown in the defendant in execution at the time of the levy and sale, or the counsel offering it connects in some way with the issue be-

tween the parties to the suit. *Mc Garrity v. Byington*, 12 Cal. 430.

276. No law authorizes a recorder or clerk of a county to record a copy of a deed in the Spanish language, so as to make it evidence without further proof of a possessio pedis in himself or in some predecessor, through whom he deduces title. *Wilson v. Corbier*, 13 Cal. 167.

277. The fact that a tax deed is prima facie evidence of certain facts, makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof. *Ferris v. Coover*, 13 Cal. 619.

278. Complaint gives a general description of mining claims. The execution of a bill of sale of the claims having been proven, plaintiff offers the paper in evidence, defendant objecting that the identity of the claims in the paper with the claims in the complaint should first be shown: held, that the paper was admissible, as also further proof to locate the claims, if requisite. And further, that the court will not control the order of proof, unless some injury will be done. *Jackson v. Feather River and Gibsonville Water Co.*, 14 Cal. 23.

279. The patent from the United States proves itself. Courts take judicial notice of the signature of the president and of the seal of the government. *Yount v. Howell*, 14 Cal. 467.

280. The patent is in itself, as against the government, evidence of the existence and validity of the grant recited in it, as well as of the relinquishment of all claim of the United States to the land it embraces. *Ib.*

281. In ejectment, plaintiff offered to introduce in evidence an executory contract by which S. & Co. agreed to sell to Wooster the land sued for, and when the purchase money was paid, to make a deed, W. to take possession at once and to retain it so long as he complied with the contract. Plaintiff stated it to be his intention to show, in connection with the contract, that the defendant claimed under Wooster. The answer averred that Wooster mortgaged the premises to defendant, who foreclosed and went into possession under the sheriff's deed: held, that the contract, with the other proof, was prima facie relevant to the issue, plaintiff's object being to show that Wooster had for-



## Conveyance.

feited his rights under the contract, and that he, plaintiff, had succeeded to the right and title of S. & Co. *Palmer v. McCafferty*, 15 Cal. 335.

282. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D., in taking said deed, acted as agent and trustee of plaintiff and for his benefit, and should have taken the deed in his name; that in equity, said O'D. ought to declare such trust and execute a deed of the property to plaintiff; that on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D.; that said trust be declared; that he execute a deed to plaintiff; that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then plaintiff have judgment against H. and wife on said notes; that all the defendants be barred, etc., and premises

sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the notes and mortgages in this case were properly admitted in evidence against the objections of O'D., as showing the history of the transaction and his connection with the property, as also the consideration of the last mortgage, which was given as security for money then loaned, and for the money previously loaned and secured by three previous mortgages on the same land. *De Leon v. Higuera*, 15 Cal. 495.

283. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgement taken before a notary, and in the place where his seal is usually found the words "no seal" thus: [No Seal]—the conclusion of the acknowledgement being, "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

284. A deed to defendant admitted as prima facie evidence the question as to the identity and description of the premises being matter of subsequent proof. See facts. *McCartney v. FitzHenry*, 16 Cal. 186.

285. Where a deed has attached to it certificates of acknowledgment, made at the Hawaiian Islands; the one by a person who describes himself in the body of the certificate as "the principal notary public" of the Islands, and affixes to his signature a similar designation of his official character, with his notarial seal; and the other by a person who describes himself in the body of his certificate as the "vice consul of the United States of America at Honolulu, Hawaiian Islands," and affixes to his signature the designation of his official character as "U. S. vice consul," and the consular seal: held, that the execution of the deed was prima facie sufficiently proved to be admitted in evidence against the objection that the persons before whom the acknowledgments



## Conveyance.—Judgment.

purported to have been made were not shown to be the officers they represent themselves to be, and were not authorized to take the acknowledgments. *Mott v. Smith*, 16 Cal. 552.

286. The general designation in the fourth section of the act of April 16th, 1850, as to conveyances of any notary public or any consul of the United States, embraces notaries and consuls of every grade—whether principal or inferior notary, or consul general or vice consul. *Ib.*

287. The certificates of a notary public or United States consul of acknowledgment of a deed are prima facie evidence of the official character of the person by whom they are given. *Ib.*

288. In the United States, certificates of the proof and acknowledgment of deeds executed in a foreign jurisdiction are generally received as prima facie evidence of both the character of the officers giving them and the genuineness of their signatures. *Ib.*

289. Where a deed of land in Yuba county, California, describes the grantor, William Johnson, as “of the Island of Hawaii, Sandwich Islands,” and after designating the property in which the interest of the grantor is conveyed as the tract situated in the county of Yuba and known as “Johnson’s ranch,” and giving its boundaries, proceeds to state that the ranch was originally granted to Pablo Gutieras by the Mexican government, and has since been confirmed to the party of the first part by the board of commissioners to ascertain and settle private land claims in California; and then in ejectment on a patent from the United States to William Johnson for this land—the patent being in evidence and referring to Johnson as claimant and as the person filing the petition before the land commission for confirmation of his claim under the grant to Pablo Gutieras, but not mentioning the residence of Johnson—this deed is offered in evidence and objected to, on the ground that there was no proof of the identity of the William Johnson of the deed with the William Johnson of the patent: held, that the deed, from the identity of names, and by its reference to the source of title, contains sufficient prima facie evidence as to identity of person to admit it in evidence; that before additional proof of such identity could be required, some circumstances

must be shown to create doubts upon the point. *Ib.* 554.

290. In this case, the original deed was produced in court, and the case tried in Yuba county, where Johnson had formerly lived for years, and where his signature could probably have been easily proved or disproved, had there been any suspicion as to its genuineness. *Ib.* 555.

291. The deed to plaintiff of the land bought being signed by the mayor of the city of San Francisco, and sealed with the corporate seal—the mayor being the legal custodian of the seal, and it being affixed by his authority—is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution. The seal is prima facie evidence that it was affixed by proper authority, and the deed is prima facie sufficient to pass the title. *McCracken v. City of San Francisco*, 16 Cal. 638.

292. The deed, in this case, is not a mere nullity. So far as passing the title to the land, or creating any right or interest against the city is concerned, the deed is inoperative and void, and may be attacked collaterally. But the objections to it do not appear on its face, and its validity must be shown by the party impeaching it by evidence aliunde. *Ib.* 640.

293. Prima facie, it is a valid and sufficient conveyance, and a party holding under it must be deemed to hold adversely, and not in subordination to the real title. Possession under it may ripen into a perfect title, and it cannot fail to prejudice the interests, if not the rights, of the lawful owner. *Ib.*

294. Such being the effect of the deed in this case, plaintiff cannot recover the purchase money without procuring a reconveyance of the property and a surrender of the possession, so as to place the parties in statu quo. *Ib.*

See BOND, CONVEYANCE, DEED, LEASE, MORTGAGE.

#### 4. Judgment.

295. A certificate of exemplification of a judgment rendered in another State, when attested by the clerk under the seal of the court, and when the presiding judge

## Of a Judgment.—Notarial Certificate.—Of a Will.

of the court certifies that the attestation is in due form of law, is sufficient evidence under the act of congress of May 26th, 1790, to sustain an action upon the judgment in this State. *Thompson v. Manrow*, 1 Cal. 425.

296. A claim of title by virtue of a sheriff's deed is not sufficient without proving the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

297. The record of a judgment of another State, if certified in conformity with the act of congress, is admissible in evidence in this State. *Parke v. Williams*, 7 Cal. 249.

298. The judgment of a court of competent jurisdiction directly upon the points is, as a plea, a bar, and as evidence conclusive between the same parties upon the same matter directly in another court. *Lore v. Waltz*, 7 Cal. 252.

299. Where a plaintiff had obtained judgment in another court for a quarter's rent under a lease: held, that in an action of forcible entry for nonpayment of another quarter's rent, under the same lease, between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Ib.*

300. In an action for damages for the diversion of water from the plaintiffs' ditch, the defendants denied the diversion, and alleged that the water used by them was used by agreement between the Volcano Water Company and themselves, and came from their reservoir. On the trial the plaintiffs could introduce in evidence the judgment wherein the right to the use of the water had been adjudged between the plaintiffs and the Volcano Water Company, and parol evidence that the water used was the same in controversy in that suit. *Walsh v. Harris*, 10 Cal. 392.

301. Where the surety undertakes that the principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive evidence against the surety. *Pico v. Webster*, 14 Cal. 204.

302. But in case of official bonds, the sureties undertake in general terms that the principal will perform his official duties, and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Ib.*

303. A judgment is always admissible as evidence of its rendition when that fact

is relevant, but not as proof to charge a stranger directly by its operation. *Ib.* 207.

304. Under our system, the judgment in ejectment is only conclusive of two points: the right of possession in the plaintiff, and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 468.

305. A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title. *Kidd v. Laird*, 15 Cal. 182.

306. Where the record shows that suit was brought in township No. 4, Sierra county; that the summons was served by the constable of that township in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, (Wood's Dig. 232, 233) the judgment rendered is void and not admissible as evidence of title upon a sale made thereunder. A constable has no power to issue process out of his township. *Low v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 16 Cal. 392.

See JUDGMENT.

## 5. Notarial Certificate.

307. By the fifth section of the act concerning notaries, notes are made protestable, and by the tenth section the protest is evidence of demand and nonpayment or nonacceptance. *Connelly v. Goodwin*, 5 Cal. 221.

308. A certificate from the notary's record shall be prima facie evidence of the facts therein contained. *McFarland v. Pico*, 8 Cal. 636.

309. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie v. Neville*, 14 Cal. 409.

See NOTARY.

## 6. Of a Will.

310. Evidence may be offered to prove

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Of the Execution of an Instrument.—For the Production of an Instrument.—Of Experts.

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a custom that no more than two witnesses were necessary to the validity of a will. *Panaud v. Jones*, 1 Cal. 500.

311. Where the testator and witnesses to a will are dead, proof of the signature of the witnesses and of the testator will be sufficient evidence of its due execution. *Tevis v. Pitcher*, 10 Cal. 478.

See WILL.

#### XIV. EVIDENCE OF THE EXECUTION OF AN INSTRUMENT.

312. The signature to a bond set out in the complaint should be proven and not deemed admitted by the answer, which fails to deny it under oath when the defendants are other parties than those who are alleged to have signed the instrument. *Heath v. Lent*, 1 Cal. 411.

313. To admit proof of the handwriting of a witness to an instrument it must be shown that the witness is beyond the jurisdiction of the court, and that he could not be found after diligent search for him had been made; that his absence may be inferred. *Powell v. Hendricks*, 3 Cal. 430.

314. The statute of 1851 gives to papers properly recorded the like effect as the originals, but it does not dispense with proof of execution. *Ib.*

315. A power of attorney not affecting real estate is not required to be recorded, and the fact of said instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution. *Stevens v. Irwin*, 12 Cal. 308.

316. A subscribing witness who is called to prove the execution of the instrument, who testifies that it was signed in his presence to the best of his recollection, is sufficient to allow it to be read in evidence. *McGarity v. Byington*, 12 Cal. 430.

317. Where a subscribing witness to a bill of sale is out of the State, and the proof is that witness saw subscribing witness put his name to it and saw grantor sign it and recognized the paper from hearing it read, not being able to read himself, and another witness testifies that the signature of the subscribing witness is in his handwriting, this is sufficient evidence to identify the paper and authorize it to be read in evidence. *Ib.*

#### XV. FOR THE PRODUCTION OF AN INSTRUMENT.

318. The sufficiency of a notice to the adverse party to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case; and where it is impossible to produce the paper between the time of giving the notice and the trial, that fact should be made to appear. *Burke v. Table Mountain Water Co.*, 12 Cal. 407.

319. Literal accuracy cannot be expected in the description given in the notice of a paper in the possession of the adverse party; such description as will apprise a man of ordinary intelligence of the document desired is sufficient. *Ib.* 408.

#### XVI. OF EXPERTS.

320. Evidence showing that the plaintiff was a good bookkeeper was proper to be submitted to the jury, to enable them to form an estimate of the damages which the plaintiff had probably sustained by reason of a breach of passenger contract, and they should consider the probabilities of his procuring a situation and retaining it. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 355.

321. Where plaintiff undertook to prove the value of his services in going twice to Europe to negotiate the purchase of an estate, but it was not shown that he undertook these voyages at the request of the defendant or in what capacity he went: held, that the court erred in admitting the testimony, as the question was hypothetical and assumed a state of facts not in proof. *Dopman v. Hoberlin*, 5 Cal. 414.

322. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of a plaintiff's services in another action. *Hart v. Vidal*, 6 Cal. 56.

323. A witness who is not an attorney is incompetent to prove the value of an attorney's services. *Ib.* 57.

324. The opinions of a person not an expert are not evidence. *Reynolds v. Jourdan*, 6 Cal. 111.

325. The opinions of witnesses are gen-

## Of a Demand.—In Criminal Cases.

erally admissible only when they relate to matters of science or art, or to skill in some profession or business. *Hastings v. Steamer Uncle Sam*, 10 Cal. 342.

326. Where in an action to recover damages occasioned to the plaintiff from his detention on the defendants' vessel, a witness was permitted to give his estimate of the value of plaintiff's services per day, which he placed as high as one hundred dollars, and stated his opinion upon the fact that plaintiff was a speculator and had large means, and frequently made from one to five hundred dollars per day: held, that the testimony was inadmissible. *Ib.*

See EXPERTS.

## XVII. OF A DEMAND.

327. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Taylor v. Seymour*, 6 Cal. 514; *Daumiel v. Gorham*, 6 Cal. 44; *Killey v. Scannell*, 12 Cal. 75.

328. In an action against a sheriff, to recover property seized or its value, by the owner, it is necessary that the plaintiff should prove affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Killey v. Scannell*, 12 Cal. 75.

329. To sustain an action on an account stated, it must be proven there was a demand in favor of plaintiff acceded to by defendant. *Terry v. Sickles*, 13 Cal. 429.

See DEMAND.

## XVIII. IN CRIMINAL CASES.

330. Where the admission or confession of a party is resorted to as evidence, it is error to exclude any portion of it made at the same time as the part which is related. *People v. Navis*, 3 Cal. 106.

331. After a jury retired to deliberate, they returned and had read to them two depositions of witnesses on behalf of defendant while he was absent: held, that defendant being on trial for felony had a

right to be present, and this reading was error. *People v. Kohler*, 5 Cal. 72.

332. Evidence is not admissible to show for what purpose a shot-gun with which the homicide was committed was loaded and used; it is sufficient that it was unlawfully used. *People v. Milgate*, 5 Cal. 128.

333. Proof beyond a reasonable doubt is necessary to establish a fact against a prisoner; but preponderating proof necessary to satisfy a jury of a fact is sufficient to establish the fact in his favor. *Ib.* 129.

334. It is not sufficient to raise a doubt of the fact of extenuation, even though it be a reasonable doubt, simply because it is no proof of the fact. *Ib.*

335. Evidence is not admissible to prove that deceased was armed and the prisoner was so cautioned, unless deceased made threats against the prisoner. *Ib.*

336. Where the killing is admitted, the presumption of guilt arises and the onus of proof is laid upon the prisoner of disproving the guilt; this cannot be done by raising a doubt in the minds of the jury, but by establishing the fact by preponderating proof. *People v. Milgate*, 5 Cal. 129; *People v. Stonecifer*, 6 Cal. 410; *People v. March*, 6 Cal. 547.

337. Any witness may be introduced in a criminal trial by consent of the court, notwithstanding he was not before the grand jury, subject only to the right of the prisoner to a continuance in case such evidence should operate as a surprise upon him. *People v. Freeland*, 6 Cal. 98.

338. On a trial for rape, where the prosecutrix is the only witness, evidence that she had committed individual acts of lewdness with other men is admissible as tending to disprove the allegations of free and total absence of assent on her part. *People v. Benson*, 6 Cal. 222.

339. No case of rape should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony. *Ib.* 223.

340. On the trial for murder, evidence of a difficulty between the prisoner and other persons connected with the deceased, on the same day, prior to the killing, and at which the deceased was not present, is admissible, for the purpose of showing a conspiracy upon the part of the prisoner and others against the deceased and oth



## In Criminal Cases.

ers, and of connecting the two difficulties together. *People v. Stonecifer*, 6 Cal. 410.

341. Insanity of the prisoner, at the instant of the commission of the offense, can only be established by evidence tending to prove that he was insane at the same period, before or afterwards. *People v. March*, 6 Cal. 547.

342. In a prosecution for assault with intent to commit murder, where the prosecuting witness was asked, on cross-examination, if he did not previous to the assault buy a pistol to use on the defendant, to which he answered "Yes;" it was competent for the prosecuting attorney to ask the witness to state his reasons for so doing, and his answer that he was induced to do so by what he was informed by a third person the defendant had said, was competent to show the motive of the witness. *People v. Shea*, 8 Cal. 539.

343. When the record states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts, as proved, being given, there is no necessity of setting forth the testimony. *People v. York*, 9 Cal. 422.

344. Evidence of the dying declarations of a deceased person are admissible, on a trial for murder, on the ground of necessity. *People v. Glenn*, 10 Cal. 36.

345. The verbal declarations of the deceased are admissible in evidence, where the written declarations, signed by deceased, have been introduced, or their absence accounted for. Having done this, it is proper to admit proof of the fact, that the deceased had, at different times, made the same statement. *Ib.* 37.

346. Where the inferior court excluded from a jury evidence of threats on the part of the deceased against the life of the defendant, and the record does not show the character of such threats, the appellate court will presume that such proof was properly excluded. *Ib.*

347. Where W., R. and B. were indicted for the crime of murder, the indictment charging all the parties as principals, but in the statement of facts constituting the offense, alleging that the fatal blow was struck by W., and that R. and B. stood by and abetted, W. having been convicted: held, that the record of W.'s conviction was not admissible in evidence, on B.'s trial, for any purpose. *People v. Bearss*, 10 Cal. 70.

348. The defendant being on trial for the crime of manslaughter, in killing a trespasser, offered to introduce in evidence a deed of the land from a third party to defendant: held, that such proof is not admissible. *People v. Honshell*, 10 Cal. 87.

349. In a criminal case, proof of statements made by defendant must be by the witness himself, and not by a written memorandum, made by him at the time, which he says is correct. *People v. El-yea*, 14 Cal. 145.

350. Upon a trial on an indictment for an attempt to contract an incestuous marriage, something more must be shown than mere intention to contract such marriage. Preparation for the attempt indicates the intention; but between this and the attempt there is a wide difference. *People v. Murray*, 14 Cal. 160.

351. On an indictment for murder, it appeared that the prisoner on the day of the killing called at a mill, several hundred yards from where deceased was killed, and borrowed a chisel—having been previously in the habit of borrowing tools at the mill. His shirt was bloody, and two spots of skin were knocked off his nose. Defendant's counsel asked the witness, "Did he (prisoner) state how he came by those hurts? If so, state all the conversation then and there between you two, in respect to those hurts, and his errand there." Objected to and ruled out: held, that there was no error in the ruling, the declarations not appearing to have any connection with the offense charged; that declarations of a prisoner, to be admissible as part of the *res gestæ*, must be contemporaneous with the main fact under consideration, and so connected with it as to illustrate its character. *People v. Wyman*, 15 Cal. 74.

352. Held, further, that even if in this case such declarations were improperly excluded, the prisoner was not prejudiced, because he was convicted of manslaughter only, showing that the jury negatived the idea of malice and premeditation. *Ib.*

353. It is not error in the court, in a criminal case, to charge the jury to give such weight to the defendant's confession as they deem it entitled to, "judging from the circumstances under which it was given, and the motives which would naturally actuate the party in giving it;" and that they might, in their discretion, be-



## In Criminal Cases.

lieve a part, and disbelieve another part of such confession. *People v. Wyman*, 15 Cal. 75.

354. Confessions of a defendant indicted for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him, that if defendant would disclose his confederates, he would use his influence to get defendant acquitted, are not admissible in evidence against him. *People v. Smith*, 15 Cal. 410.

355. Query. Whether there is any foundation for the distinction between confessions induced by persons who have no authority or control over the prisoner, and those induced by persons having such authority, as constables, prosecutors and the like. *Ib.*

356. Indictment for murder. Plea, self defense. Testimony conflicting as to facts occurring at the time of homicide. M., a witness for prosecution, testified that he was present August 24th, at a difficulty between defendant and deceased, in the course of which defendant discharged a double barreled shot gun at deceased, who fell forward; that immediately thereafter witness approached deceased, and saw lying on the ground, about six feet forward of him, a pistol, which witness had previously seen in deceased's possession. Witness then detailed the circumstances immediately connected with the difficulty, in which he himself, armed with a pistol, took part with deceased against defendant; and then stated that the pistol he saw lying on the ground, deceased borrowed from C. some time before August 24th; that C. had given the pistol to deceased, who said he would clean it; and that he (witness) had often, since then, and before August 24th, seen the pistol in deceased's possession. Defendant's counsel then asked witness this question: "At the time C. gave the pistol to Sweeney (deceased) was anything said by S. with reference to using the pistol against the defendant." Objected to and ruled out as irrelevant and incompetent, unless evidence was produced tending to show that the thing said had come to the knowledge of defendant: held, that the court erred; that the evidence was admissible; that the declaration of deceased made at the time of procuring the weapon was part of the *res gestæ*, and illustrative of the transaction; that it showed the purpose for which the weapon

was procured, and that this purpose was an item of proof upon the question, which of the two parties first assaulted—this being the point to which the testimony was offered. *People v. Arnold*, 15 Cal. 480.

357. The mere fact that one man threatens to kill another does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused before they are admissible as evidence for him for any purpose—and then the effect and bearing of the testimony should be explained by the judge to the jury, before the case is finally submitted to them. *Ib.*

358. But where a rencounter occurs between two persons, one of whom is killed, and the witnesses as to the difficulty differ, or the circumstances are equivocal as to which one of the two commenced the affray, then the fact that one of the parties had previously procured a weapon for the avowed purpose of using it against the other—the weapon being found at the place of the affray—is a circumstance tending to show that the purpose was fulfilled, and hence is proper for the consideration of the jury. *Ib.*

359. Generally, when the fact of a homicide is shown, defendant must show by a preponderance of testimony that the killing was justifiable; but this rule is subject to the qualification that where the testimony of the prosecution leaves a doubt as to the character of the homicide—as whether justifiable or not—then the benefit of the doubt is given to the prisoner. *Ib.* 481.

360. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the *res gestæ*, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People v. Costello*, 15 Cal. 353.

361. To convict a defendant of larceny

## In Criminal Cases.—Of Character.

upon the testimony of an accomplice, together with corroborating evidence, the corroborating evidence must connect the defendant with the offense charged. It is not sufficient that it corroborate the accomplice as to the fact that a larceny was committed. *People v. Eckert*, 16 Cal. 112.

362. McB., the accomplice, swore to the larceny by the defendant. The court instructed the jury, "that though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony:" held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *Ib.*

363. On the trial upon indictment for murder, the only witness for the prosecution who saw the transaction itself, testified in substance, that he and Tung Hoy met a large number of their countrymen, Chinese, six of whom took them out into the chapparal, tied him, and then one of the Chinese struck Tung Hoy on the head with a sword, another pierced him in the back, when he fell, and witness then escaped, and has never since seen him. The court instructed the jury that if the evidence of this witness were true, defendants were guilty of murder in the first degree: held, that the court erred; that such instruction assumed the homicide, which was not proven by the witness. *People v. Ah Fung*, 16 Cal. 138.

364. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about \$1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento instead of the mill. Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there, he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been

paid before L. took the property. Ruled out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and to show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness has been paid. *People v. Stone*, 16 Cal. 371.

365. Larceny is compounded of the taking and carrying away *and* the felonious intent. Whatever has a legal tendency to show the intent is proper evidence. *Ib.*

See CRIMES AND CRIMINAL LAW.

### 1. Of Character.

366. Evidence of character can only be considered in relation to the particular crime charged, in cases where the guilt of the accused is doubtful. *People v. Roberts*, 6 Cal. 217.

367. Evidence of character can be given to the jury as to the whole case, and not on an isolated fact. *People v. Milgute*, 5 Cal. 130.

368. Evidence of good character, as a defense in a criminal case, should be restricted to the trial of character which is in issue. *People v. Josephts*, 7 Cal. 130.

369. Where the prosecuting attorney was allowed by the court to ask a witness on a trial for murder what was the business of the prisoner, under the objection of the latter on the ground of irrelevancy: held, that where the record did not contain all the evidence given, the question must be presumed to be relevant, as such might often be proper. *People v. Butler*, 8 Cal. 440.

370. The answer of witness as to character, that prisoner was a gambler, cannot be considered an injury to the prisoner at the time when gambling was licensed by law. *Ib.*

371. The rule is well settled, that the reputation of the deceased cannot be given in evidence unless at the least the circumstances of the case raises a doubt in re-

## Evidence to Impeach a Witness.—Presumptive Evidence.

gard to the question whether the prisoner acted in self defense. *People v. Murray*, 10 Cal. 310.

See CHARACTER.

## XIX. EVIDENCE TO IMPEACH A WITNESS.

372. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This last has been the uniform practice in this State, and no injury has resulted from such practice. *Stevens v. Irwin*, 12 Cal. 308.

373. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of these contradictions, and the time and place of the contradictory statements must be brought to the knowledge of the witness on cross examination. *Baker v. Joseph*, 16 Cal. 178.

374. And this rule as to evidence of contradictory statements, applies equally to evidence of declarations or acts of hostility or ill feeling on the part of the witness. There is no distinction between admitting declarations of hostility of witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned. *Ib.*

375. Where the objection to such impeaching evidence was general, and the court excluded the testimony without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below; and the appellant must show error to his prejudice, by putting his exception in the proper shape. *Ib.*

376. To impeach the testimony of F., a witness for plaintiff, by showing that on a former occasion he had sworn differently, defendant offered in evidence a statement on motion for a new trial and on appeal, in a former suit between the parties, purporting to contain all the evidence, and agreed to as correct by the attorneys therein, in which statement there appeared the testimony of F. on the trial: held, that the statement was not admissible; that it was made for a particular purpose, and was not proof except for that purpose—certainly not to impeach F., who neither

made nor signed it. *Payne v. Treadwell*, 16 Cal. 239.

## XX. PRESUMPTIVE EVIDENCE.

377. The power given in an assignment to sell on credit is presumptive evidence of a fraudulent intent to hinder and delay creditors. *Billings v. Billings*, 2 Cal. 113.

378. Although the question of fraudulent intent is made a question of fact in all cases, yet whenever the law declares that certain indicia are conclusive evidences of fraud, a verdict against such conclusive evidence should in all cases be set aside; but where the facts are merely presumptive evidence, the jury may find against the presumption. *Ib.*

379. A check is presumptive evidence of payment of a debt due and not of money loaned. *Headley v. Reed*, 2 Cal. 324.

380. The surrender of a note is prima facie evidence of its payment, but may be rebutted by testimony. *Smith v. Harper*, 5 Cal. 330.

381. Express proof is not required when proof is charged; it may be inferred from strong presumptive circumstances. *McDaniel v. Baca*, 2 Cal. 338.

382. Hearsay information of the death of the ancestor of plaintiff, derived from the immediate family of the deceased, is sufficient prima facie to establish the fact. *Anderson v. Parker*, 6 Cal. 200.

383. The fact that the business was unsuited to the sex of a sole trader, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it. *Guttman v. Scannell*, 7 Cal. 459.

384. In case of an absent person from whom no tidings are received, the presumption of life ceases at the end of seven years. *Ashbury v. Sanders*, 8 Cal. 64.

385. To shorten this time there must be evidence of some specific peril to the life of the individual. *Ib.*

386. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on board a particular vessel bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not suf-

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 Newly discovered Evidence.—Evidence on Continuance.
 

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ficient to raise a legal presumption of his death. *Ib.*

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 XXI. NEWLY DISCOVERED EVIDENCE.

387. A party ought not to rely on his own single and unsupported statement on a motion for a new trial of the newly discovered evidence, but should, if possible, procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts they will testify. *Rogers v. Huie*, 1 Cal. 432.

388. On a motion for a new trial on the ground of newly discovered evidence, the newly discovered evidence should be fully set forth, or the motion must be overruled. *Perry v. Cochrane*, 1 Cal. 180.

389. An application for a new trial on the ground of newly discovered evidence must show affirmatively that the evidence is new, material and not cumulative; that the applicant has used due diligence in preparing the case for trial, and that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not distinctly in issue on the trial and were not then known or investigated by proof. *Bartlett v. Hodgdon*, 3 Cal. 57; *Burritt v. Gibson*, 3 Cal. 399.

390. A new trial on the ground of newly discovered evidence should not have been granted where such evidence is merely cumulative, and is that of a witness whose deposition was used on the trial, and particularly where the verdict shows he was not believed at first. *Gaven v. Dopman*, 5 Cal. 342.

391. In a suit in equity for relief against a judgment at law, the complainant will not be entitled to relief unless the evidence alleged in the bill to be newly discovered evidence appears to be incontrovertible and conclusive. *Buckelew v. Chipman*, 5 Cal. 400.

392. An affidavit for a new trial on the ground of newly discovered evidence is insufficient when it appears that the witnesses named in the affidavit are residents of San Francisco, and it does not appear that this testimony could not with reasonable diligence have been procured at the time of trial. *Jacks v. Cooke*, 6 Cal. 164.

393. In cases of conflicting evidence

newly discovered evidence, merely cumulative, is no ground for a new trial. *Taylor v. California Stage Co.*, 6 Cal. 230.

394. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, and going to contradict the witnesses of the other party. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

395. It is not good ground for a new trial that the defendant discovered material testimony at too late a period to produce the same at the trial. *Berry v. Metzler*, 7 Cal. 418.

396. A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried. *Weimer v. Lowry*, 11 Cal. 113.

397. On a motion for a new trial of newly discovered evidence, the affidavit of one of the defendants as to what the witness will testify is insufficient. It should be accompanied by the affidavit of the witness himself; and if that cannot be obtained in time, additional time should be applied for. *Jenny Lind Co. v. Bower*, 11 Cal. 199.

398. Motions for new trial on the ground of newly discovered evidence regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. (In this case the party himself was present.) *Baker v. Joseph*, 16 Cal. 180.

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 XXII. EVIDENCE ON CONTINUANCE.

399. A defendant applied for a continuance to enable him to take the deposition of a witness whose evidence would be of no avail in his defense, and in which he showed no diligence: held, that the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 473.

400. An affidavit for a continuance on the ground of absence of a witness should



## Evidence on Continuance.—Evidence on New Trial.—Depositions.

state that the testimony wanted is not simply cumulative, and cannot be proven by others, and that the application is not made for delay; the character of the diligence used in trying to obtain the attendance of the witness—whether by exhausting the process of the law or otherwise—should also be stated. *People v. Thompson*, 4 Cal. 240; *People v. Quincy*, 8 Cal. 89; *Pierce v. Payne*, 14 Cal. 420.

401. Affidavits for continuance should show that the facts expected to be proved by the absent witnesses cannot otherwise be proven. *People v. Quincy*, 8 Cal. 89.

402. Where it is admitted, for the purpose of preventing a continuance, that the several witnesses named would, if present, respectively testify as stated in the affidavit, and that their testimony should be considered as actually given on the trial or as offered and overruled by the court as improper; the testimony thus assumed was offered, and for all the purposes of this case must be deemed as actually before the court. *Boggs v. Merced Min. Co.*, 14 Cal. 358.

403. An affidavit for continuance on the ground that a witness is absent from the State, must aver that the party cannot to his knowledge prove the same facts by any other witness. *Pierce v. Payne*, 14 Cal. 420.

404. An affidavit for continuance, on the ground that a witness is absent, when the opposite party admits that the witness would testify to the facts set forth, is evidence, but not conclusive proof, of its contents; it must be regarded only as a deposition. *Blankman v. Vallejo*, 15 Cal. 645.

See CONTINUANCE.

## XXIII. EVIDENCE ON NEW TRIAL.

405. On a motion for a new trial on the ground of surprise at the trial by the non-attendance of witnesses, the affidavits, in endeavoring to procure the attendance of the witnesses, should set forth that reasonable diligence has been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers v. Huie*, 1 Cal. 432.

406. Surprise at the testimony of a

witness called by the adverse party is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor v. California Stage Co.*, 6 Cal. 230.

407. Mere surprise at the evidence given by the witnesses of the defendant is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

408. Where the evidence is insufficient, a new trial should be granted. *Potter v. Carney*, 8 Cal. 574.

409. In a statement for a new trial the evidence may be simply referred to, and need not be set out in the statement itself. *Dickinson v. Van Horn*, 9 Cal. 211.

See NEW TRIAL.

## XXIV. DEPOSITIONS.

410. Notaries public are by law entitled to take depositions by commission, but cannot exercise the plenary powers to compel the attendance of witnesses by attachment. *McCann v. Beach*, 2 Cal. 29.

411. All the requisitions of the statute in relation to the taking of depositions must be strictly complied with, being in derogation of the common law, and this must appear upon the deposition to entitle it to admission. *Dye v. Bailey*, 2 Cal. 384.

412. There is nothing in the statute which requires that exception to depositions shall be filed before the time of trial. The objection can be made at any time before the depositions are read in evidence. *Id.*

413. Proof of notice to take a deposition, where the written notice was defective, was held good when made by parol, and conforms substantially to the statute. *Mills v. Dunlap*, 3 Cal. 96.

414. A motion to suppress the reading of a deposition, before the case in which it is taken is put upon trial, is premature; the proper time to object to such deposition is when it is offered in evidence on the trial. *Id.*

415. The decision of such motion vests in the sound discretion of the court, who



## Depositions.—Cross Examination.—Conflicting Evidence.

must decide upon the sufficiency of such grounds upon which such motion is made. *Ib.*

416. Where a deposition is taken ex parte, though after notice, and the witness is therefore not subjected to a cross-examination, the language used by him will be suspiciously regarded, and only a very literal interpretation given to it. *Spring v. Hill*, 6 Cal. 18.

417. A deposition taken before an examining magistrate, on the preliminary examination of a person charged with the commission of a felony, is not admissible on the trial, because the magistrate is not authorized or required to take it, and because it was taken before the defendant was held to answer. *People v. Garrett*, 6 Cal. 204.

418. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by the defendants on a new trial. *Turner v. McIlhany*, 8 Cal. 579.

See DEPOSITIONS.

## XXV. CROSS EXAMINATION.

419. Where a witness is examined on his voir dire as to his interest, he may be cross examined as to his interest. *Beach v. Covillaud*, 2 Cal. 239.

420. In a case of collision, after the witness had testified concerning the position of the vessels and the character of the night, he was asked whether a vessel on such a night and in such a place could be seen at a considerable distance from a vessel approaching the shore, and if so, how far: held, that the question should have been allowed. *Innis v. Steamer Senator*, 4 Cal. 5.

421. A witness cannot be cross examined except in reference to matters concerning which he has been examined in chief. *Thornburg v. Hand*, 7 Cal. 561.

422. Cross examination cannot go beyond the subject matter of the evidence in chief, but should be allowed a very free range within it. *Jackson v. Feather River and Gibsonville W. Co.*, 14 Cal. 23.

423. Action for damages to a mining claim by overflow and leaking from defendants' ditch. To question by plaintiff to one of his witnesses: "Did you ever see water splashing over the flume?" he

answered, "Yes." Defendants, on cross examination, proposed to ask, "Whose water was that you saw splashing over the flume?" held, that the question was proper, even though it went to the ownership of the water. *Ib.*

424. That the overflow or breakage was occasioned not by the acts or negligence of the defendants, but by the acts or negligence of another, was matter of denial simply, not new matter of defense, to be proved only when defendants opened their case. *Ib.* 24.

425. When defendant on cross examination of plaintiff's witness, aims to disprove by the witness the very case the witness himself has made, the rule of excluding such evidence, until defendant opens, has no application. *Ib.*

## XXVI. CONFLICTING EVIDENCE.

426. The finding of a jury or court, deciding upon the weight of testimony, will not be reviewed on appeal unless such finding be impeached for fraud, misconduct, mistake or improper influences. *Payne v. Jacobs*, 1 Cal. 41.

427. The verdict of a jury should not be disturbed when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Johnson v. Pendleton*, 1 Cal. 133; *Happe v. Robb*, 1 Cal. 373; *Vogan v. Barrier*, 1 Cal. 187; *Dwinelle v. Henriquez*, 1 Cal. 389; *Griswold v. Sharpe*, 2 Cal. 23; *Duell v. Bear River and Auburn W. & M. Co.*, 5 Cal. 86; *Conroy v. Flint*, 5 Cal. 329; *White v. Todds' Valley Water Co.*, 8 Cal. 444; *Scannell v. Strahle*, 9 Cal. 177; *Weddle v. Stark*, 10 Cal. 303; *Bensley v. Atwill*, 12 Cal. 240; *Ritter v. Stock*, 12 Cal. 402; *Mc Garrity v. Byington*, 12 Cal. 432; *Visher v. Webster*, 13 Cal. 60; *Stevens v. Irwin*, 15 Cal. 504.

428. On a question of fraud, where there is conflicting evidence which was proper to have been submitted to a jury to pass upon, and the court granted a nonsuit, the appellate court in determining the question of nonsuit will presume that the fraud was not proven. *Ledley v. Hays*, 1 Cal. 161.

429. The finding of a referee is conclus-

## Conflicting Evidence.—Evidence Reviewed.

ive on the facts, where the evidence is conflicting. *Knowles v. Just*, 13 Cal. 621.

430. Where in a suit for conversion by an administrator, the complaint averred the facts necessary under the statute to maintain the action, and the action denied the facts; but it is agreed by counsel that the proof is conflicting; and the court below instructed the jury, that if they believed from the evidence that defendant did receive the property mentioned in the complaint, belonging to the estate of G., deceased, and converted and appropriated to his own use, and refused to deliver the same when demanded, etc., they will find for the plaintiff; and it is objected to upon appeal that this instruction was wrong, because it ignores all reference to the time of the alienation by defendant, whether before or after the issuing of letters of administration upon the estate of deceased: held, that there being no statements of facts, the appellate court cannot tell whether there was any discrepancy in the proof as to the time of alienation, assuming that there was such alienation; and that in favor of the judgment, it must be presumed, unless there be direct evidence to the contrary, that the court did not err in giving the instruction in this form, for there may have been no controversy as to the time of alienation, if any was made, though there might have been conflict in the proof as to the fact of alienation, and this the court left to the jury. *Beckman v. McKay*, 14 Cal. 252.

431. In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and eleventh section of the statute to regulate the settlement of estates, the proof as to the right, title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Ib.*

432. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury,

and their verdict, on conflicting testimony, will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

## XXVII. EVIDENCE REVIEWED.

433. Unless the illegal evidence could have no influence upon the verdict, the presumption is that it did have some weight with the jury, and a new trial should be ordered. *Santillan v. Moses*, 1 Cal. 93.

434. Where a special contract for the performance of work is proven, but it is also shown that the contract has been deviated from, the judgment will not be reversed, on the ground that the court below admitted testimony as to the value of the plaintiff's services. *DeBoom v. Priestly*, 1 Cal. 207.

435. The rejection of proper, or admission of improper evidence, if it could in no way materially affect the verdict, will not be cause to set the same aside. *Persse v. Cole*, 1 Cal. 370.

436. The admission of improper testimony is no ground for disturbing a verdict, where it is evident by the verdict itself that no injury was done thereby to the party objecting to its admission. *Priest v. Union Canal Co.*, 6 Cal. 171.

437. The fact of the appellants having objected, in the court below, to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 113.

438. In a statement on appeal, the evidence, if relied upon, must be set out, to enable the appellate court to review the facts. *Dickinson v. Van Horn*, 9 Cal. 211.

439. Where the evidence is not set out in a statement on appeal, the appellate court will presume that the court below had good reason to grant or refuse a new trial. *Dickinson v. Van Horn*, 9 Cal. 211; *People v. York*, 9 Cal. 422.

440. Minor errors in the rulings of the court, and the admission or rejection of evidence, when the whole case is before the supreme court, and we can see that

## Evidence Reviewed.—When Insufficient.

no error that ought to change the result intervenes, are not noticed by us. *Smith v. Brannan*, 13 Cal. 116.

441. The appellate court will not review the evidence on questions of fact, and especially in cases of fraud, where the result depends upon various considerations of greater or less force, to be found in the conduct, dealings and relations of the parties, and various circumstances, tending with more or less directions, to prove or repel the ascription of fraud. *Patrick v. Montader*, 13 Cal. 441.

442. If after a verdict no motion be made for a new trial, the supreme court will not review the testimony. *Liening v. Gould*, 13 Cal. 599.

443. In an equity case the appellate court will not review the evidence, if any proof sustains the judgment. *Pfeiffer v. Riehn*, 13 Cal. 648.

444. Where the motion for new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 543.

445. Where a verdict is supported by any evidence at all, the supreme court will not review an order of the court of original jurisdiction refusing a new trial, unless the order is manifestly an abuse of the legal discretion of the court. *Burnett v. Whitesides*, 15 Cal. 36; *Weaver v. Eureka Lake Co.*, 15 Cal. 273; *Stevens v. Irwin*, 15 Cal. 504.

446. Injury is presumed from evidence erroneously admitted, and the adverse party must clearly show that no injury accrued, or the judgment cannot stand. *Grimes v. Fall*, 15 Cal. 66.

447. In a suit to recover goods on the ground of fraud in the vendee, the admission of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting. *Coghill v. Boring*, 15 Cal. 219.

448. Where there is some evidence to support the verdict, and a motion for new trial is overruled, the supreme court will not interfere. *Baxter v. McKinlay*, 16 Cal. 77.

## 1. When Insufficient.

449. Where the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection taken to its insufficiency, the appellate court will presume that sufficient evidence of a proper character was given to warrant the finding of the jury. *Bunting v. Beideman*, 1 Cal. 183.

450. The appellate court will not affirm a judgment where the verdict is rendered contrary to the evidence. *Acquital v. Crowell*, 1 Cal. 193.

451. The appellate court will decline to review the facts of a case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to the evidence, and that only on appeal from the refusal to grant a new trial. *Griswold v. Sharpe*, 2 Cal. 23.

452. Where the evidence is not set out in a bill of exceptions, or other authentic form, the appellate court will not inquire into the correctness of instructions given by the court below, considered as abstract questions of law. *People v. Lafuente*, 6 Cal. 202.

453. Courts of equity will not interfere to enjoin a judgment not manifestly wrong, simply because of a defect in the evidence. *Pico v. Sunol*, 6 Cal. 295.

454. Where no motion for a new trial is made, this court cannot examine the evidence to see whether it warrants the findings. *Covillaud v. Tanner*, 7 Cal. 40.

455. The appellate court will not disturb the instructions of an inferior court to the jury on the ground that there was no evidence upon which to base them, when there was some evidence, although it may have been slight. *Perlberg v. Gorham*, 10 Cal. 125.

456. To justify an interference with the verdict of a jury in a criminal action, there must be an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor. *People v. Ah Loy*, 10 Cal. 301.

457. The judgment in a cause may be reversed on the ground that the evidence did not justify the verdict. *Easterling v. Power*, 12 Cal. 89.

458. On motion for new trial, on the sole ground that the verdict is not sus-

## When Insufficient.—Evidence of Lost Instrument.

tained by the evidence, the court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. *Mc Cloud v. O'Neill*, 16 Cal. 397.

459. A verdict obtained upon incompetent evidence may be set aside; but this cannot be done if the evidence were admitted without objection, nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. *Ib.*

460. In such cases, that which vitiates the verdict is the error of the court in admitting the evidence, and if the party seeking to set aside the verdict be not in position to take advantage of this error, he cannot object that the evidence was improperly admitted. *Ib.*

## XXVIII. EVIDENCE OF LOST INSTRUMENT.

461. Proof of the loss of an instrument is generally made by an affidavit ex parte, and is not required to be made in court, nor subject to the same rule in ordinary depositions. *McCann v. Beach*, 2 Cal. 29.

462. In case of lost instrument, where no copy has been preserved, it is not to be expected that witnesses can recite its contents word for word. It is sufficient if intelligent witnesses who have read and understood the paper can state it with precision. *Posten v. Rasette*, 5 Cal. 469.

463. Proof of the loss of receipts, without proof of their genuineness, is not a sufficient predicate for the admission of evidence as to their contents. *Reynolds v. Jourdan*, 6 Cal. 112.

464. The rule is well settled, that a party has a right to testify in his own behalf to prove the loss of original documents, as a predicate for the introduction of secondary evidence to prove their contents. *Grass Valley Quartz G. M. Co. v. Stackhouse*, 6 Cal. 414.

465. The admission of secondary evidence of a paper alleged to have been lost, is only allowable on proof of a bona fide diligent search unsuccessfully made for it in the place where it was most likely to be found, and that the party has exhausted in a reasonable degree all the sources of in-

formation and means of discovery naturally suggested by the nature of the case and accessible to the party. *Folsom v. Scott*, 6 Cal. 461.

466. Mere evidence of search is not sufficient, for the search may not have been diligent. *Ib.*

467. Evidence that the library and papers of the party were destroyed by fire, except a few papers, accompanied by evidence of search for the particular paper, is insufficient, for the paper in question may be one of those saved from the fire. *Ib.*

468. Where all the records of a former suit have been destroyed by fire, except the judgment book, parol evidence of the pleadings and issues between the parties is admissible, unless the party offering it introduces at the same time a certified copy of the judgment. *Nims v. Johnson*, 7 Cal. 113.

469. The object of the rule of law which requires the production of the best evidence of which the facts sought to be established are susceptible, is the prevention of fraud; for if a party is in possession of this evidence and withholds it, and seeks to substitute inferior evidence in its place, the presumption naturally arises that the better evidence is withheld for fraudulent purposes, which its production would expose and defeat. *Bagley v. McMickle*, 9 Cal. 446.

470. It is not a matter of course to allow secondary evidence of the contents of an instrument in suit upon proof of its destruction. If the destruction was the result of accident, or was without the agency or consent of the owner, such evidence is generally admissible. But if the destruction was voluntarily and deliberately made by the owner, or with his assent, the admissibility of the evidence will depend upon the cause or motive of the party in effecting or assenting to the destruction. *Ib.*

471. When it appears that this better evidence has been voluntarily and deliberately destroyed, the same presumption arises, and unless met and overcome by a full explanation of the circumstances, it becomes conclusive of a fraudulent design, and secondary evidence is rejected. *Ib.* 447.

472. The cause or motive of the destruction of the original is, then, the controlling



## Evidence of Lost Instrument.—Secondary Evidence.

fact which must determine the admissibility of this evidence in such cases. *Ib.*; *Bagley v. Eaton*, 10 Cal. 148.

473. The same principle, then, which allows the parties to prove by their own testimony the destruction, must necessarily allow them to prove all such facts and circumstances as are requisite to the introduction of the secondary evidence. *Bagley v. McMickle*, 9 Cal. 448.

474. Upon these incidental questions the oath of parties is received, and its admissibility, though generally placed on the ground of necessity to prevent a failure of justice, does not always nor even mostly depend upon that circumstance. *Bagley v. Eaton*, 10 Cal. 146.

475. In this State, the testimony necessary as a predicate for secondary evidence may be given orally, or offered by affidavit. *Ib.* 147.

476. Whatever may have been the reason originally assigned, the true ground upon which the testimony of parties is admitted to prove the destruction of written instruments is, that the testimony relates to matters preliminary and incidental, and is addressed solely to the court, and does not affect the issue to be tried by the jury. *Ib.*

477. It is within the discretion of the court, after hearing the affidavits of the loss of an instrument, to require the oral examination of the parties, as they were present at the trial, in relation to the facts and circumstances detailed by them. *Ib.* 148.

478. Where the record book containing a judgment has been destroyed by fire, secondary evidence is admissible to establish the fact of the existence of such judgment and its contents. *Ames v. Hoy*, 12 Cal. 20.

479. In an action of ejectment, where the plaintiff seeks to establish the loss of a deed under which he derives title, in order to lay the foundation for secondary evidence, the proof of search by the agent or attorney in fact of the plaintiff, and inquiry by him of the grantor, is insufficient, as the plaintiff himself might have possession or control of the original, and in the absence of any other evidence his affidavit should have been offered. *Fallon v. Dougherty*, 12 Cal. 105.

480. Where the original records of a certain district have been destroyed by

fire, and the miners, by a resolution subsequently passed, required the claims to be recorded in a new book, such book may be admitted in evidence on the trial of an ejectment case for a mining claim, to show that the rules of vicinage had been complied with. *McGarity v. Byington*, 12 Cal. 480.

481. To make a copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the court. *Smith v. Brannan*, 13 Cal. 115.

482. As to parol evidence to prove contents of instruments destroyed by fire. *Collier v. Corbett*, 15 Cal. 186.

## XXIX. SECONDARY EVIDENCE.

483. The best evidence of which the case is susceptible must be produced, and a failure to produce such evidence, unless accounted for, raises the presumption that there is something behind which the party is unwilling to disclose. *McCann v. Beach*, 2 Cal. 30.

484. Hearsay and irrelevant testimony should be excluded by referees. *De la Riva v. Berreyesa*, 2 Cal. 196.

485. Hearsay evidence, even with regard to boundaries of parishes or towns, is only received where such boundary is of remote antiquity, and query if ever it should be received to affect a private right. *Vanderslice v. Hanks*, 3 Cal. 45.

486. If the payment of taxes was sought to be proven in order to show no abandonment of the premises, the evidence of the tax collector would be better than the tax receipt, and in his absence only would the receipt properly proven be admissible. *Powell v. Hendricks*, 3 Cal. 430.

487. A newspaper copy of a city ordinance is not the best evidence, although the counsel swore to a search for the original in the book of ordinances handed him by the keeper of the archives. The keeper himself should have been examined as to its whereabouts, to lay the proper predicate for secondary evidence. *Norris v. Russell*, 5 Cal. 250.



## Secondary Evidence.

488. Evidence of a notice of a sale for taxes should be by the notice itself, and secondary evidence should only be given when they have exhausted all search for the notice. *Ib.* 251.

489. Secondary evidence must always be received with caution, and then not until every means is shown to be exhausted in the effort to procure that which is superior. *Norris v. Russell*, 5 Cal. 251; *People v. Clingan*, 5 Cal. 390.

490. Receipts executed by a third party, acknowledging the payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made. *Ford v. Smith*, 5 Cal. 314.

491. A copy of a mortgage is not admissible in evidence where the absence of the original is not accounted for. *Ord v. McKee*, 5 Cal. 516.

492. Where an original instrument proven to be lost has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. *Brotherton v. Mart*, 6 Cal. 488.

493. The admission of hearsay testimony of a fact admitted by both parties is not error. *Williams v. Chadbourne*, 6 Cal. 561.

494. The act of March, 1851, giving to copies of papers from the county recorder's office the like effect as evidence as originals, does not dispense with the production of the originals if they can be obtained; it merely fixes the value of a copy as evidence, when it is necessary to be introduced for the loss of the original. *Macy v. Goodwin*, 6 Cal. 582.

495. Certified copies of grants made by the surveyor-general of the United States are inadmissible in evidence, unless the absence of the originals be accounted for. *Hensley v. Tarpey*, 7 Cal. 289.

496. Courts of this State are not bound to take official notice of the rules adopted for the regulation of the various departments of the federal government, or those established by the board of land commissioners, or surveyor-general of the United States for California, to permit secondary evidence of statements in their possession. *Hensley v. Tarpey*, 7 Cal. 289; *Bagley v. Eaton*, 10 Cal. 147.

497. Secondary evidence of the con-

tents of a deed or grant is admissible where the possession of the original is traced to the possession of a party not in the State. *Gordon v. Searing*, 8 Cal. 50.

498. Where parol evidence is given of certain regulations of miners, and it does not appear until the cross examination of the witness that the regulations were in writing, the proper course to pursue, if any objection is taken to the evidence, is by motion to strike it out. *Kiler v. Kimball*, 10 Cal. 268.

499. If a party permits his antagonist to prove a fact by secondary evidence, he cannot afterwards object that it was not proven by the best. *Goode v. Smith*, 13 Cal. 84.

500. A sworn copy or exemplification of the originals of Mexican archives is evidence, and the originals ought not to be removed from the governmental offices. *Gregory v. McPherson*, 13 Cal. 572.

501. Whenever the acts of public officers are authenticated by their records, the records are evidence of the acts. *Ib.* 573.

502. Upon the proof, therefore, of the existence of the paper in the proper depository of the government, the law permits evidence of a copy proven to have been examined with the original and found a true transcript. *Ib.* 574.

503. The decrees of the board of land commissioners and of the district court are not indispensable to a recovery in ejectment on a grant, but are admissible and conclusive against the government and against those holding by its license or permission. *Ib.*

504. An affidavit by a party to the suit, that the original deed "is not in his possession or under his control" is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded and the grantor being a third person. *Skinker v. Flohr*, 13 Cal. 638.

505. A bill of sale of a mining claim is sufficiently proven when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor is proven; and this, though the subscribing witness was in the State after suit instituted, and near the time of trial, and plaintiff used no efforts to get the testimony of the witness before he left the State. *Jackson v. Feather River and Gibsonville W. Co.*, 14 Cal. 22.

## Secondary Evidence.

506. It is no objection to such bill of sale that it is not under seal, whatever may be the effect of it as evidence. *Ib.*

507. A duly certified copy of a Mexican grant from the United States surveyor general's office, is admissible in evidence against the objection that the absence of the original is not accounted for, but it is admissible only when the original itself would be. The statute simply removes the objection to the copy as secondary evidence. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 550.

508. A certificate of the surveyor general that the paper "is a true and accurate copy" of a document on file in his office is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant. *Ib.*

509. A copy of a muster roll of United States soldiers is not admissible in evidence to prove a man to be a soldier. *People v. Riley*, 15 Cal. 49.

510. A copy of a notice posted on a mining claim to show its extent is not admissible in evidence if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases. *Lombardo v. Ferguson*, 15 Cal. 373.

511. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties, as hearsay evidence upon the location of such lines, after his death. *Morton v. Folger*, 15 Cal. 278.

512. Hence the deposition of Vioget, as to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties. *Ib.* 282.

513. The declarations—on a question of boundary—of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, whether the boundary be one of a general or public interest, or be one between the estates of private proprietors, and their admissibility cannot be affected by the fact that they are reduced to writing and were made under oath in a judicial proceeding. *Ib.* 280.

514. Such evidence is admissible as hearsay evidence from the necessity of the case, which, in this instance, presents itself with peculiar force. The survey by Vioget was made in 1841, when the valley of the Sacramento was occupied almost exclusively by roving tribes of Indians, and no interest was felt in preserving, on the surface of the ground, the evidence of its lines. At that time there were no white men, nor were there for years afterwards, to question Sutter's claim, or to dispute as to its boundaries. Whatever landmarks were originally made must have soon disappeared. Two cities, Sacramento and Marysville, one of them the second in population in the State, are built upon the land supposed to be within the grant to Sutter; and residents of these cities, and occupiers of land lying between them—numbered by thousands—have taken conveyances from Sutter, and expended their money in improvements, relying upon the survey and map of Vioget as evidence that their property is within the grant. *Morton v. Folger*, 15 Cal. 282.

515. Besides, the land is divided into a large number of farms; and the doctrine is, that where the tract originally surveyed was large, and was subsequently divided into numerous farms, the boundary of the original tract serving as a boundary of the several farms, such evidence is admitted on principles similar to those which relate to the boundaries of a manor or parish. *Ib.*

516. In England, such evidence is confined to showing boundaries of parishes, manors, and the like, which are of public interest, and is not allowed to establish the boundary of a private estate, unless the matter be identical with that of a public or quasi public nature. *Ib.* 281.

517. Circumstances under which the depositions of Vioget, now deceased, as to the boundary lines of the Sutter grant are admissible, stated. *Cornwall v. Culver*, 16 Cal. 429.

518. *Morton v. Folger*, (15 Cal. 275) holding the declarations, on a question of boundary, of a deceased person who was in a situation to be acquainted with the matter, and who was, at the time, free from any interest therein, to be admissible, whether the boundary were one of general or public interest, or were one between the estates of private proprietors, affirmed. *Ib.* 428.

Parol Evidence.—To Explain a Consideration.—To Explain a Contract.

519. *Ferris v. Coover*, (10 Cal. 589) holding that the map or plat referred to in the grant to Sutter must be regarded, for the purpose of identifying the land, as part of the grant itself; that the description given in the grant was to be taken in connection with the lines marked on the map, and if any portion was to be rejected, reference would be had to the circumstances under which the grant was made, and the intention of the parties, and to ascertain these, parol evidence was admissible, and that such portions would be rejected, and such construction adopted, as would give effect to that intention, affirmed. *Ib.* 427.

### XXX. PAROL EVIDENCE.

#### 1. To Explain a Consideration.

520. Although want of, or illegality of consideration may be inquired into in an action upon a bill or note between the original parties, by the general mercantile law, the maker is estopped from setting up this defense where the securities have passed into the hands of innocent third parties, unless made void by statute. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

521. The consideration of the assignment of a personal chattel or chose in action may be proven by parol, and a different one established from that expressed in the instrument. *Bennett v. Solomon*, 6 Cal. 138.

522. Under our system, a mortgage is a mere incident to the debt secured by it, and as the consideration for endorsing a note can be gone into at any time, there can be no reason for adopting a more stringent rule as to the assignment of the mortgage securing it. *Ib.*

523. As to instruments under seal generally, the American rule seems to be, that the consideration clause in a deed can be explained by parol proof, at least where the consideration proven is of the same species as that mentioned in the instrument. *Ib.*

524. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the

consideration of a sealed bond may be impeached by the obligor in the same manner as a promissory note by the maker. *Comstock v. Breed*, 12 Cal. 288.

525. In a bill of sale of goods sold and delivered, a recital that the consideration was paid is only prima facie evidence of that fact, which may be rebutted or explained by parol. *Cravens v. Dewey*, 13 Cal. 43.

#### 2. To Explain a Contract.

526. Where a special contract for the performance of work is proven, but it is also shown that the contract has been deviated from, the judgment will not be reversed on the ground that the court below admitted testimony as to the value of the plaintiff's services. *DeBoom v. Priestly*, 1 Cal. 267.

527. Parol evidence is inadmissible to vary the terms of a written contract. *Lenard v. Vischer*, 2 Cal. 38; *Conner v. Clark*, 12 Cal. 170.

528. Parol evidence cannot be admitted to alter or vary the terms of a written contract, nor to explain its terms, if the contract itself seems to express the intention of the parties with sufficient certainty. *Johnson v. Carry*, 2 Cal. 36.

529. The custom of merchants is not admissible in evidence to vary the plain meaning of a written contract. *Corwin v. Patch*, 4 Cal. 204.

530. In an action on quantum meruit, testimony is inadmissible to prove that the original contract has been changed at the request of the defendant, and the value of the extra work performed. *Mowry v. Starbuck*, 4 Cal. 275.

531. In the absence of any ambiguity on the face of the contract, parol evidence is inadmissible for the purpose of varying its terms, or of altering the liability created by it. *Ruiz v. Norton*, 4 Cal. 358.

532. Parol evidence is inadmissible to vary the terms of a written contract, so as to make it embrace property not described therein. *Osborne v. Hendrickson*, 7 Cal. 285; 8 Cal. 32.

533. Where in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract,

## To Explain a Contract.

which the court refused to allow: held, not to be error, as the change in the contract could only be by ordinance. *City of Sacramento v. Kirk*, 7 Cal. 420.

534. Parol evidence of the contents of a written contract between the alleged husband and wife to live together without marriage is inadmissible, except after due notice to produce the contract and refusal to do so, but it is admissible simply to prove the fact that a writing was made in reference to the matter in controversy, without stating the contents of the same. *Poole v. Gerrard*, 9 Cal. 594.

535. But where such evidence is offered simply to prove a fact that a writing was made in reference to the matter in controversy, without stating the contents of the same, it is admissible. *Ib.* 595.

536. The distinctions between patent and latent ambiguities are now regarded as intended to enable the court to distinguish between cases curable and those of incurable uncertainty; to carry the aid of evidence as far as it can go without making for the parties what they did not make for themselves. *Brannan v. Mesick*, 10 Cal. 106.

537. Parol evidence is sometimes admissible to explain, but not to contradict or vary the terms of a written contract; then if words be ambiguous, its meaning may be gathered from contemporaneous facts which intrinsic testimony establishes. *Brannan v. Mesick*, 10 Cal. 106; *Jenny Lind Co. v. Bower*, 11 Cal. 198.

538. Parol evidence is perfectly legitimate to ascertain the meaning attached to words, when words are used in various senses. *Jenny Lind Co. v. Bower*, 11 Cal. 198.

539. Where a party signs a promissory note with the addition to his name of the word trustee, he is personally liable; nor can evidence be admitted to show that at the time of the execution of the note there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. *Conner v. Clark*, 12 Cal. 171.

540. A court of equity will release against mistakes as well as fraud in a deed or contract in writing, and parol evidence is admissible to show it if denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

541. In a bill of sale of goods sold and

delivered, a recital that the consideration was paid is only prima facie evidence of that fact, which may be rebutted or explained by parol. *Cravens v. Dewey*, 13 Cal. 43.

542. Plaintiff assigns to defendant, September 22d, two shares of stock in a mining company, stating in the assignment, "I authorize the transfer to him, (defendant) with all the dividends made after the morning of the twenty-third of September." Both parties expected a dividend on Monday, the twenty-second. The trustees did not, in fact, declare dividends until between noon and one o'clock on Tuesday: held, that the dividends belonged to plaintiff; and that parol evidence was admissible to explain the transaction, and point its meaning. *Brewster v. Lathrop*, 15 Cal. 23.

543. A receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol. *Hawley v. Bader*, 15 Cal. 46.

544. In suit on an account, against B. & S., as a firm, a receipt to B. alone, signed by plaintiffs, "in full for acct's and demands due us at this date," was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on: held, that the parol proof was admissible; that the term "all accounts," may be shown to cover firm as well as personal indebtedness. *Ib.*

545. Parol proof of a written contract and assignment thereof in writing, is not admissible so as to charge the assignee without notice to produce the original and accounting for its loss. *Grimes v. Fall*, 15 Cal. 65.

546. When a note on its face draws two and a half per cent. per month interest, parol evidence is inadmissible to prove that from a certain time the interest had been reduced, by a verbal agreement between the parties, to one and a half per cent. per month. Interest beyond the statutory rate cannot be established by parol. *Adler v. Friedman*, 16 Cal. 140.

547. Parol evidence is admissible to establish a new and distinct agreement upon a new consideration, which takes the place of and is a substitute for the old. In the latter case, however, it must appear that the old agreement is rescinded and abandoned, and it is not competent to show



## To Explain an Instrument.

by parol the incorporation of new terms and conditions. It is obvious, too, that the new agreement must be valid in itself, and such as may be made the basis of an action. *Ib.*

## 3. To Explain an Instrument.

548. A deed is void on account of patent ambiguity which cannot be cured by parol evidence, where the land intended to be conveyed in the instrument is insufficiently described. *Mesick v. Sunderland*, 6 Cal. 312.

549. The law requires that the conveyance of land shall be in writing, but it is not guilty of the solecism of permitting or providing that the land, to which the title passed, may vest in parol, nor need not be in writing. *Ib.*

550. Where the deed to the trustee, and his covenant of warranty, were given in evidence to support the objection to his competency, by which it appeared that the land was conveyed to him absolutely, and that he had conveyed a part, with a covenant of warranty; but it appeared from his examination on his voir dire that the trust existed by parol and that he really had no interest therein, and was indemnified against loss by his warranty: held, that the question as to the admissibility of such parol evidence to contradict or vary the terms of the instrument under seal, could only properly arise in a suit between the trustee and cestui que trust, upon a denial of trust by the grantee, and that for the purpose of the examination the evidence on the voir dire is admissible. *Peralta v. Castro*, 6 Cal. 358.

551. Parol evidence of a deed is admissible to prove the consideration for the agreement to pay a note was the conveyance of the land. *Palmer v. Tripp*, 8 Cal. 97.

552. Parol evidence of the existence of a debt intended to be secured by mortgage is admissible. *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 401.

553. The evidence of the circumstances under which a deed was executed is admissible beyond question. The circumstances place the court in the position of the parties, and enable it to interpret intelligently the language used by them. *Stanley v. Green*, 12 Cal. 162.

554. A court of equity will relieve against mistake as well as fraud in a deed or contract in writing; and parol evidence is admissible to show, if it be denied in the answer. *Wagenblast v. Washburn*, 12 Cal. 212.

555. Where a mistake appears upon the face of the instrument itself courts of equity will correct the mistake without evidence aliunde. *Ib.*

556. Parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage. *Pierce v. Robinson*, 13 Cal. 125; overruling *Lee v. Evans*, 8 Cal. 434; *Low v. Evans*, 9 Cal. 548.

557. Evidence of the circumstances and relations which created a mortgage of a deed absolute is admitted not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms. *Pierce v. Robinson*, 13 Cal. 125, 131.

558. The rule which refuses the admission of parol evidence to contradict or vary written instruments is directed to the language employed by the parties, which cannot be qualified, but must be left to speak for itself. *Ib.* 126.

559. There is no error in permitting a mistake in the recital of a bond, to be explained and corrected by parol evidence. *Palmer v. Vance*, 13 Cal. 556.

560. Parol evidence is admissible to prove that a deed, absolute upon its face, was intended as a mortgage to secure the payment of the purchase money named. *People v. Irwin*, 14 Cal. 435.

561. Parol evidence is admissible to show that a conveyance or assignment, absolute on its face, was intended as a mortgage. *Johnson v. Sherman*, 15 Cal. 291.

562. Such evidence is admissible not to vary the language of the instrument, but to explain the character of the transaction; not to ascertain the meaning of the terms of the instrument, but to show the purpose for which the instrument was given. *Ib.*

563. Parol evidence is admissible not only as between the parties to the instrument, but where third persons were concerned, if no trust or confidence had been reposed upon the absolute form of the instrument, and they had not been thereby misled. *Ib.* 293.



## Exception.

564. If a conveyance from a son to his father did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Russ v. Mebius*, 16 Cal. 355.

## EXCEPTION.

1. It devolves upon the plaintiff, on the settlement of the bill, to see that all the evidence material for him in sustaining the decision complained of is inserted in the bill of exceptions. *Ringgold v. Haven*, 1 Cal. 115; *People v. Lafuente*, 6 Cal. 202.

2. Where there has been no objection raised or exception taken to the insufficiency of the evidence, this court would presume that sufficient evidence of a proper character was given to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

3. If a party desires to bring the rulings of a district judge, during the progress of the trial, under review in the appellate court, he must make out a statement of facts, or a bill of exceptions. *Gunter v. Geary*, 1 Cal. 464.

4. The proper mode of reserving questions of law arising upon the facts, is to ask the court to decide the law as counsel may desire, and upon a refusal, to have it noted in the bill of exceptions. *Griswold v. Sharpe*, 2 Cal. 23.

5. The report of a referee should be taken advantage of by filing written objections to the entry of judgments thereon, or by a motion for a new trial setting forth the alleged error. *Porter v. Barling*, 2 Cal. 73.

6. If there be no exception in the report showing that the referee erred in fact, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot distrust the report, and an order granting a new trial in such case will not be reversed. *Tyson v. Wells*, 2 Cal. 130.

7. Exceptions must be taken to the rulings of a referee during the trial, and certified by him. *Ib.*

8. If the report of a referee is not made immediately after the close of the testimony, it is deemed excepted to. *Headley v. Reed*, 2 Cal. 325.

9. There is nothing in the statute which requires that exceptions to depositions shall be filed before the time of trial. The objection can be made at any time before they are read in evidence. *Dye v. Bailey*, 2 Cal. 384.

10. Errors which are relied upon must be set forth clearly and affirmatively. *Rabe v. Wells*, 3 Cal. 151.

11. The sole object of a bill of exceptions is to make a record of the special action of the court of what is not record by the general law. But that which is a record already, cannot receive any higher degree of sanction by being made record a second time. *Parsons v. Davis*, 3 Cal. 425.

12. It is not necessary to embody matter of record in a bill of exceptions. *Johnson v. Sepulveda*, 5 Cal. 151.

13. An appeal can be heard upon a bill of exceptions taken at the trial, if signed by the judge. *Ib.*

14. Courts will require an objection to the sufficiency of evidence to be made at the time the same is offered to be introduced, so that a party may have the opportunity of supplying the necessary evidence. *Goodale v. West*, 5 Cal. 341.

15. Errors cannot be relied on in an appellate court, which are not taken advantage of and excepted to in the court below. *Morgan v. Hugg*, 5 Cal. 410; *Covillaud v. Tanner*, 7 Cal. 39; *Potter v. Carney*, 8 Cal. 574.

16. A trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions and certified by the referee. *Goodrich v. City of Marysville*, 5 Cal. 431; *Phelps v. Peabody*, 7 Cal. 52.

17. Exceptions to the admissibility of a deed in evidence must be taken advantage of at nisi prius. *Posten v. Rasette*, 5 Cal. 468; *Pearson v. Snodgrass*, 5 Cal. 479.

18. Affidavits as to the incompetency of a juror must be embodied in a bill of exceptions to be reviewed by the appellate court. *People v. Stonecipher*, 6 Cal. 411.

19. The fact that a bill of exceptions was not signed until more than ten days

## Exception.

after the trial, cannot defeat a party's right to appeal. *People v. Martin*, 6 Cal. 478.

20. A general objection to the admissibility of evidence is insufficient. *People v. Apple*, 7 Cal. 290; *Kiler v. Kimball*, 12 Cal. 268; *Martin v. Travers*, 12 Cal. 245.

21. A party cannot take his chances for a verdict on instructions given or refused without exceptions taken, and then after verdict except to the action of the court upon motion for a new trial. *Letter v. Putney*, 7 Cal. 423.

22. Where no exception is taken to the order of the court below overruling a motion to set aside the judgment and quash the execution, such order cannot be reviewed by this court. *Smith v. Curtis*, 7 Cal. 587.

23. In an application for a mandamus, to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where the district judge, in his answer, avers that he has signed a true bill of exceptions, and the one presented by the relator is not a true bill: held, that the relator is not entitled to a jury to try the issue, whether it is correct or not. *People v. Judge of the Tenth Judicial District*, 9 Cal. 20.

24. Where the deposition of a witness is taken, objections to his competency must be taken at the time, and not reserved till the trial, or they will be deemed waived. *Jones v. Love*, 9 Cal. 71.

25. When the referee excludes proper testimony, or admits improper evidence, or does any other act materially affecting the rights of either party during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Branger v. Chevalier*, 9 Cal. 362.

26. The granting of a nonsuit on the facts is a question of law, and if the proper exceptions be taken, may be reviewed on appeal without motion for a new trial. *Cravens v. Dewey*, 13 Cal. 42.

27. Where no grounds or reasons are stated, on motions for nonsuit and new trial, and no exceptions taken to instructions of the court, errors cannot be assigned. *Holverstot v. Bugby*, 13 Cal. 44.

28. For an error of law excepted to, an appeal lies without motion for a new trial. *Rice v. Gashirie*, 13 Cal. 54.

29. When it appears from a bill of exceptions, signed by the judge, that the

motion for a new trial was heard on statement, counter statement and affidavit, it cannot be objected that the statement was not settled. *Williams v. Gregory*, 9 Cal. 76.

30. If a party permits his antagonist to prove a fact by secondary evidence, he cannot afterwards object that it was not proven by the best. *Goode v. Smith*, 13 Cal. 84.

31. It has been the practice, on appeal, to examine the case only upon the errors assigned by the appellant, and not to look into the exceptions taken by respondent. *Jackson v. Feather River and Gibsonville W. Co.*, 14 Cal. 21; *Seaward v. Malotte*, 15 Cal. 307.

32. Where there is no bill of exceptions and no statement, the ruling of the court upon questions of law during the trial cannot be sought from the evidence as taken down by the clerk, neither from the act of 1850 nor 1851. *Castro v. Armesti*, 14 Cal. 38.

33. A certificate of the judge who tried the cause, made eight years after the trial, that he believed the exceptions taken were correctly noted in the clerk's minutes of the evidence, cannot supply the place of a bill of exceptions. *Ib.* 39.

34. A statement and bill of exceptions in the statute on the subject of appeal mean the same thing. *People v. Lee*, 14 Cal. 510.

35. When the judge cannot be found, the proposed statement or bill in a criminal case may be delivered to the clerk of the court for him, the clerk's office being the proper place for the deposit of the papers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt, and hand it to the judge at the earliest convenient opportunity. *Ib.* 512.

36. Where plaintiffs having excepted to the ruling of the court excluding certain evidence take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exceptions taken. Objections to the introduction of evidence confined on appeal to the grounds taken below. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 549.

37. An exception, showing that the court ruled out the proffered statements of the vendor of personal property, subse-

## Exception.—Execution in general.

quent to his sale, without showing what the statements were, is insufficient. The exception must show the statements to have some pertinency to the matters in issue. *Cohn v. Mulford*, 15 Cal. 52.

38. Where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving and refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

39. An objection that the court below directed the jury to find specially as to a particular fact comes too late, if made in the supreme court for the first time, it not appearing that the party objecting was injured by the direction. *People v. Chu Quong*, 15 Cal. 333.

40. In ejectment, the court having admitted in evidence, as sufficiently proven, the mesne conveyance through which plaintiff traced title—the defendants being mere trespassers—charged the jury that “the written evidence of title, together with the admissions of the parties, authorized them to find for plaintiff, since the execution of the papers had been passed upon by the court:” held, to be no objection to this instruction that it does not leave the execution and delivery of the conveyance to the jury; that the sufficiency of their execution was a matter addressed solely to the court, and that—no question being raised during the trial as to their delivery, and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an announcement of the law as to the effect of the conveyance and of the admission of the defendants: held, further, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no such objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Stark v. Barrett*, 15 Cal. 372.

41. An objection that one of the counts in a complaint is an equitable cause of action, and should not be tried by a jury, must be taken at the time, and cannot be urged on appeal if not so taken. *Baker v. Joseph*, 16 Cal. 177.

42. Where the objection to impeaching

evidence was general, and the court excluded the testimony without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below; and the appellant must show error to his prejudice by putting his exceptions in the proper shape. *Ib.* 179.

43. If exceptions to the rulings below be not taken at the time, they cannot be urged on appeal. *McCartney v. Fitz Henry*, 16 Cal. 186.

44. Where the court below charged the jury, among other things, that if they found for plaintiff, he was entitled to recover the value of the use and occupation from October, 1853—a period long anterior to the commencement of the action, the complaint not containing any averment as to the time when plaintiff’s title accrued or existed, etc.—and the defendant excepted generally to all of the charge, and followed this general exception up by a specification of certain portions of the charge to which his exception was particularly directed: held, that this general exception did not cover the charge as to damages. *Payne v. Treadwell*, 16 Cal. 248.

See ASSIGNMENT OF ERRORS, APPEAL, IV, V.

## EXECUTION.

- I. In general.
- II. Sale on Execution.
- III. Levy.
- IV. Writ of Execution.
  - I. Return upon the Writ.
- V. Supplementary Proceedings.
- VI. Exemption from Execution.

## I. IN GENERAL.

1. The facts upon which a judgment of fraud is found must appear affirmatively in a judgment, in order to authorize an arrest on final process. *Mattoon v. Eder*, 6 Cal. 60.

2. A confession of judgment to a bona

## In general.

fide creditor, and the issuance of execution and making a levy under the same by the judgment debtor without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating his attachment, is void as to the attaching creditors. *Ryan v. Daly*, 6 Cal. 239.

3. An execution can only be issued upon a judgment obtained before a justice of the peace, within five years after the entry of the judgment. *White v. Clark*, 8 Cal. 513.

4. Where an appellant failed to perfect his appeal bond by justification of his sureties, it was error for the judge of the court to make an order of supersedeas staying the execution. *Mokelumne Hill Canal & M. Co. v. Woodbury*, 10 Cal. 188.

5. A mandamus will not lie against the clerk of the district court to compel him to issue execution on a money judgment rendered in the court of which he is clerk. The remedy is on his bond. *Goodwin v. Glazer*, 10 Cal. 333; *Miller v. Sanderson*, 10 Cal. 490.

6. Where an execution on a judgment for money is not stayed by the statutory undertaking on appeal, a sale may be had under the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.

7. An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis v. Robinson*, 10 Cal. 412.

8. To authorize an arrest upon execution against a defendant on a judgment recovered, the fraud must be alleged in the complaint, and passed upon by the jury, and stated in the judgment. *Ib.*

9. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H. as sheriff. M. J., wife of J., claimed the property as a sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking as required by section one hundred and two of the code. The undertaking was executed by defendant R. & S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained a judgment in the attachment suit against J. November 30th, 1854. On the 18th of February, 1855, executions in favor of

other creditors of J. coming into the hands of H. as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 277.

10. Where a sheriff, having an execution against S. & M., levied it upon certain goods, the property of S. & M., placed them in the hands of W. as keeper, and subsequently the execution was quashed; and between that time and the issue and levy of a new execution, W., who still remained in possession of the goods, purchased the goods of S. & M.: held, that such purchase is valid, and vested the property in W. *Wellington v. Sedgwick*, 12 Cal. 475.

11. Where the property seized by a sheriff is in the possession of a stranger to the execution, it is not sufficient as a justification of the seizure to prove the execution only; the judgment upon which it was issued should also be proved. *Paige v. O'Neal*, 12 Cal. 495.

12. In an action on an attachment release bond, execution against the judgment debtor is not a condition precedent to suit on the bond. *Palmer v. Vance*, 13 Cal. 557.

13. The improper issuance of a second execution is no ground for equitable interference. Such irregularities must be corrected by the court issuing the writ. *Gregory v. Ford*, 14 Cal. 143.

14. Relief against a judgment obtained against an insolvent previous to his discharge may also be granted by a perpetual stay of execution, or by setting it aside, or by any other order requisite to protect the rights of the parties. *Imlay v. Carpentier*, 14 Cal. 177.

15. Where the sheriff or constable seizes the property of one man under an execution against another, he is a trespasser, and liable on his official bond. *Van Pelt v. Littler*, 14 Cal. 200.

16. The one hundred and forty-first section of the act regulating estates of deceased persons applies only to money judgments, or to such portions of other judgments as require for their satisfaction execution against the general property of the deceased. *Cornell v. Buckelew*, 14 Cal. 641.



## In general.—Sale on Execution.

17. The provision of the code authorizing the supreme court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court from exercising the same power. *Reynolds v. Harris*, 14 Cal. 677.

18. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved *all* of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject as his to the process because of the fraud. *Walker v. Woods*, 15 Cal. 69.

19. But even if any proof aliunde of C.'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was *prima facie* sufficient to admit the attachment papers in proof. *Ib.*

20. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such jurisdiction. *Ib.*

21. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the

indebtedness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by plaintiff. *Ib.*

22. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

23. An action will lie on a judgment obtained in a justice's court in this State, even when the time within which an execution could be issued on such judgment has expired. *Stuart v. Lander*, 16 Cal. 375.

24. Section two hundred and forty-six of the practice act authorizes, in foreclosure suits, a personal judgment against the mortgagor in addition to the relief usually granted, and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien until the amount of the deficiency to be recovered has been ascertained and fixed. *Chapin v. Broder*, 16 Cal. 420.

25. In this latter case, the lien does not commence to run until the deficiency be ascertained and an execution can be issued therefor. *Ib.*

## II. SALE ON EXECUTION.

26. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring v. Illsley*, 1 Cal. 29.

27. All the public streets of San Francisco running into the water, as laid down on the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the



## Sale on Execution.

free enjoyment of the public and exempt from executions against the city. *Wood v. City of San Francisco*, 4 Cal. 193.

28. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sales. *Duprey v. Moran*, 4 Cal. 196.

29. The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Gaskill v. Moore*, 4 Cal. 235.

30. A purchaser at sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. *People v. Hays*, 5 Cal. 68.

31. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against an officer; but it is not sufficient to set aside or avoid a sale. *Smith v. Randall*, 6 Cal. 50.

32. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money on the ground that he is entitled to it as oldest judgment and execution creditor, especially where there is a contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

33. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption. *Harlan v. Smith*, 6 Cal. 174.

34. A party who purchases stock of an incorporation sold under execution, knowing they were under hypothecation, is chargeable with notice of the fact, and takes subject to the claim of the pledge. *Weston v. Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

35. Great inadequacy of consideration paid for land is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof on execution at a constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

36. A purchaser at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of six months allowed for redemption, as often as the

rent becomes due, under the terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 46.

37. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey v. Dunlap*, 7 Cal. 162.

38. Tenants in common, or partners, have a right to acquire their cotenant's or copartner's interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter v. Laffan*, 7 Cal. 593.

39. Where a party purchased real estate at an execution sale upon the faith of the representations of a judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 8 Cal. 25.

40. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch v. Sullivan*, 8 Cal. 197; contra *Hart v. Burnett*. See *Holladay v. Frisbie*, 15 Cal. 616; *Wheeler v. Miller*, 16 Cal. 125.

41. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray v. Hawes*, 8 Cal. 568.

42. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up as a defense that no sufficient notice of the sale was given. *Harvey v. Fisk*, 9 Cal. 94.

43. The title to real estate sold under execution does not pass until the execution and delivery of the sheriff's deed. *Anthony v. Wessel*, 9 Cal. 104.

44. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. *Knight v. Fair*, 9 Cal. 118.

45. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 9 Cal. 142.

46. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of defects in the judgment upon which the execution issued. *Wells v. Stout*, 9 Cal. 497.

## Sale on Execution.

47. An execution issued under a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Ib.*

48. A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. *Alverson v. Jones*, 10 Cal. 12.

49. A party may enjoin a sale of his property on execution against another for this other's debt. *Hickman v. O'Neal*, 10 Cal. 294.

50. D. purchased a lot of land at sheriff's sale on execution, entered and improved the same. Afterwards D. removed the buildings. On that day the defendants in execution sold the premises to T., who then redeemed the lot, and then sued D. for the value of the buildings: held, that as there was no evidence that the buildings were attached to the premises sold, T. cannot recover. *Tyler v. Decker*, 10 Cal. 436.

51. Until a consummation of a sale of real property upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. Until then the purchaser possesses only a right to an estate, which may afterwards be perfected by conveyance. *Cummings v. Coe*, 10 Cal. 531.

52. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris v. Reynolds*, 13 Cal. 516.

53. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey v. Abbott*, 13 Cal. 619.

54. S. & B. in 1854 execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same

recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown v. Winter*, 14 Cal. 34.

55. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to entitle the holder to redeem as such successor, at least not until the expiration of the six months. *Haskell v. Manlove*, 14 Cal. 58.

56. On mandamus by the assignee of a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee of the execution debtor after the sale cannot be tried. The right to the deed is the only matter in controversy. *People v. Irwin*, 14 Cal. 436.

57. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterwards reversed. *Reynolds v. Harris*, 14 Cal. 679.

58. If, on sale under judgment, the plaintiff buys in the property, he must restore it to the defendant on reversal of the judgment. Otherwise, as to a stranger, a bona fide purchaser without notice. He is not within the rule. But to constitute himself such purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a sheriff's deed. *Ib.* 680.

59. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done the assignee. *Ib.* 681.

## Sale on Execution.—Levy.

60. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

61. The municipal lands to which the city of San Francisco succeeded as a pueblo were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution. *Hart v. Burnett*, 15 Cal. 616.

62. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Holladay v. Frisbie*, 15 Cal. 636; *Wheeler v. Miller*, 16 Cal. 125.

63. *Smith v. Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay v. Frisbie*, 15 Cal. 637.

64. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold, previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the

commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 125.

65. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

## III. LEVY.

66. If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Loring v. Illsley*, 1 Cal. 31.

67. A being indebted to B, delivered to him merchandise as security for his debt, which he was to sell, and apply the proceeds to its payment. A sheriff levied upon the property as belonging to A; held, that the merchandise was not subject to seizure under an execution against A, without first paying the debt of B. *Swanson v. Sublette*, 1 Cal. 124.

68. In an action against a sheriff by A, for seizing the property of A on an execution against B: held, that no demand was necessary before bringing suit, if the officer was previously informed of the claim. *Ledley v. Hays*, 1 Cal. 161.

69. The assent of an ordinary agent who had general charge of his principal's affairs during his temporary absence, will not justify the sheriff who holds an execution against a third person in levying upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 578.

70. Money in the hands of the sheriff collected on execution is not a debt due to plaintiff in execution, but is in the custody of the law until properly disposed of, and it is not the subject of attachment or garnishment, nor can the sheriff attach money collected on execution in his own hands. *Olymer v. Willis*, 3 Cal. 365.

71. A conveyed land to B, and allowed part of the purchase money to remain unpaid; B afterwards sold part of the land to C, who has no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A obtained

## Levy.

judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: held, that the purchaser at sheriff's sale did not acquire title to the mortgaged debt due from C to B *Bryan v. Sharp*, 4 Cal. 351.

72. Where an order of court directed the sheriff to seize certain specific property, and the property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. *Rhodes v. Patterson*, 3 Cal. 470.

73. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 44; *Wellington v. Sedgwick*, 12 Cal. 476; *Paige v. O'Neal*, 12 Cal. 495.

74. Under our statute an execution affects property only from the time of levy, and service of a copy of an execution constitutes no lien on property capable of manual delivery. *Johnson v. Gorham*, 6 Cal. 196; *Dutertre v. Driard*, 7 Cal. 551.

75. A levy under execution on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 30.

76. A levy under execution upon a county's revenues in the hands of the treasurer is illegal and void. *Gilman v. Contra Costa County*, 8 Cal. 58.

77. Notice of a motion to set aside an execution and a levy under it, will not operate as a stay of proceedings. *Bryan v. Berry*, 8 Cal. 134.

78. The writ of venditioni exponas is a simple order of the court to sell property already levied on under execution. It confers no power to levy; and a recital in the return that the sheriff had levied and sold by virtue of the writ, is an unimportant error when it appears that the levy had been previously made under execution. *Welch v. Sullivan*, 8 Cal. 186.

79. The issuing and levy of an execution before the lien of the judgment upon which the execution issued expires, will not operate to prolong the lien of the judgment beyond the time limited in section two hundred and four of the code. *Isaac v. Swift*, 10 Cal. 81.

80. The levy and sale must be made

within the period of two years limited by statute. *Ib.*

81. Where an execution debtor owns property jointly with another, a sheriff who has the execution has the right to levy on such property and take it into possession for the purpose of subjecting it to sale. *Waldman v. Broder*, 10 Cal. 380; *Jones v. Thompson*, 12 Cal. 198.

82. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the sheriff, who had the execution, in going on the ground and digging up the soil, and taking the gold it contained. *Rowe v. Bradley*, 12 Cal. 230.

83. If the sheriff levies upon the property of a person not a party to the execution, he is responsible to an action at law. *Murkley v. Rand*, 12 Cal. 277.

84. Plaintiff was a surety on a contract for the payment of money upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon the property of the principal sufferer to satisfy the same. After the levy the sheriff took the principal's note by consent, and released the levy: held, that this release discharged the surety. *Morley v. Dickinson*, 12 Cal. 536.

85. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall v. Blen*, 13 Cal. 22.

86. Query. Whether a chose in action, as a note or judgment and the like, calling for a definite sum, without any condition, is the subject of levy and sale, and if it can be sold without actual possession by the officer of the chose. *Ib.*

87. The mere fact that an individual creditor obtains judgment, issues execution and levies on firm property, gives him no right to the property as against firm creditors who have not yet obtained judgment. *Conroy v. Woods*, 13 Cal. 631.



## IV. WRIT OF EXECUTION.

88. Where a case is remitted from the supreme court to a district court, the clerk of the latter may issue an execution for the costs accrued thereon, without the order of the district court, nor can the district court prevent the immediate execution of the judgment. *City of Marysville v. Buchanan*, 3 Cal. 213.

89. The time in which a sheriff makes return to an execution does not affect the validity of the execution or of a sale under it. *Low v. Adams*, 6 Cal. 281.

90. Property in the custody of the law is not liable to seizure without an order from the court having charge thereof. *Yuba County v. Adams*, 7 Cal. 37.

91. On the election of a new sheriff, the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office. *People v. Boring*, 8 Cal. 407; *Anthony v. Wessel*, 9 Cal. 104.

92. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney v. Butterfield*, 13 Cal. 340.

93. In the service of process the sheriff is responsible only for unseasonably or not seasonably executing it. He is not bound to start on the instant of receiving a writ to execute it, without regard to anything else. *Ib.*

94. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

95. Plaintiff was walking along the street with a bag of gold coin in his hand. Two of defendants, a deputy sheriff and constable, seized him, and by force took the bag of coin from him. Plaintiff sues for the seizure and conversion of the coin. Defendants gave in evidence three judgments and executions, in favor of three of their number, and against Alfred A. Green, brother of plaintiff, and offered to

prove that the bag of coin was the property of Alfred, and was seized under these executions, and applied to their satisfaction. The court excluded the proof: held, that such exclusion was erroneous; that plaintiff could claim no exemption from the seizure of coin held, as this was, in his hand, as he might, perhaps, in reference to money upon his person. The coin in the hand was, like a horse held by the bridle, subject to seizure on execution against its owner. *Green v. Palmer*, 15 Cal. 418.

## 1. Return upon the Writ.

96. A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. *Egery v. Buchanan*, 5 Cal. 56.

97. A sheriff failing to pay over money collected on execution, should be prosecuted for a false return. *Ib.*

98. The title of a purchaser of real estate on execution at sheriff's sale does not depend upon the return of the officer of the writ. *Cloud v. El Dorado County*, 12 Cal. 133.

99. A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, endorses it on the execution, and then returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 666.

## V. SUPPLEMENTARY PROCEEDINGS.

100. Proceedings supplementary to execution, as laid down by the code, were intended as a substitute for what was called a creditor's bill. *Adams v. Hackett*, 7 Cal. 201.

101. The fact that a referee in the proceedings supplementary to execution was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Ib.*

102. As soon as proceedings supplementary to execution were instituted be-



## Exemption from Execution.

fore the district court, it obtained jurisdiction over the case and had authority to proceed and apply the property of the judgment debtors to the satisfaction of the judgments of the plaintiffs. *Ib.* 202.

## VI. EXEMPTION FROM EXECUTION.

103. In the act which exempts certain articles from execution, the term "wagon" is intended to mean a common vehicle for the transportation of goods, wares and merchandise. *Quigley v. Gorham*, 5 Cal. 418.

104. A sale under execution of a house claimed as a homestead by the defendant in execution, and ascertained by appraisal to be worth over \$5,000, should not be made until an exact appraisal of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein. *Gary v. Easterbrook*, 5 Cal. 459.

105. A ferry is a franchise, and not the subject of levy, sale or delivery under execution. *Monroe v. Thomas*, 5 Cal. 471; *Thomas v. Armstrong*, 7 Cal. 287.

106. A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets up that the sheriff was in possession of a certain execution against plaintiff, Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of plaintiffs, and averring damages in the sum of \$2,000, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. *Kendall v. Clarke*, 10 Cal. 18.

107. Where two mules are claimed as exempt from sale on execution, it must be shown that the party claiming the mules habitually earned his living by the use of the animals in question, or that he is one of the persons mentioned in the statute. *Calhoun v. Knight*, 10 Cal. 394.

108. The private property of an inhabitant of a county is not liable to seizure and sale on execution for the satisfaction of a judgment recovered against the county. *Kimeric v. Gilman*, 10 Cal. 408.

109. No execution can issue upon a judgment rendered against a county. When a judgment is rendered against a county,

it is the duty of the supervisors to order it paid, or resort may be had to a mandamus. *Ib.* 410.

110. Where certain household furniture is claimed as exempt from execution, the fact that the number of beds claimed—six in all—is greater than is required for the immediate and constant use of the family, is no objection. Such a construction of the statute would be too narrow. *Harwell v. Parsons*, 15 Cal. 267.

111. Where a party was absent in San Francisco at the time such furniture was sold on execution, on account of sickness in his family, it is sufficient excuse for not claiming the exemption at the time, the defendant, plaintiff in execution, being aware of such claim, it having been made on a previous seizure. *Ib.*

112. In suit against plaintiff in execution, for the value of household furniture sold thereunder, as being exempt, defendant offered to show that plaintiff agreed to place the property in the hands of a third person, to be sold for the benefit of said defendant, the creditor: held, that the evidence was not admissible, because such agreement does not necessarily waive the exemption from forced sale. *Ib.*

113. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ackley v. Chamberlain*, 16 Cal. 182.

## EXECUTIVE.

See GOVERNOR.

## EXECUTORS.

See ADMINISTRATORS.

## EXEMPLIFICATION.

1. A certificate of exemplification of a judgment rendered in another State, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient under the act of Congress of May 26th, 1790, to sustain an action upon the judgment in another State. *Thompson v. Manrow*, 1 Cal. 428; *Parks v. Williams*, 7 Cal. 249.

2. A certificate of the proceedings of the surrogate's court of New York, which states that A. W. Bradford is surrogate of the city and county of New York, and acting clerk of the surrogate's court; that he has compared the transcript of the papers with the original records in the matter of the estate of William Young, and find the same to be correct; and that the certificate is in due form of law; in testimony whereof he sets his hand and seal of office—is sufficient. *Low v. Burrows*, 12 Cal. 188.

3. If by law or usage having the force of law, a California grant was matter of record, then it would seem to follow that the record is proof of the grant, especially where the record is an exemplification of the grant. *Gregory v. McPherson*, 13 Cal. 573.

## EXPEDIENTE.

1. An expediente consisting of the petition of the grantee and plat, the reference for information, the report, the act or decree of concession, the reference to the departmental assembly for approval, the approval and the grant, filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee. *Gregory v. McPherson*, 13 Cal. 570.

## EXPERT.

1. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services, by a witness who is not an attorney. *Hart v. Vidal*, 6 Cal. 57.

2. The opinions as to the value of labor upon a contract, by a person not an expert, cannot be received as evidence. *Reynolds v. Jourdan*, 6 Cal. 111.

3. The opinions of witnesses are generally admissible only when they relate to matters of science or art, or to skill in some particular profession or business. *Hastings v. Steamer Uncle Sam*, 10 Cal. 342.

## EXTRADITION.

1. The judiciary have jurisdiction by habeas corpus to investigate cases, where a party is arrested as a fugitive from justice, escaped from another State, but have no control over the executive discretion in surrendering fugitives from justice, nor can they compel a surrender in such case; yet the executive having acted, that discretion may be examined into, in every case where the liberty of the subject is involved. *Ex parte Manchester*, 5 Cal. 238.

2. The governor of the State issuing the requisition for the fugitive, is the only proper judge of the authority of the affidavit; and the judge on habeas corpus cannot go behind his action to inquire whether the affidavit was a forgery; it is sufficient if the requisition certifies that the affidavit is "duly authenticated according to the laws of the State." *Id.*

## FACTOR.

1. The purchase of property by a factor in his own name makes him to all the world the apparent owner, and so far as

## Factor—Fees.

affects the rights of third persons, his power is unlimited. He has the right to sell or pledge. *Leet v. Wadsworth*, 5 Cal. 405.

2. Where goods are in possession of a factor, whose usual business it is to buy and sell goods on his own account, and who is clothed with the external evidences of ownership of the peculiar goods, such apparent ownership gives him the power to sell or pledge. *Hutchinson v. Bours*, 6 Cal. 385.

3. The rule as to the lack of power in factors to pledge, applies to technical factors, whose notorious employment it is to sell goods of others, consigned to them for that purpose. *Ib.*

4. Where there is nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in a particular case. *Glidden v. Lucas*, 7 Cal. 29.

5. The rule that a factor cannot pledge the goods of his principal is, in this State, confined to technical factors, when the rights of third parties are involved. *Horr v. Barker*, 11 Cal. 401.

See AGENT, BAILMENT.

## FEDERAL COURTS.

See COURTS.

## FEES.

1. In an action against defendant to recover his fees in payment of services of the plaintiff, as arbitrator, that he, as well as the other party in the action, was liable to the plaintiff, and that he was entitled to recover upon a promise made by the defendant to pay for his services, in case he would deliver to them the award which he did. *Young v. Starkey*, 1 Cal. 427.

2. One of the conditions upon which an

appeal is allowed from a justice's court, is the payment of the fees of the justice. *McDermott v. Douglas*, 5 Cal. 89; *Bray v. Redman*, 6 Cal. 287.

3. An act regulating fees in office is not an act of a general nature, within the meaning of the constitution. It is entirely of a specific character. *Ryan v. Johnson*, 5 Cal. 87.

4. On May 1st, 1851, two acts were passed by the legislature; one an act to regulate proceedings in criminal cases, the other, an act to regulate fees in office; both fixing the fees of the clerk in criminal cases, and essentially different: held, that the latter act must govern, as the subject of fees was the sole object of that act, and the fixing of fees in the former act being a mere incident. *Dobbins v. Supervisors Yuba County*, 5 Cal. 415.

5. An offer to pay the justice his fees on appeal so soon as the appeal papers are ready to transmit to the county court, is not a sufficient tender under the statute; they must be tendered without condition. *People v. Harris*, 9 Cal. 572.

6. The payment or tender of the fees does not strictly constitute a condition of appeal, but a condition precedent to sending up the papers; but this may be waived by the justice, or the fees may be paid at any time, so as to bring the case up before the county court within the period limited by the rules of the court. *Ib.* 573.

7. Prior to the consolidation act, the recorder of the city of Sacramento was entitled to collect the same fees as a justice for services in criminal cases; but he was bound to pay them over to the city treasurer. *Curtis v. Sacramento County*, 13 Cal. 292.

8. The legislature having vested certain duties in a public officer, for whose services compensation is allowed, may take those duties and the fees from the office before the expiration of the term, and confer them upon another officer. *People v. Squires*, 14 Cal. 15.

9. Under the act of 1857, (ch. 236) regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepaid and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were

served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmondson v. Mason*, 16 Cal. 388.

10. The clerk is entitled to charge, under that act, fees for certified copies of summons and injunction, if the copies, though prepared by plaintiff, were certified by the clerk at plaintiff's request. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk. *Ib.*

11. Under the practice act, as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited, waived his right to costs, whether they were clerk's and sheriff's fees or other costs; and in the absence of such memorandum, the clerk had no power to include costs in the judgment. *Chapin v. Broder*, 16 Cal. 418.

12. If the clerk's and sheriff's fees were inserted in the judgment, when not so claimed, the judgment is so far a nullity, and may be attacked collaterally. *Ib.*

See COMPENSATION, COSTS, OFFICE.

## FELONY.

1. If it appear on the examination of a person before a committing magistrate, that the prisoner is guilty of felony, although different from that specified in the warrant of arrest, it is the duty of the officer to commit the prisoner for trial for the offense of which he appears guilty. *People v. Smith*, 1 Cal. 11.

2. The supreme court has no appellate jurisdiction in cases of misdemeanor, or crimes of less degree than felony, and no jurisdiction can be conferred by the legislature in these cases. *People v. Applegate*, 5 Cal. 296; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

3. In cases of felony the prisoner must be present during the whole of his trial, and where depositions are read to a jury during his absence, a new trial will be ordered. *People v. Kohler*, 5 Cal. 72.

4. An indictment charging a felony and setting forth that the defendant was an accessory before the fact, is good under the statute, by which no distinction exists between a principal and an accessory before the fact. *People v. Cryder*, 6 Cal. 23.

5. A deposition taken before an examining magistrate on the preliminary examination of a person charged with the commission of a felony is not admissible on his trial, because the magistrate is not authorized or required to take it, and because taken before the defendant was held to answer. *People v. Garrett*, 6 Cal. 204.

6. Where a trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel by force. *People v. Payne*, 8 Cal. 343.

7. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 16 Cal. 188.

8. Some offenses may be punished either as felonies or as misdemeanors, and in such cases the punishment inflicted must determine the grade of the offense, and the right of appeal depends on the nature and extent of the punishment. *Ib.*

See CRIMES AND CRIMINAL LAW.

## FERRIES.

See BRIDGES AND FERRIES.

## FINDING.

See JUDGMENT.

## FINES.

1. Fines properly imposed in the court of a mayor or recorder of a city, or before any municipal officer of a corporation, must be paid into the treasury of the city or other corporation. *People v. City of Sacramento*, 6 Cal. 425.

2. The act to suppress gaming must be construed with the general act concerning criminal proceedings; and where a fine is imposed on a conviction for gaming, the defendant may be imprisoned to enforce its payment. *People v. Markham*, 7 Cal. 209.

## FIRE.

1. A person who tears down or destroys the house of another in good faith and under the apparent necessity, during a fire, to save the adjacent buildings, and stops the progress of the fire, is not personally liable in an action by the owner of the property destroyed or the goods contained therein. *Dunbar v. City of San Francisco*, 1 Cal. 356; *Correas v. City of San Francisco*, 1 Cal. 452; *Surocco v. Geary*, 3 Cal. 72.

2. A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate, and the private rights of the individual yield to general convenience and the interests of society. *Surocco v. Geary*, 3 Cal. 73.

3. A clause in a lease, exempting the tenant from liability to restore the house in case it should be destroyed by fire, does not relieve him from paying rent in case of such destruction. *Beach v. Farish*, 4 Cal. 340.

4. The declarations of a master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, were admissible in evidence to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop.

*Gerke v. California Steam Nav. Co.*, 9 Cal. 255.

5. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed among other things to find specially as to the negligence of the captain and crew of the steamer, and they found generally for plaintiff, four hundred dollars damages; and also that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good, in the absence of any objection at the time of its rendition, that it was not responsive to the special direction. *Algier v. Steamer Maria*, 14 Cal. 170.

6. The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is prima facie proof of negligence sufficient to go to the jury. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

## FIRE DEPARTMENT OF THE CITY OF SAN FRANCISCO.

1. The fire department of San Francisco is not a mere voluntary association, but it is a branch of the municipal government of that city. *People v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 497.

2. We think it is well settled that a common law certiorari tries nothing but the jurisdiction, and, incidentally, the regularity of the proceedings upon which the jurisdiction depends. *Ib.* 500.

3. While it is well settled at common law, and must be regarded so equally under our statute, that the review under this writ cannot be extended beyond the question of power or jurisdiction, the authorities are not agreed as to what may be considered by the court of review for the purpose of determining this question. *Ib.*

4. The cases are numerous to the effect that the review may be extended to every issue of law and fact involved in the question of jurisdiction, and that not only the



record, but the evidence itself, when necessary for the determination of this question, must be returned. *Ib.*

5. The decision of the board of delegates of the fire department, in the case of a contested election for chief engineer, is a judicial decision, and subject to review by the courts on certiorari. *Ib.*

6. The form and manner of proceeding before the board of delegates in deciding upon a contested election is for the board to determine; and courts will not undertake to say what is or is not sufficient for the board to proceed upon in the first instance. It is requisite simply that at some point of the proceedings it appear that the case is within the terms of the law. *Ib.* 502.

7. Where the contest before the board of delegates was on the sole ground of illegal votes, the board had no power to declare the election void. It should have declared for one or the other of the contestants, and issued a certificate accordingly. *Ib.* 503.

8. Where the board, instead of so deciding, declared the election void, and ordered a new one, the contestant not objecting, the matter of the contested election must be considered finally dismissed; and the board ought to declare the result of the first election, according to the returns then made, and issue a certificate of office. *Ib.* 504.

## FIXTURES.

1. A tenant who puts up machinery for a mill in a house leased, and fastens it by bolts and screws, etc., to the house, has the right to remove it, but as between vendor and vendee, such machinery would be considered as part of the realty. *McGreary v. Osborne*, 9 Cal. 121.

2. Whatever is once annexed to the freehold becomes parcel thereof, and passes with the conveyance of the estate. *Sands v. Pfeiffer*, 10 Cal. 264.

3. A tenant may remove what he has added to the freehold when he can do so without injury to the estate, unless it has become by its manner of addition an in-

tegral part of the original premises. *Ib.*

4. Engine and boilers permanently fastened to the building which had its foundation in the ground, and could not be removed without injury to the premises. *Ib.* 265.

5. D. purchased a lot of land at sheriff's sale on execution, and entered into possession and erected certain buildings thereon. On the 25th of May, 1858, D. removed the buildings. On the same day defendant in execution sold the premises to T., and a day or two after T. redeemed the lot from the sale and then brought suit against D. to recover the value of the buildings: held, that as there was no evidence that the buildings were attached to the soil, T. cannot recover. *Tyler v. Decker*, 10 Cal. 436.

6. A fixture is an article of a personal nature annexed to the freehold and may exist on public land. *Merritt v. Judd*, 14 Cal. 69.

7. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Ib.*

8. Such machinery, when applied to quartz leads, is a trade fixture, removable by the tenant if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the premises under. A right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

9. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

10. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lease. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

11. A general deed of mortgage or of bargain and sale passes the fixtures as part of the freehold. *Ib.*

12. At common law, a bond for a title is in effect a mortgage. The legal title remains in the vendor, and an equity vests

## In general.

in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Ib.*

## FORCIBLE ENTRY AND DETAINER.

- I. In general.
- II. Jurisdiction.
- III. Pleading.
- IV. Evidence.
  - 1. Notice to quit.
- V. Judgment.
- VI. Writ of Restitution.

### I. IN GENERAL.

1. When a party is in quiet and peaceable possession of lands, the law will not sanction any invasion of his rights by force. When he has been restored to the possession of which he was thus improperly deprived, it will then be time to try the issue of title. *Ladd v. Stevenson*, 1 Cal. 21.

2. One tenant in common cannot sustain an action of forcible entry and detainer against his cotenant holding over. He must first resort to a partition of the land in dispute. *Lick v. O'Donnell*, 8 Cal. 63.

3. By the thirteenth section of the act concerning forcible entries and unlawful detainers, it was the intention of the legislature to make the nonpayment of rent work a forfeiture of the estate of the tenant. But to effect this the rent must be demanded on the day it becomes due and at a late hour of the day, and where the record shows no demand of the rent there can be no forfeiture. *Chipman v. Emeric*, 3 Cal. 283; *Gaskill v. Trainer*, 3 Cal. 339.

4. The plaintiff must have an actual, peaceable possession in himself at the time of entry. *Treat v. Stuart*, 5 Cal. 114.

5. A landlord cannot sue in this form in his own name for an unlawful entry upon the possession of his tenant. *Ib.*

6. This remedy is a summary one given by statute to protect the possession, and cannot be extended by implication to any other than the real occupants. *Ib.*

7. By the terms of award, which was decisive, between a landlord and tenant, the latter was to leave the premises on the ninth; held, that the plaintiff had no right to give a notice to quit until the tenth, after which by the act of forcible entry and detainer, the plaintiff had six days to remove, wherefore the action commenced on the tenth was premature. *Ray v. Armstrong*, 4 Cal. 208.

8. The statute provides a remedy for an unlawful entry, as well as a forcible entry, and the policy is doubtless to avoid nice distinctions as to what constitutes force in an entry upon lands. *Moore v. Goslin*, 5 Cal. 266.

9. The statute concerning forcible entry and detainer must be strictly construed, and the possession must be actual, peaceable and exclusive. *House v. Keiser*, 8 Cal. 501.

10. This action can only be maintained by the person ousted; his grantee cannot maintain the action. *House v. Keiser*, 8 Cal. 501; *Dickinson v. Maguire*, 9 Cal. 48.

11. The action of forcible entry and detainer may be maintained in three cases; first, when the entry is forcible; second, when the entry is simply unlawful, and the detainer forcible; third, when the entry was lawful and the holding over forcible. But in all cases there must be something of personal violence, either threatened or actual. *Dickinson v. Maguire*, 9 Cal. 49.

12. When the possession of the premises is demanded of the party, if he by word or act, look or gesture, gives reasonable ground to apprehend the use of force to prevent the rightful claimant from obtaining peaceable possession, this would be sufficient. *Ib.*

13. If a party making an unlawful entry will peaceably quit the premises when demanded, he will be only responsible for a trespass, and not for a forcible detainer. *Ib.* 50.

14. The object of the statute concerning forcible entries is to afford relief to all parties whose possession is disturbed by

In general.

force and violence. *Fremont v. Crippin*, 10 Cal. 214.

15. An action of forcible entry and detainer will not lie against a party claiming a right to land, who is not in the actual possession. *Preston v. Kehoe*, 10 Cal. 446.

16. This action is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant, the object of the law being to prevent the disturbance of the public peace by the forcible assertion of a private right. *McCauley v. Weller*, 12 Cal. 524.

17. There is no reason why a public officer, who acts without authority, or under a void authority, or who transcends the authority conferred by law, should not be held to strict accountability for a forcible entry and unlawful detainer of property. *Ib.* 527.

18. The statute was intended to prevent bloodshed, violence and breaches of the peace, too likely to result from wrongful entries into the possession of others; and it would be absurd to say, that to enable a party to avail himself of its provisions, there must have occurred precisely the evil which it was the object of the law to prevent. *Ib.*

19. The plaintiff was in peaceable possession; the defendant ousted him by force; and before the legality of the title of the parties to the premises can be the subject of consideration, the plaintiff must be placed in statu quo with reference to the property. *Ib.* 533.

20. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 109.

21. Where, in such case, proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot

afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that therefore his possession was not sufficiently proven. *Ib.*

22. Where plaintiff has been in peaceable and quiet possession and use of the premises through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in "actual possession" of the premises, within the statute of forcible entry and detainer. *Ib.*

23. The statute does not require actual occupancy, and "actual possession" consists as much of a present power and right of dominion as of an actual corporal presence in the house. *Ib.*

24. Where a building locked up and so in possession of plaintiff has been entered by third persons, and taken possession of forcibly and unlawfully, and is detained, it should be left to the jury how and by whose direction, agency, or procurement the entry was made, and whether by preconcert and arrangement or not; and if they find possession was taken by the act, agency and coöperation of all the defendants, and the holding, whether by one or many, was in pursuance of such arrangement or preconcert, then the defendants are guilty of the entry and detainer. *Ib.*

25. The fact that the defendants did not themselves go into the actual corporal possession of the premises, or did not personally take possession or make entry, does not defeat the action. *Ib.*

26. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiff will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no

## Jurisdiction.—Pleading.

averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law, and that in such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Tomlinson v. Rubio*, 16 Cal. 206.

## II. JURISDICTION.

27. A case of forcible entry and detainer was legally brought before a justice, and he being a witness in the cause sent it to the mayor of the city, who having no jurisdiction, returned it to the successor of the justice, before whom it was tried and decided: held, that the mere fact of having been proposed for jurisdiction to the mayor who had none, and who therefore did not pretend to exercise any, cannot be error. *Davis v. Gallen*, 2 Cal. 360.

28. The recorder of Sacramento city has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise v. Carghill*, 4 Cal. 122.

29. A cause having been transferred from the recorder's court to a justice's, the latter of which had jurisdiction, and the defendant having appeared before the justice and consented to the time fixed for trial, is a waiver of his right to be brought in by the summons and complaint. *Ib.*

30. This action is a summary proceeding provided by statute, and does not belong to the district courts, by virtue of their original common law jurisdiction over the subject matter in controversy. *Townsend v. Brooks*, 5 Cal. 52.

31. Plaintiff brought his action against defendant under the statute, in a justice's court, who certified it to the district court: held, that the transfer was illegal, and could not defeat the plaintiff's rights by operating a discontinuance. *Larue v. Gaskins*, 5 Cal. 509.

32. Justices' courts have jurisdiction in cases of forcible entry. *O'Callaghan v. Booth*, 6 Cal. 66; *Hart v. Moon*, 6 Cal. 162; *Small v. Gwinn*, 6 Cal. 449.

33. The power of the county court to

treble the damages, by way of penalty, in actions of forcible entry, results by necessary implication from its power to try de novo. *O'Callaghan v. Booth*, 6 Cal. 66.

34. On appeal from a justice's court, in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

35. If the bond be void or defective through accident or mistake, a new bond may be filed on such terms as the court deems just, the right of the other party being regarded. *Ib.*

36. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—query, whether the supreme court has jurisdiction of an appeal from the county court. *Paul v. Silver*, 16 Cal. 76.

## III. PLEADING.

37. The statute does not require an allegation in the complaint of possession, and an averment that the premises "are unlawfully withheld from the plaintiff" is somewhat general, yet not insufficient in a justice's court, except on demurrer. *Cronise v. Carghill*, 4 Cal. 122.

38. A description of the land sufficiently definite to enable the administration of substantial justice, is all that is required in an action before a justice of the peace. *Hernandez v. Simon*, 4 Cal. 183.

39. Where treble damages are given by a statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute, or conclude to the damage of the plaintiff against the form of the statute. *Chipman v. Emeric*, 5 Cal. 240; contra, *O'Callaghan v. Booth*, 6 Cal. 66; *Small v. Gwinn*, 6 Cal. 162.

40. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres).



Pleading.—Evidence.—Notice to Quit.—Judgment.

“The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter’s Point.” Said gate was where this last road passed through. The proof among other things showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

41. The objection to a complaint in forcible entry and detainer, that it does not aver “actual possession”—the word “possession” only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended, but it cannot be urged in the supreme court for the first time. *Min-turn v. Burr*, 16 Cal. 110.

#### IV. EVIDENCE.

42. In this action, the holding over the land is the foundation of the action, and must necessarily be proven like any other substantive fact. *Reed v. Grant*, 4 Cal. 176.

43. Where a party of four men enter a building occupied by another, in the night-time, during the hours of sleep, and take possession, and avow their intention to keep possession and actually do so, it is sufficient to maintain this action. *Scarlett v. Lamarque*, 5 Cal. 63.

44. To sustain this action actual force, threats or violence in the entry, or the just apprehension of violence to the person must be shown to have existed, unless the detainer be riotous. *Frazier v. Hanlon*, 5 Cal. 157.

45. Proof of actual force is not neces-

sary to maintain this action; but threats showing an intention to resort to violence if resistance is offered, are sufficient. *O’Callaghan v. Booth*, 6 Cal. 66.

46. Where the plaintiff in an action of forcible entry for the front of a town lot, proved that he had a small house in the rear of it: held, to be sufficient to warrant the jury in finding an actual possession of the whole lot. *Ib.*

47. Where a plaintiff had obtained judgment in another court for a quarter’s rent under a lease: held, that in an action of forcible entry and detainer for nonpayment of another quarter’s rent under the same lease, between the same parties, the plaintiff could introduce the former judgment as evidence in all the points identical in the two cases. *Love v. Waltz*, 7 Cal. 252.

48. To sustain forcible entry and detainer, plaintiff must have been in actual possession; and where the land is public land, not taken up under our possessory act nor under the federal laws, such actual possession can be shown only by actual inclosure, or its equivalent. Merely putting down stakes, or marking out a boundary line, is not sufficient. In such action, proof of forcible detainer does not prove forcible entry. *Preston v. Kehoe*, 15 Cal. 318.

49. Where the complaint avers forcible and unlawful entry, and that defendants forcibly detained the premises so unlawfully taken, forcible entry must be proven; the averment of detainer not being stated as an independent ground of relief. *Ib.*

#### 1. Notice to Quit.

50. In an action for unlawfully holding over after the expiration of the tenant’s term, three days notice to quit is all that is required. *Garbrell v. Fitch*, 6 Cal. 189.

#### V. JUDGMENT.

51. A sued B & C for forcible entry and detainer, and obtained judgment against them for damages, and afterwards took a deed from B for the premises, procured D to indemnify B against the judgment: held, that this released C also



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Judgment.—Writ of Restitution.—Forfeiture of Lands by Aliens.

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from the judgment as to damages. *Ransom v. Farish*, 4 Cal. 387.

52. In this action, where the injury affects the constructive possession and not the actual possession, the land can be recovered without a fine or treble damages. *Stark v. Barnes*, 4 Cal. 414.

53. In an action for a forcible and unlawful entry and detainer of a mine, against a corporation and C. & V., the jury returned a verdict of guilty as to C. & V., and not guilty as to the corporation: held, that such verdict is conclusive that the plaintiff was peaceably in actual possession of the premises at the time of the entry; that unlawful and forcible entry on his possession was made by the defendants C. & V., and that the corporation did not participate in the trespass. *Fremont v. Crippen*, 10 Cal. 214.

54. In forcible entry and detainer tried in the county court, on appeal from a justice's court, plaintiff, having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of premises. Plaintiff applies to the supreme court for *mandamus* to compel the court below to render judgment for treble damages: held, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 150.

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## VI. WRIT OF RESTITUTION.

55. The writ of restitution obtained in an action of forcible entry and detainer does not determine the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell v. Hagood*, 6 Cal. 148.

See FORFEITURE, LANDLORD AND TENANT, LEASE.

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## FORECLOSURE.

See EQUITY, MORTGAGE.

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## FOREIGNERS.

See ALIENS, NATURALIZATION.

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## FORFEITURE.

- I. Of Lands by Aliens.
  - II. Of Interest in Corporations.
  - III. Of Title.
  - IV. Of Leasehold Interest.
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### I. OF LANDS BY ALIENS.

1. An alien cannot be deprived of his land, or of any right incident to its ownership, by proof of his alienage in a collateral proceeding. *Ramirez v. Kent*, 2 Cal. 560.

2. The estate purchased by an alien does not vest in the sovereign until office found; until then the alien is seized and may sustain actions for injuries to the property. *Ib.*

3. The relation of landlord and tenant exists where the landlord is an alien non-resident, and is obligatory upon the tenant, and he cannot be allowed to controvert the title of the lessor. *Ib.*

4. In order that the United States should take any interest in the land in question, it was necessary that the forfeiture should have been ascertained either by her or Mexico. *People v. Folsom*, 5 Cal. 378.

5. It would be difficult to establish the doctrine, on authority or argument, that the United States after the treaty became vested with authority to prosecute any claims for a forfeiture that had accrued in California to the Mexican government. *Ib.* 380.

## II. OF INTEREST IN CORPORATIONS.

6. Stock being divided into money shares and labor shares, the holders of the latter, who had contributed no capital towards the outfit of the company, had performed no labor beneficial to the company, and had their expenses to California paid out of the funds contributed by the holders of the money alone, and had abandoned the association, which fact by the articles worked a forfeiture of the labor shares: held, that the assets of the company should be distributed among the holders of the money shares alone, and the court could not relieve them from the forfeiture. *Von Schmidt v. Huntington*, 1 Cal. 70.

7. Contracts by reason of which a forfeiture is claimed to have accrued should be construed strictly, and the facts urged in support of the forfeiture ought to be clear and explicit, and not left to inference and argument. *Ib.* 71.

8. The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, nor does his refusal to pay, or his delay in paying the expenses of the business, or the assessments, create of itself a forfeiture; there must be clear and unequivocal proof of abandonment. *Waring v. Crow*, 11 Cal. 371.

9. In order to the enforcement of the forfeiture of the interest in the claim, some appropriate action by suit must be taken to liquidate the demand and sell the property, or there must be at least clear and unequivocal proof of abandonment. *Ib.* 372.

## III. OF TITLE.

10. Where parties to a bond for a title stipulate among themselves for a forfeiture, such forfeiture cannot defeat the plaintiff's rights to the purchase money. *Bagley v. Eaton*, 5 Cal. 501.

11. Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture has accrued is a ques-

tion of law, and cannot therefore be properly submitted to a jury. *Fairbanks v. Woodhouse*, 6 Cal. 435.

12. Where the grantor of defendant obtained an alcalde's grant to a town lot, in 1843, and was put into possession thereof, and commenced building thereon, (his grant containing the usual condition of building within one year) and was compelled to suspend the erection of his house, and the lot remained unoccupied till 1849, when he went again into possession and built a house, which possession was maintained till the bringing of this suit, and the plaintiff's grantor obtained a grant of the same lot in 1847, but never went into possession: held, that there was no forfeiture of the grant of defendant's grantor on the ground of nonperformance within the time, unless something else was done to produce it. *Holliday v. West*, 6 Cal. 526.

13. To avoid a denouncement, and a possible forfeiture of the estate of a Mexican grant, a party was required to cultivate or occupy the land, and his possession was his right, which could have been enforced under the Mexican government. *Ferris v. Coover*, 10 Cal. 620.

14. The failure to comply with any one of the mining rules and regulations of the camp is not a forfeiture of title. *McGarritty v. Byington*, 12 Cal. 431.

15. No forfeiture accrues of a title otherwise good, by failure to present it to the Board of Land Commissioners. *Gregory v. McPherson*, 13 Cal. 570.

## IV. OF LEASEHOLD INTEREST.

16. At common law, there was no forfeiture of an estate for years for the nonpayment of rent, nor the commission of waste. *Chipman v. Emeric*, 3 Cal. 288.

17. By the statute of Gloucester, 6 Edw. 1, the remedy of forfeiture was given for waste, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to the recovery of treble damages. *Ib.*

18. By the thirteenth section of the act concerning forcible entries and unlawful detainers it was the intention of the legislature to make the nonpayment of rent work a forfeiture of the estate of the

## Of Leasehold Interest.—Forgery.—Franchise.

tenant. But to effect this the rent must be demanded on the day it becomes due, and at a late hour of the day, and where the record shows no demand of the rent there can be no forfeiture. *Chipman v. Emeric*, 3 Cal. 283; *Gaskill v. Trainer*, 3 Cal. 339.

19. Where a lease contains a covenant against assignment, such a restriction would not in any case be enforced so as to work a forfeiture. It is a restraint against alienation and is against the policy of the law. *Chipman v. Emeric*, 5 Cal. 51.

20. Tenants have no right to remove buildings erected by them, after a forfeiture or reëntry for covenant broken. *Whipley v. Dewey*, 8 Cal. 38.

21. Where a landlord agreed to allow his tenant a reasonable time after the expiration of his lease to remove his buildings, and the tenant surrendered or forfeited his lease before its expiration, the intention of the parties must be confined to its legal expiration, and not to the wrongful act of the lessee in terminating it, and the lessee can claim no rights under the contract. *Ib.* 39.

22. A defendant cannot rest his justification of a forcible entry upon any possible forfeiture of the lease. Such forfeiture cannot be asserted except by force of a judicial determination. *McCauley v. Weller*, 12 Cal. 533.

23. The averment of forfeiture is a legal conclusion upon which no issue can be taken. The fact should be stated so as to enable the court to determine whether the forfeiture did accrue. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

24. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for non-payment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title and his own relation of tenant: held, that

plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89, 92.

## FORGERY.

1. It is necessary to a conviction under an indictment for forging an order for the delivery of goods, that the order should be signed in the name of a party having goods in their possession of the drawee. *People v. Way*, 10 Cal. 236.

See CRIMES AND CRIMINAL LAW, FELONY.

## FRANCHISE.

1. A mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of a reality, and this property is not taxed by the revenue act of 1851. *Dewitt v. Hays*, 2 Cal. 468.

2. A ferry is a franchise, and is not the subject of levy, sale or delivery under execution. It involves a personal trust granted by the sovereign upon conditions imposed upon the grantee alone, and his liability cannot be removed by substitution. *Monroe v. Thomas*, 5 Cal. 471; *Thomas v. Armstrong*, 7 Cal. 287.

3. The right to be protected in the possession of the public lands in this State, is founded alone on the doctrine of presumption; for a license to occupy, from the owner, will be presumed. *Conger v. Weaver*, 6 Cal. 556.

4. The right of constructing ditches,

## Franchise.—Fraud in general.

canals or flumes in the mines, like gold is a franchise, and the attendant circumstances raise the presumption of a general grant from the sovereign of this privilege; and every one who wishes to obtain it has license from the State to do so, provided that the prior rights of others are not infringed upon. *Ib.* 558.

5. If a party by conspiracy with others procured them and himself to be elected to the Board of Trustees of a town, for the purpose of defrauding the town of its property and its franchises for his benefit, the whole transaction is illegal. *City of Oakland v. Carpentier*, 13 Cal. 551.

6. The general doctrine in the United States now is, that the grant of a ferry, bridge or similar franchise does not carry with it a restriction upon the granting power to make a similar grant to other grantees, though the last grant necessarily interferes with the profits and business of the first. *Indian Cañon Road Co. v. Robinson*, 13 Cal. 520.

See BRIDGES AND FERRIES, WHARF.

## FRAUD.

- I. In general.
- II. As a ground for relief in Equity.
- III. Evidence of Fraud.
- IV. Arrest for Fraud.
- V. Fraud in a Consideration.

## I. IN GENERAL.

1. Where there has been such a part performance of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him, unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. *Tohler v. Folsom*, 1 Cal. 212.

2. The power given in an insolvent's assignment to sell on credit is presumptive evidence of fraud as to creditors. *Billings v. Billings*, 2 Cal. 113.

3. Where there is no dispute as to the facts, and the law upon these facts declares

a transaction fraudulent, it is not a question for the jury. *Billings v. Billings*, 2 Cal. 113; *Chenery v. Palmer*, 6 Cal. 122.

4. An attorney at law took an assignment of a lot upon which there was a lien for purchase money after suit brought against the assignee for recovery of the money. The attorney defended the suit throughout all its stages without disclosing his claim. Judgment was rendered for the plaintiff, and all the right, title and interest of the defendant in the lot was sold by the sheriff and purchased by the plaintiff. The attorney then claimed the lot in possession of his tenant, refusing to pay rent in arrear, and denying that any lien existed. In a new action he was made a party, and in view of these facts it was held that his silence in regard to his own claim throughout his connection with the former suit was a fraudulent concealment, and he was decreed to deliver possession, pay all costs and arrear rents. *Truebody v. Jacobson*, 2 Cal. 288.

5. A deed void by reason of fraud cannot be made valid by legislation so as to affect the rights of third persons. *Smith v. Morse*, 2 Cal. 542.

6. Courts will not defeat rights of property on the ground of fraud, unless the fraud be made plainly apparent. *Joyce v. Joyce*, 5 Cal. 163.

7. Under the twelfth section of the act concerning corporations, passed April 22, 1850, no transfer of stock is good against third parties, unless the transfer be made upon the books of the company. *Weston v. Bear River and Auburn W. and M. Co.*, 5 Cal. 189.

8. It is a familiar maxim of the law that fraud vitiates everything, and a district court being a court of general jurisdiction, can in a case in equity, where fraud and collusion are charged against a judge in entering an order or decree, review the same and annul it, if the facts justify such a conclusion. *Sanford v. Head*, 5 Cal. 298.

9. A court of chancery has jurisdiction to set aside decrees obtained by fraud on an original bill filed for that purpose. *Ib.*

10. However fraudulent against creditors a sale might be, yet it is binding between the parties. *Montgomery v. Hunt*, 5 Cal. 368.

11. An insolvent person sold certain property to plaintiff to unincumber his

## In general.

homestead for the purpose of saving it to himself, which plaintiff knew: held, that the sale was fraudulent and void as to creditors. *Riddell v. Shirley*, 5 Cal. 490.

12. Plaintiff cannot recover against the corporation of Bradley, Berdan & Co." upon a written contract entered into between himself and Bradley & Co., as the contract was not made by the corporation, unless a deceit was practiced by the plaintiff, and the circumstances of the case were such as to raise the presumption that the corporation was cognizant of the deceit and fraudulently participated in it by availing itself of the plaintiff's labor; it is liable, not upon the written agreement, but for work and labor. *Morrison v. Bradley*, 5 Cal. 503.

13. Fraud is a fact which must be proved. The party undertakes to do so when he sues out his process. It gives character to his judgment and determines his right, and he should substantiate it. *Mattoon v. Eder*, 6 Cal. 60.

14. A confession of judgment to a bona fide creditor, and the issuance of execution and making levy under the same by the judgment debtor without the knowledge of the judgment creditor, done with the knowledge that another creditor is about to attach, and for the purpose of defeating the attachment, is void and fraudulent as to the attaching creditor. *Ryan v. Daly*, 6 Cal. 239.

15. A failure to make all the disclosures in a statement of a confession of judgment required by the statute is prima facie evidence of fraud. *Richards v. McMillan*, 6 Cal. 422.

16. The sale of the equity of redemption of mortgaged premises and assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 616.

17. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it. On the contrary, fraud is a legitimate defense at all times and in all proceedings, at least, under our system. *Hopkins v. Beard*, 6 Cal. 665.

18. The recording act is sufficient to charge a prior mortgagee with fraud in releasing portions of the mortgaged prem-

ises, retaining a lien on the balance, of which part had been sold after the mortgage, but before his releases, so as to justify a court of equity to set it aside. *Dennis v. Burritt*, 6 Cal. 673.

19. To constitute fraud, actual notice is necessary, or such acts in the premises as some positive statute characterizes as fraudulent. *Id.*

20. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof at a constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679.

21. To maintain a creditor's bill in chancery, in order to reach equitable assets which are alleged to have been fraudulently conveyed, it is not sufficient simply to aver that the conveyance was fraudulent, but facts and circumstances must be set forth which will reasonably sustain the theory of the bill. *Kinder v. Macy*, 7 Cal. 207.

22. The grounds on which the registry acts are based are that the party who fails to record the deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible as assisting the fraud. *Bird v. Dennison*, 7 Cal. 308.

23. Where there is no fraud, and the vendor binds himself to convey a certain title, and afterwards discovers a defect which he can cure and thus convey to the purchaser all the latter bargained for, it is obviously just that the vendor should be allowed to do so. *Alvarez v. Brannan*, 7 Cal. 509.

24. Every sale of property and personal chattels is good as between the parties, and cannot be attacked for fraud, except by a creditor who has obtained judgment and taken out execution, which has been returned unsatisfied in whole or in part, as also those who have a lien by attachment. *Heyneman v. Dannenberg*, 6 Cal. 380; *Thornburgh v. Hand*, 7 Cal. 565.

25. The maxim caveat emptor applies to sheriff's sales, yet such a sale may be impeached on the ground of fraud or misrepresentation. *Webster v. Haworth*, 8 Cal. 26.

26. There is no great difference in morality and common sense between a fraud committed by putting in pledge notes al-



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ready paid and obtaining money under false pretenses. *Potter v. Seale*, 8 Cal. 226.

27. Where a person knowingly, though passively, looks on and suffers another to purchase and expend money without making known his claim, he shall not afterward be permitted to assert his legal right against such person. *Bryan v. Ramirez*, 8 Cal. 467.

28. Where a contract was made not to run a steamboat, and the consideration paid, and a penalty attached to be paid should the party or his assigns run the same, he cannot retain the consideration on the ground of fraud, and resist the payment of the penalty of an infraction of his contract on the same ground. *California Steam Nav. Co. v. Wright*, 8 Cal. 592.

29. A complaint, alleging that the defendant collected and received certain money as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of fraud, and after judgment and execution against his person and property, is insufficient to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

30. Where the character or capacity in which a party is alleged to have collected money is essential—as in the present case—to the charge of fraud, that character or capacity must be averred in direct and positive terms, or the charge must fall. *Ib.* 624.

31. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold under a conveyance with express covenants. *Peabody v. Phelps*, 9 Cal. 226.

32. To the general rule that a bailee will not be allowed to set up title in a third party in an action brought by the bailor there is an exception in cases where the bailor's possession was obtained by fraud. *Hayden v. Davis*, 9 Cal. 574.

33. It would be a fraud which no court of equity could tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money and seeing the vendee expend large sums of money improving the property, without

objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part on holding the whole contract forfeited, claim the land and the money paid, and all the improvements, and deny all obligations on his part to comply with his engagements. *Farley v. Vaughn*, 11 Cal. 237.

34. A nonnegotiable chose in action created by the immediate parties to it for the purpose of defrauding creditors, cannot be impeached in the hands of an innocent assignee by the creditors of the debtors making such chose in action. *Wright v. Levy*, 12 Cal. 263.

35. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court on questions of fraud made on the application of an insolvent for a discharge of his debts. *Fisk v. His Creditors*, 12 Cal. 281.

36. Upon the issue of fraud of making a sham deed for his property, no delivery of the deed was necessary. The fraud is as complete without the delivery as with it. *Ib.* 282.

37. The ownership of goods is not changed when the claim to such ownership is based upon a fraudulent contract. *Butler v. Collins*, 12 Cal. 461.

38. Where the vendor of personal property acquired his title to the property in fraud of the creditors of his vendor, his vendee for a valuable consideration and without notice of the original fraud is not affected by the taint of his title. The title, although originally fraudulent, is cured by the subsequent conveyance to an innocent party. *Paige v. O'Neal*, 12 Cal. 496.

39. Conveyances of real and personal property made to defraud creditors are subject to the same defect and liable to be avoided at the suit of the creditors, but valid as between the parties, and vests a title which can be transferred perfect to a bona fide purchaser for a valuable consideration. *Ib.* 497.

40. In a suit on a note and mortgage where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent against them, the intervenors cannot present a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement

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of the judgment to their prejudice. *Horn v. Volcano Water Co.*, 13 Cal. 69.

41. In a suit to set aside a judgment confessed to a party to defraud creditors, it is not necessary that plaintiff should be either a judgment creditor or execution creditor. A lien acquired by attachment suffices. *Scales v. Scott*, 13 Cal. 78.

42. There is no more reasoning for sanctioning a marriage procured by fraud than one procured by force and violence. *Baker v. Baker*, 13 Cal. 102.

43. If an instrument be void for actual fraud ab initio, it is void for every purpose of protection to the fraudulent actor, and will not be allowed to stand as security for advances made. *Goodwin v. Hammond*, 13 Cal. 170.

44. It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Holmes v. Rogers*, 13 Cal. 200.

45. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud has been discovered. *Patrick v. Montader*, 13 Cal. 444.

46. If a party, by conspiracy with others, procured them and himself to be elected to the board of trustees of a town for the purpose of defrauding the town of its property and franchises, for his benefit, the whole transaction is illegal. *City of Oakland v. Carpentier*, 13 Cal. 551.

47. Where, under the fourth section of the attachment act of 1858,\* defendant puts in issue the truth of the facts alleged in the affidavit, to wit: "That defendant was about fraudulently to convey his property to hinder, delay or defraud creditors," proof that defendant was able to pay the debt, that he put plaintiff off from time to time, and threatened to assign his property for the benefit of his creditors if sued, is sufficient to go to the jury on the question of fraud. *White v. Leszynsky*, 14 Cal. 166.

48. And a verdict for plaintiff will not

be disturbed. The statute does not contemplate conclusive proof of the intention to commit a fraud. *Ib.* 167.

49. Relief against a judgment recovered against an insolvent may be by motion to discharge it, unless there be suspicions of fraud in the release of the insolvent. *Imlay v. Carpentier*, 14 Cal. 177.

50. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up a fraud in the survey or procurement of the patent, to defeat the action. If the defendant had vested rights so as to avail him against the assertion of any claim of the government respecting the controversy, it would only follow that the patent was inoperative to that extent, not that it was void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3d, 1851, and the patent would be like a second grant to premises previously granted, and pass, as to the property, no interest. *Boggs v. Merced Mining Co.*, 14 Cal. 361.

51. Nor would the fraud alleged in the answer here, and supposed to consist in a variance between the private survey made by Fremont and the official survey by the surveyor general, and concealment of this latter survey, avail defendant in avoiding or resisting the patent, even if presented in an original or cross bill. *Ib.* 363.

52. It would also be a fatal objection to a bill in equity by defendant, to set aside the patent in this case for fraud in its procurement, that Fremont, the patentee, is not a party. He would be a necessary party to any proceeding to avoid or set aside his patent, on the ground that it was issued through fraud or misrepresentation. His rights cannot be determined or impaired in any side suit between third parties. *Ib.*

53. Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment, by taking the note of third persons, not negotiable in the mercantile sense, in payment; the makers of the note agreed to this under the supposition, induced by him, that he was the owner of the judgment: held, that the makers of the note, upon discovering that the plaintiff was not the owner of the judgment,

\* This section has been amended, April 28th, 1860, restoring the former provisions, and allowing an attachment upon the contract without averring any fraud.

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properly refused to pay the note even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

54. Plaintiff sues the sheriff for seizing certain chattels claimed by the plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that the defendant had not proved *all* of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker v. Woods*, 15 Cal. 69.

55. Plaintiff sues defendants for partition of certain property. The court orders a sale of the property, and distribution of the proceeds. After the sale, G. files a petition, stating that he is creditor of one F. M. Harris (not plaintiff), and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property, in fact, belonged to F. M. Harris, and that any conveyances of the same from him to plaintiff were merely colorable for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff. Court refused: held, that there was no error; that the petition of G. being an attempt to defeat a conveyance to plaintiff, on the ground of fraud, is insufficient in this, that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud are too general, and do not state the specific facts constituting the fraud. *Harris v. Taylor*, 15 Cal. 349.

56. A conveyance in such case, however fraudulent as to creditors, may be

good between the parties, and creditors cannot impeach it without showing that they have been injured by it; they must show, that by the conveyance they have been deprived of their remedy at law, and are compelled to resort to equity. If the debtor have other property which may be reached by ordinary legal remedies, equity will not interfere. It must be affirmatively shown that such remedies have been exhausted, or that a resort to them would be fruitless. *Id.*

57. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that the defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many more thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D., in taking said deed, acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to be declared such trustee, and execute a deed of the property to plaintiff; that, on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that said trust be declared, that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said

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mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then the plaintiff have judgment against H. and wife on said notes, that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken, that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *DeLeon v. Higuera*, 15 Cal. 495.

58. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 499.

59. Where a vendee of personal property buys it bona fide, takes possession openly, and holds it in exclusive possession for a year or more, and afterwards puts the property into the possession of the vendor, as attorney in fact of the vendee, this qualified possession of the vendor does not, as matter of law, show the sale to be fraudulent and void as against the creditors of the vendor. *Stevens v. Irwin*, 15 Cal. 506.

60. R. & Co., defendants, had two mechanics' liens upon certain property, one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R & Co. signed an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a Sheriff's deed. Plaintiff, as mortgagee of

the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble v. Voll*, 15 Cal. 509.

61. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.* 510.

62. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment of the liens, by paying the money justly due, interest, costs, etc.—he not having been party to the suit by the lienholder. *Ib.*

63. Plaintiffs here cannot object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment. *Ib.*

64. In this case, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed: but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from the decree. *Ib.*

65. Mrs. L., defendant, when a femme sole, contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid, by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit against her was brought



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expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her—the judgment of the supreme court, being conclusive so long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

66. In suit against an agent for fraudulently appropriating money of plaintiff, defendant cannot, on the trial, object that the person making the demand on him before suit did not exhibit his authority so to do, unless defendant questioned his authority at the time of demand. *Baxter v. McKinlay*, 16 Cal. 77.

## II. AS A GROUND FOR RELIEF IN EQUITY.

67. Where a petition set forth a lease and contract to pay rent in kind, by defendant to plaintiff, a refusal to pay rent, and an allegation of fraud in removing the *specie* in which rent was to be paid, and a prayer for an injunction, etc.: it was held, that the bill must also aver insolvency, or inability to enforce rent by the remedial process of attachment or on execution. *Gregory v. Hay*, 3 Cal. 334.

68. A party is not confined to his remedy by statute, but may resort to a court of equity for relief against a judgment obtained by fraud or surprise. *Carpentier v. Hart*, 5 Cal. 407.

69. In cases of fraud in obtaining the judgment, the party aggrieved must proceed by a bill to impeach the original decree for fraud. *Robb v. Robb*, 6 Cal. 22.

70. A court of equity will take jurisdiction of a bill for an injunction filed by attaching creditors of an insolvent to restrain proceedings on execution against the property attached under a judgment against the debtor, in favor of another alleged to have been obtained by fraud, where all the material averments of the bill, except fraud, are admitted. *Heyneman v. Dannenberg*, 6 Cal. 380.

71. A plaintiff having discovered the fraud by his superior diligence, in an assignment, is not compelled to bring in the other creditors to share its fruits, nor is it

necessary in order to grant the relief sought, and to set aside the assignment, that the assignee should have been a party to the fraud. *Baker v. Bartol*, 6 Cal. 486.

72. Where the plaintiff filed a bill in equity, in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run, he could not recover. *Dominguez v. Dominguez*, 7 Cal. 427.

73. Where husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterwards fraudulently attached, in a suit brought by the real, though not the ostensible purchaser, against the husband alone: held, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 287.

74. In an action for relief on the ground of fraud, the fraud is the substantive cause of action, and not the discovery. If, therefore, the plaintiff alleges the fraud to have been committed more than three years before the commencement of his action, his cause of action is barred, and his complaint is demurrable. *Sublette v. Tinney*, 9 Cal. 425.

75. Equity has jurisdiction to vacate a judgment fraudulently altered, so as to include a defendant not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 560.

76. In a suit to recover goods on the ground of fraud in the vendee, the admission of evidence that he was insolvent two months after the purchase is not sufficient to reverse the judgment, unless it is clearly shown that the evidence was irrelevant, and injurious to the party objecting. *Coghill v. Boring*, 15 Cal. 219.

## III. EVIDENCE OF FRAUD.

77. Where a bill was filed to set aside a judgment on the ground that it was obtained through fraud, and these charges are denied in the answer, the effect of the denial is the same as if the charges in the bill had been disproved by testimony. *Belt v. Davis*, 1 Cal. 142.

78. Although the question of fraudu-



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lent intent is made a question of fact in all cases, yet wherever the law declares that certain indicia are conclusive evidences of fraud, a verdict against such conclusions should in all cases be set aside; but when the facts are merely presumptive, the jury may find against such presumption. *Billings v. Billings*, 2 Cal. 113.

79. Where fraud is charged, express proof is not required; it may be inferred from strong presumptive circumstances. *McDaniel v. Baca*, 2 Cal. 338.

80. Defendant in answer alleged fraud in the contract sued upon, but admitted payment under protest: it was held, that the protest preserved his rights to aver and avail himself of the fraud, if any. *Russell v. Amador*, 3 Cal. 402.

81. There is no conclusion of fraud springing from the want of consideration in a deed which will enable a stranger to attack it, though it is a circumstance, among others, from which fraud may be inferred. *Gillan v. Metcalf*, 6 Cal. 139.

82. A person must be held to know the true state of his own business; and if he does not, the consequences should not be visited upon the party who had not the means of knowing. *Taaffe v. Josephson*, 7 Cal. 355; *Alvarez v. Brannan*, 7 Cal. 508; *Swartz v. Hazlett*, 8 Cal. 128; *Seligman v. Kalkman*, 8 Cal. 215.

83. Testimony showing a fraudulent design in a vendor of goods, is admissible under the allegation of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such fraudulent design. *Landecker v. Houghtaling*, 7 Cal. 392; *Vischer v. Webster*, 8 Cal. 113.

84. The fact that a business is unsuited to the sex of a sole trader, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it. *Guttman v. Scannell*, 7 Cal. 459.

85. The intention of a party can only be shown by proof; and when the injured party proves that the fact as represented was not only untrue, but that the person knew it to be untrue, he can show no more, and unless this be sufficient, he would be wholly unable to prove the fraud. *Alvarez v. Brannan*, 7 Cal. 508.

86. Fraud may consist in the misrepresentation or the concealment of material

facts, and may be inferred from the circumstances and condition of the parties contracting. *Belden v. Henriquez*, 8 Cal. 89.

87. The question of fraudulent intent in all cases arising under the fraudulent conveyance act, shall be deemed a question of fact and not of law, and the want of a valuable consideration shall not constitute conclusive evidence of fraud. *Swartz v. Hazlett*, 8 Cal. 127.

88. Proof of fraudulent intent on the part of the donor is sufficient to avoid the deed as against the innocent donee, and in determining the question of fraudulent intent of the donor, he must be considered as knowing the law and the state of his affairs. *Ib.* 128.

89. Where a purchase of goods is made with the preconceived design of not paying for them, it is such a fraud as will vitiate the sale. *Seligman v. Kalkman*, 8 Cal. 213.

90. Where a purchaser was not only insolvent and knew the fact, but had performed an open and notorious act of insolvency, it was his duty, arising out of his previous dealing with the vendors to disclose the fact before the sale, and that a violation of that duty amounted to a fraud. *Ib.* 214.

91. Where a person clearly insolvent purchases goods from another on credit, and conceals the fact of insolvency from the vendor, he is guilty of fraud sufficient to vitiate the sale. *Ib.* 215.

92. Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the declarations of the vendor are admissible, and a fortiori, his sworn statement. *Howe v. Scannell*, 8 Cal. 327.

93. In all cases of agency, a fraudulent concealment of the fact upon the existence of which the cause of action accrues is a good answer to the plea of the statute of limitations. *Kane v. Cook*, 8 Cal. 460.

94. In cases of fraud, the rule which admits testimony to impeach it is liberal, both in civil and criminal cases, and subsequent acts are frequently resorted to for the purpose of showing antecedent fraud. *Butler v. Collins*, 12 Cal. 465.

95. When a man openly violates his engagements so as to give a false and fraudulent effect to something which he has not done before, a jury may as well

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date the fraudulent intent from one period to another of the transaction, and no rule of charity requires us to date his fraud at a period which would be most advantageous to the perpetrator of the fraud. *Ib.*

96. As against subsequent creditors, a conveyance, even if voluntary, is not void unless fraudulent in fact—that is, made with the view to future debts—though the evidence of an intent to defraud existing creditors is deemed sufficient prima facie evidence of fraud against subsequent creditors. *Horn v. Volcano Water Co.*, 13 Cal. 72.

97. A woman who has been pregnant over four months by a stranger is not at the time in a condition to bear children to her husband, and the representation in such a case is false and fraudulent. *Baker v. Baker*, 13 Cal. 103.

98. Fraud, accident and mistake are special grounds of equity jurisdiction, and may be shown by any satisfactory evidence, written or verbal, with reference not merely to mortgages, but to all written instruments. *Pierce v. Robinson*, 13 Cal. 127.

99. The want of a schedule of the property to an assignment is sometimes regarded as a circumstance of fraud; but the absence of a schedule has never, we believe, been held sufficient of itself to avoid a conveyance of this sort. *Forbes v. Scannell*, 13 Cal. 288.

100. That the trustees of an assignment employ the partner assigning to aid them in winding up the concern, and pay him and allow his wife some furniture, is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. *Ib.* 289.

101. An attachment issued before the maturity of the debt is only prima facie fraudulent and void as against a subsequent attachment; but where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and the other creditors subsequently attaching cannot complain that the suit was prematurely brought. *Patrick v. Montader*, 13 Cal. 435; overruling *Taaffe v. Josephson*, 7 Cal. 355.

102. The supreme court will not review the evidence on questions of fact, and especially in cases of fraud, where the result depends upon considerations of greater

or less force, to be found in the conduct, dealings and relations of the parties, and various circumstances tending with more or less directness to prove or repel the ascription of fraud. *Patrick v. Montader*, 13 Cal. 441.

103. Trespass against the sheriff for levying on certain goods as the property of G. & Co., under an execution on a judgment in favor of *Crafts v. G. & Co.* Plaintiff claims to have been the owner of the goods, by purchase from G. & Co. before the levy. Defense was, fraud in such purchase. On the trial, defendants, to prove fraud, offered to show that before this sale, "about a year past, plaintiff had bought G. & Co. out before, for the purpose of proving fraud," and the court rejected the testimony: held, that this was not error; that there was nothing on the face of the exception to show the materiality or relevancy of the testimony—there being no offer to show even that the first sale was fraudulent. *Cohn v. Mulford*, 15 Cal. 52.

104. The rule allowing distinct frauds to be proven in such cases is limited to frauds which are contemporaneous, or nearly so, and does not embrace dealings at a remote time. *Ib.*

105. Statements made by a vendor of personal property subsequent to his sale, are not admissible to defeat the title of his vendee, either when used as proof of fraud, or any other fact in avoidance of the deed. *Ib.*

106. *Landecker v. Houghtaling*, 7 Cal. 391, and *Vischer v. Webster*, 8 Cal. 109, only hold, that the admissions of the vendor, made before the sale is completed, are admissible to show his own fraud. And thus far the rule is approved. *Ib.*

107. Where goods are seized by the sheriff on an execution against G., and the owners of the goods, so in the sheriff's hands, assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a *chose in action*, but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 213.

## IV. ARREST FOR FRAUD.

108. When the relations subsisting be-

## Arrest for Fraud.—Fraud in a Consideration.

tween the parties be that of partners and not that of principal and agent, an embezzlement of the copartnership property is not such a fraud as will warrant an arrest under the code. *Soule v. Hayward*, 1 Cal. 346.

109. A defendant cannot be arrested for fraudulent representations in obtaining money, where the representations were made some time after the money was obtained. *Snow v. Halstead*, 1 Cal. 361.

110. In an action to recover money received by a person as agent, he cannot be arrested without the affidavit showing some fraudulent conduct on his part, or a demand on him for the money and a refusal to pay. *Ex parte Holdforth*, 1 Cal. 439; *Ex parte Prader*, 6 Cal. 240.

111. On a rule to show cause why an arrest of a party for fraud should not be vacated, the question of fact involved must be decided by the weight of the evidence; a reasonable belief that fraud was intended is sufficient, and the party should be held, and look to the undertaking to protect him in the abuse of the writ. *Southworth v. Resing*, 3 Cal. 378.

112. In cases of fraud, it appears that there can be but two judgments, one against the person, and the other against the property; in the former of which the execution issues directing the officer to arrest and confine the party until the debt be paid. *Mattoon v. Eder*, 6 Cal. 60.

113. The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. *Ib.* 61.

114. No person can be imprisoned for debt under the constitution except in cases of fraud. *Ex parte Prader*, 6 Cal. 240.

115. To authorize an arrest of the defendant upon execution issued upon a judgment recovered in an action upon contract, the fraud for which the arrest is sought must be alleged in the complaint and passed upon by the jury, and stated in the judgment. *Davis v. Robinson*, 10 Cal. 412.

See ARREST, CRIMES AND CRIMINAL LAW.

## V. FRAUD IN A CONSIDERATION.

116. A contract, however fraudulent as to creditors, is good as between the contracting parties. *Montgomery v. Hunt*, 5 Cal. 368.

117. Where, in an action on a promissory note, the defense set up is that defendant executed the note as the consideration for a deed from the plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein; the defendant, if he would avoid payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

118. When a part of a consideration of a contract is illegal, or when an entire judgment is composed of several elements, one of which is fraudulent, the whole is void. *Taaffe v. Josephson*, 7 Cal. 355; *Swartz v. Hazlett*, 8 Cal. 129; *Valentine v. Stewart*, 15 Cal. 404.

119. If a purchaser is not only insolvent, and knew the fact, but performed an open and notorious act of insolvency, it was his duty, arising out of his previous dealings with the vendors, to disclose the fact before the sale; and a violation of that duty amounted to a fraud, which avoided the contract. *Seligman v. Kalkman*, 8 Cal. 214.

120. It is fully established that where a purchase of goods is made with the preconceived design of not paying for them, it is such a fraud as will vitiate the sale. *Ib.*

121. A purchaser must be held to know the true state of his own business; and if he does not, the consequence should not be visited upon the party who had not the means of knowing. *Ib.*

122. A party cannot retain the consideration of a contract on the ground of fraud, and resist the payment of a penalty of an infraction of his contract on the same ground. *Cal. Steam Nav. Co. v. Wright*, 3 Cal. 592.

123. Where a party has given a promissory note, and the payee assigns the note, without recourse after maturity, and suit is brought upon the note by the assignee, and the maker then files his bill against the assignor and assignee, alleging fraud in obtaining the note, and praying for an

## Fraud in a Consideration.—Freight.

injunction, and that the note be canceled: held, that the case was a proper one for equitable relief; and the maker had the right to have the note canceled, so as to prevent future litigation. *Domingo v. Getman*, 9 Cal. 102.

124. If any portion of the consideration of a note be fraudulent, the entire note is void, as against creditors. *McKenty v. Gladwin*, 10 Cal. 229.

125. Where a note is antedated for the purpose of making it draw interest for which there is no consideration, it is fraudulent and void as to creditors. *McKenty v. Gladwin*, 10 Cal. 228; *Scales v. Scott*, 13 Cal. 79.

126. L. executed and delivered his note to N. without consideration, and for the purpose of defrauding, hindering, and delaying creditors. N. had knowledge of the fraud, and sued and attached upon the note, L.'s property. After this, W., a creditor of L., also attached and levied upon the same property. Before judgment, N., for a valuable consideration, assigned the note to J., who knew nothing of the fraud: held, that J. was not protected in his purchase; N. having been superseded by W.'s attachment, could not, by any act or deed of his, put his assignee in any better position than he occupied himself. *Wright v. Levy*, 12 Cal. 263.

127. Where judgment is confessed on a note, a portion of the consideration being advanced from time to time after the date of the note, which drew interest on the whole amount from date, a portion of the interest is fraudulent, and the entire note is void against creditors. *Scales v. Scott*, 13 Cal. 78.

128. Suit on a note for the purchase of land. Answer sets up that the note was given for the land, fencing and building materials; that plaintiffs falsely represented that there was building material for building a barn; that this material was so insufficient in quantity that it cost defendant six hundred dollars to buy more: held, that defendant having taken possession under the contract, and retaining it, cannot set up representations, fraudulent or otherwise, as to the fences, they being part of the freehold: held, further, that a special demurrer being put in to the answer, it sets up no defense as to the building material, because neither quantity nor value is given. Plaintiff is responsible,

not for what defendant paid for lumber, but for the value of lumber contracted for and not delivered, and this at the time of contracting. *Kinney v. Osborne*, 14 Cal. 113.

129. Plaintiff and defendant were partners in the purchase of a mining claim. Defendant was the active partner and acquainted with the value of a certain claim, while plaintiff was ignorant. Plaintiff sold his interest in this claim to defendant for greatly less than its value: held, in an action by plaintiff against defendant to set aside this sale, for fraud, and for an account in a sum greater than that paid by defendant for the mining claim, is in effect an offer to place defendant in statu quo, as per rule of law. *Watts v. White*, 13 Cal. 323.

130. Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending, made a contract to discharge the judgment by taking the note of third persons, not negotiable in the mercantile sense, in payment; the makers of the note agreed to this under the supposition, induced by him, that he was the owner of the judgment: held, that the makers of the note, upon discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees, before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

## FREIGHT.

1. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading until the whole freight is paid, and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. *Frothingham v. Jenkins*, 1 Cal. 44.

2. Delivery of goods by the master and payment of freight by the owner are concurrent acts, and neither party is bound to perform his part of the shipping contract, unless the other is ready and willing to perform the correlative act. *Ib.*



## Freight.—Fugitive Slaves.

3. Delivery of part of the goods mentioned in one bill of lading to the consignee does not defeat a lien on the remainder for the whole freight unpaid. *Ib.*

4. Shipmasters cannot require payment of freight unless ready to deliver the goods, and consignees cannot require a delivery of goods unless ready to pay the freight, and neither party can bring an action to compel the other to perform his part of the contract, unless ready to perform the correlative act. *Ib.*

5. A merchant in Boston, Mass., shipped by one bill of lading merchandise to his agent at San Francisco. On arrival, part of the goods were delivered and part of the freight paid; but the agent, unable to pay the balance of freight due, offered to give good security for its payment if the master would deliver the remainder, which offer the master refused to accept: held, that the master had a lien for the entire freight on all the goods; that part delivery was no waiver of his lien on those not delivered for the unpaid freight, and an offer to give security for its payment did not divest the master's lien; and that the consignee could not bring an action to compel the delivery. *Ib.*

6. The consignee named in a bill of lading is to be deemed prima facie the owner of the goods mentioned therein, and upon payment of freight, may maintain an action against any person who assumes a control over them in violation of his right of property. *Webb v. Winter*, 1 Cal. 418.

7. A right to detain goods until the freight is paid, by reason of a lien of the owner, grows out of the usage of trade. *Brown v. Howard*, 1 Cal. 424.

8. Where it appears clearly from a charter party that the intention of the owner of a ship and the charterer is that the former shall have no lien on the freight, but shall give a personal credit to the charterer, the former loses his right of lien on the cargo, and can look only to the personal responsibility of the charterer for payment of the hire of his vessel. *Ib.*

9. In an action for freight money in a State court it is not a sufficient answer to plead that the vessel has been libeled for nondelivery of freight in the federal court; both actions may proceed at the same time without the fear or danger of any collision or clashing of jurisdiction. *Russell v. Alvarez*, 5 Cal. 48.

10. Contracts for carrying freight form no exception to the general rule of law that where money is paid by one party in consideration of an act to be done by another, and the act is not done, the money so paid may be recovered back. *Reina v. Cross*, 6 Cal. 31.

11. If freight is paid in advance on a charter party, and the voyage is not accomplished by loss of the vessel at sea, the freight advanced may be recovered back. *Reina v. Cross*, 6 Cal. 31; *Lawson v. Worms*, 6 Cal. 370.

See ADMIRALTY, BILL OF LADING, CHARTER PARTY.

## FUGITIVE SLAVES.

1. The arrest and commitment for deportation of fugitive slaves does not determine their slavery. It leaves that to future adjudication. *Ex parte Perkins*, 2 Cal. 438.

2. A statute is not ex post facto, and impairs no obligation which derives no right nor constitutes the refusal to return to servitude a crime, but simply provides for the deportation of slaves. *Ib.* 440.

3. If the slaveholder had authority to bring his slaves here under the constitution of the United States, the right could not be abridged or controlled until the admission of California as a State. *Ib.*

4. The constitution of the United States recognizes a property in the class of persons known as slaves, and the institution is a social and political one. *Ib.*

5. The right of transit through each State with every species of property known to the constitution of the United States and recognized by that paramount law is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte Archy*, 9 Cal. 162.

6. The character of immigrant or traveler bringing with him a slave into this State, must last so long as it is necessary, by the ordinary rules of travel, to accomplish a transit through the State. Nothing but accident or imperative necessity



## Fugitive from Justice.—Gaming.

could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the State through which he is passing. But visitors for health or pleasure stand in a position different from travelers on business, and are protected by the law of comity. *Ib.* 165.

7. It is the right of the judiciary, in the absence of legislation, to determine how far the policy and position of this State will justify the giving a temporary effect, within the limits of this State, to the laws and institutions of a sister State. To allow mere visitors to this State for pleasure or health to bring with them, as personal attendants, their own domestics, is not any violation of the end contemplated by the constitution of this State. *Ib.* 166.

8. The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business, except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. *Ib.* 168.

## FUGITIVE FROM JUSTICE.

1. The judiciary have jurisdiction by habeas corpus to investigate cases where a party is arrested as a fugitive from justice escaped from another State; but have no control over the executive discretion, in surrendering fugitives from justice, nor can they compel a surrender in such case; yet the executive having acted, that discretion may be examined into, in every case where the liberty of the subject is involved. *Ex parte Manchester*, 5 Cal. 238.

2. The governor of the State issuing the requisition for the fugitive, is the only proper judge of the authenticity of the affidavit; and the judge on habeas corpus cannot go behind his action to inquire

whether the affidavit was a forgery; it is sufficient if the requisition certifies that the affidavit is "duly authenticated according to the laws of the State." *Ib.*

3. Where a fugitive from justice had not been heard of for sixteen months, and he was a passenger on a vessel for a specified port, and neither he, the vessel or crew had ever been heard of, still it is not sufficient to raise a legal presumption of his death. *Ashbury v. Sanders*, 8 Cal. 64.

## GAMING.

1. Money lost at play cannot be recovered in an action, it being unknown to the common law. *Bryant v. Mead*, 1 Cal. 441.

2. The statute authorizing the granting of a license to keep a gambling house could not be construed as conferring a right to sue for a gaming debt, but as a protection solely against a criminal prosecution. *Ib.*

3. Wagers which tend to excite a breach of the peace or are against good morals, or which are against the principals of sound policy, are illegal, and no contract arising therefrom can be enforced. *Ib.* 444.

4. Evidences of indebtedness given on a gaming consideration are valid in the hands of innocent and bona fide endorsee. *Haight v. Joyce*, 2 Cal. 66; *Thorne v. Yontz*, 4 Cal. 323.

5. Money won at play cannot be recovered at common law. *Gahan v. Neville*, 2 Cal. 81.

6. An action for debt will not lie against the keeper of a gaming table without license, to recover the amount of license; the only redress is by indictment. *People v. Craycroft*, 2 Cal. 244; *People v. Raynes*, 3 Cal. 367.

7. Gaming debts have not been legalized by the operation of the statute licensing gaming houses, and no action can lie to recover money lost at gaming. *Carrier v. Brannan*, 3 Cal. 329.

8. Wagers are recoverable in this State at common law, except such as are prohibited by law or are against public policy, or calculated to affect the interest, character or feelings of third parties. *Johnson v. Fall*, 6 Cal. 361.

9. An allegation in a complaint that the parties kept a saloon for the purpose of gaming and selling liquors and cigars does not raise the presumption that the gaming was necessarily unlawful, or that the saloon was a common gambling house, as the word might apply to lawful games, such as billiards, etc. *Whipley v. Flower*, 6 Cal. 632.

10. The act to suppress gaming must be construed with the general act concerning criminal proceedings, and where a fine is imposed on a conviction for gaming, the defendant may be imprisoned to enforce its payment. The law does not look to the owners of the house for payment of the fine, as they are only liable where gaming is done within their knowledge. *People v. Markham*, 7 Cal. 209.

11. The answer of a witness that the prisoner is a gambler should not be considered as an injury to the prisoner at a time when gambling was licensed by law. *People v. Butler*, 8 Cal. 440.

12. A check given for a gaming debt is void in the hands of all persons except a bona fide holder, without notice. *Fuller v. Hutchings*, 10 Cal. 526.

13. A party placing money in the hands of another for the purpose of making a bet on an election, in the name of the bailee, but for the benefit of the bailor, may retract the illegal act of making the bet, and does not forfeit the money by reason of the illegality of the purpose for which it was deposited. *Hardy v. Hunt*, 11 Cal. 348.

14. An indictment, under the act of 1857, for dealing the game of monte for money, need not state the particulars of the offense—as the persons present, the room, and the like. Under our law, an indictment is good if it states the acts constituting the offense in ordinary and concise language, and in such a way that a person of ordinary understanding can know what was intended. *People v. Saviers*, 14 Cal. 30.

15. An indictment for dealing faro, designating the offense as a felony, is sufficiently specific as to name, and without this word the indictment is good where it states facts which constitute the offense. *People v. Beatty*, 15 Cal. 572.

## GANANCIALES.

1. By the Mexican law, the wife during the continuance of the marriage has a revocable and feigned dominion in and possession of one-half the property acquired by her and her husband; but the husband is the real and veritable owner, and has the irrevocable dominion in all the gananciales, and may sell and dispose of them at pleasure. *Panaud v. Jones*, 1 Cal. 515.

2. After the death of the wife, the husband may dispose of the gananciales without being obliged to reserve for the children of the marriage either the property in or proceeds of the same. *Ib.*

3. A father during his lifetime, and after the death of the wife, may, although there have been children of the marriage, dispose of the gananciales for any honest purpose, where there is no intention to defraud the children, and may by last will and testament direct the sale of them for the payment of his debts. *Ib.*

4. A having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage: held, that the children upon the death of the wife did not acquire a vested estate in the common property, and that the father had absolute dominion over and power to sell such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts—not only such as were contracted during the continuance of the marriage, but also such as were contracted by the husband after the dissolution of the marriage by the death of his wife. *Ib.* 517.

See COMMON PROPERTY.

## GARNISHMENT.

See ATTACHMENT, VII.

## GAUGER, STATE.

1. The office of State gauger having been created, must be presumed to be continuing, unless limited by the terms of the act, or by the nature of the duties to be performed. *People v. Addison*, 10 Cal. 7.

2. There is nothing temporary in the duties of the office, nor is there anything in the language of the act limiting the duration of the office. *Ib.*

## GOLD DUST.

1. A contract to pay cash cannot be fulfilled by payment in gold dust at its market value, unless the parties agree to it, and when gold dust was paid below the market price as cash under protest, the court will not relieve him and decree repayment of the alleged difference. *Gunter v. Sanchez*, 1 Cal. 49.

2. A merchant was in the habit of having his gold dust carried gratuitously on the steamer *New World*, the owners refusing to carry it for hire or to become liable as common carriers in case of loss: held, where a quantity of gold dust belonging to the plaintiff was stolen from the steamer without any negligence on the part of the master or officers, that the plaintiff could not recover its value. *Fay v. Steamer New World*, 1 Cal. 349.

3. Whether a common carrier of goods and passengers merely can be made liable in an action for refusing to carry gold dust, query. *Ib.* 350.

4. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received coin made of the dust, and a creditor of C. attached the coin by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the at-

tachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendants' hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right to the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application to a case like this. *Walling v. Miller*, 15 Cal. 40.

## GOOD WILL.

1. Plaintiff having bought certain horses of defendant, as also the "good will" of a mercantile house in the matter of drayage, cannot sue to recover back the purchase money paid, on the ground that such "good will" is not vendable. *Buckingham v. Waters*, 14 Cal. 147.

## GOVERNOR.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment as well as the first one, was irregular and void. *People v. Fitch*, 1 Cal. 536.

2. An appointment to fill a vacancy in the office of State printer, made by the governor during the session of the legislature, is irregular and void. *Ib.*

3. In approving a statute, the executive act is a component part of the law-making power, and his power of approval ceases

## Governor.

on the adjournment of the legislature. *Fowler v. Pierce*, 2 Cal. 172.

4. Where an act was presented to the governor for approval on the last day of the session, and purported to have been approved on that day, but was in fact not approved until the next day after the adjournment: held, that the act was void, and that parol evidence was admissible to show when the act was approved. *Ib.*

5. The power of filling vacancies in office, vested in the governor of the State by the constitution, applies only to vacancies occurring under circumstances when the original appointing or electing power cannot act. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power. *People v. Mott*, 3 Cal. 505; *People v. Mizner*, 7 Cal. 525.

6. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such a grant on the ground of want of authority in the governor is not sustainable. *Den v. Den*, 6 Cal. 82; *Brown v. City of San Francisco*, 16 Cal. 458.

7. The proclamation of the governor required by statute, is necessary to the validity of a special election. *People v. Porter*, 6 Cal. 28; *People v. Weller*, 11 Cal. 65; *People v. Martin*, 12 Cal. 411; *People v. Rosborough*, 14 Cal. 187.

8. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *People v. Talmage*, 6 Cal. 258.

9. The act to establish an insane asylum, providing that the resident physician shall hold his office for two years, and until his successor is appointed and qualified: held, that on failure of the legislature to elect at the expiration of the incumbent's term, the office becomes de jure vacant and can be filled by the governor by appointment. *People v. Reid*, 6 Cal. 291; *People v. Baine*, 6 Cal. 510; *People v. Langdon*, 8 Cal. 11.

10. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of

the incumbent expires during a recess of the legislature, and the governor appoints a successor to the office: held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term subject only to be defeated by the nonconcurrence of the senate. *People v. Mizner*, 7 Cal. 523.

11. In making the appointment, the power of the executive is original and unlimited. He can select any one, from all the qualified citizens of the State, while the power of the senate is the right to advise or refuse to advise the appointment of the particular individual. *Ib.* 524.

12. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature, and the governor appoints a successor to the office: held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term, subject only to be defeated by the nonconcurrence of the senate. *Ib.*; *People v. Addison*, 10 Cal. 7.

13. The power to appoint to a vacancy has to be vested in some department of the government, and the constitution was compelled to vest it in the executive, because it was the only department that could be properly charged with such a duty. *People v. Mizner*, 7 Cal. 525.

14. The power to appoint for the full term of the office of resident physician of the insane asylum is vested in the legislature, and the governor has no right to exercise it. *People v. Langdon*, 8 Cal. 13.

15. The constitution provides that if any bill presented to the governor, having passed both houses of the legislature, shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return. *Price v. Whitman*, 8 Cal. 415; overruling *People v. Whitman*, 6 Cal. 660.

16. The governor, in issuing a patent to an individual of swamp lands, acts as the agent of the State, under powers conferred by statute, and his authority extends only to such lands as were granted to the State by the act of congress. *Summers v. Dickinson*, 9 Cal. 555.

17. A patent from the governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law. *Ib.* 556.

18. The term of the office of governor is fixed at two years certain, with a contingent extension. When this contingency happens, this extension is as much a part of the entire term as any portion of the two years. *People v. Whitman*, 10 Cal. 44.

19. In cases where there is no incumbent to hold over, the law will allow the appointment by the executive to fill the office. *Ib.* 46.

20. Where the governor of the State, who is authorized, and whose duty it is made by law, to take immediate possession of the State prison and grounds then in possession of a lessee of the State, goes in company with other officers of State upon the grounds, and demands possession, which was refused, and the room where the keys were kept was forced by the governor, and the keys taken, and possession of the prison and grounds taken by the governor in the name and on behalf of the State: held, that such acts amounted to forcible entry and detainer on the part of the governor, and he is liable therefor. *McCauley v. Weller*, 12 Cal. 531.

21. If a county judge resigns before the expiration of his term, there is a vacancy to be filled by the governor. His appointee would hold until the next general election, or at most until the qualification of the person elected by the people. *People v. Rosborough*, 14 Cal. 187.

22. Where an appointee of the governor to fill a vacancy in a judicial office holds the office for several years because of no valid election by the people of his successor, his acts are as binding and effectual as to third persons as though he held the office by strict law. *Ib.*

23. The constitution affixes no period of tenure to the office of tax collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged. *People v. Squires*, 15 Cal. 17.

24. A controller must be elected biennially, at the same time and place and manner with the governor and lieutenant

governor, and an appointment of a controller by the governor before this biennial general election, whatever its effects otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *People v. Melony*, 15 Cal. 62.

25. A mandamus will issue to the governor in certain cases. The distinction from political considerations, between the governor and the inferior officers of the executive department, as to the issuance of this writ, stated. *People v. Brooks*, 16 Cal. 45.

## GRACE.

1. Checks are sight bills and are not entitled to grace, unless made payable at a future day when they become an inland bill of exchange, and the drawer is entitled to three days grace, and notice of nonpayment. *Minturn v. Fisher*, 4 Cal. 37.

2. The presentment and demand of commercial paper having days of grace must be made within reasonable hours on the last day of grace. *McFarland v. Pico*, 8 Cal. 631.

See BILLS OF EXCHANGE, NOTARY, PROTEST.

## GRAND JURY.

1. The deposition of witnesses taken before a magistrate upon a criminal charge may be used by a grand jury in finding an indictment. *People v. Stuart*, 4 Cal. 225.

2. An indictment found by a grand jury composed of twenty-four persons, when the statute limits the number to twenty-three, is worthless and void. *People v. Plummer*, 5 Cal. 69.

3. The objection, that the name of one of the witnesses sworn before the grand jury was not endorsed on the indictment, must be taken by motion to set aside the



## Grand Jury.—Grant.

indictment. *People v. Freeland*, 6 Cal. 98.

4. The declaration of a grand juror, that he is a naturalized citizen, should be received by the court as prima facie true, and proof thereof by actual production of papers is unnecessary. *People v. Roberts*, 6 Cal. 215.

5. A grand jury must be composed of not less than seventeen, all of whom, however, need not be present at the finding of an indictment, provided that twelve concur in finding the indictment. *People v. Roberts*, 6 Cal. 216; *People v. Butler*, 8 Cal. 439.

6. Where the prisoner was present at the empaneling of the grand jury and challenged particular persons, and his challenge was overruled, and he was indicted for murder, and the cause was transferred for trial to the district court, it is too late to except to the whole panel. His exceptions should have been urged in the court of sessions. *People v. Roberts*, 6 Cal. 216.

7. A commitment for contempt "in refusing to answer certain questions propounded to witness by the grand jury," is not a compliance with the statute which requires that when a contempt subsists in the omission to do an act which it was in the power of the performer to perform," the act shall be specified in the commitment. It does not appear from such commitment whether the question was legal or not. *Ex parte Rowe*, 7 Cal. 183.

8. An objection taken to the panel of a grand jury that had been summoned by the sheriff of the county under an order of the court, after the commencement of term, on the ground that said jury had not been drawn in the manner pointed out by statute, is not well taken. *People v. Rodriguez*, 10 Cal. 59.

9. Defendants in criminal cases, who have not been held to answer before the empaneling of the grand jury, may challenge the panel on arraignment. If they have been held to answer, they must challenge the panel before it is made up and sworn. *People v. Beatty*, 14 Cal. 569; *People v. Cuintano*, 15 Cal. 329; *People v. Moice*, 15 Cal. 331.

10. The grand jury may inquire into all offenses committed within the county not barred by the statute of limitations. *People v. Beatty*, 14 Cal. 569.

11. It is no objection to the panel of the grand jury that it was summoned by the

order of the court, under the eleventh section of the act concerning jurors, while the prisoner was in custody, on an offense charged, before the commencement of the term. *People v. Cuintano*, 15 Cal. 329; *People v. Moice*, 15 Cal. 331.

12. Nor is it an objection that the copy of such order was not served on the sheriff, as the statute directs, provided he has, otherwise, regularly summoned the jury. *People v. Cuintano*, 15 Cal. 329.

13. Challenges to the panel of the grand jury, or to individual jurors, must be made at the impaneling of the jury; and on indictment for murder transferred to the district court, the challenge cannot there be made. *People v. Moice*, 15 Cal. 331.

14. Where defendant is held to answer before the finding of the indictment, an objection to the mode of drawing the names of grand jurors must be taken on their being empaneled. *People v. Arnold*, 15 Cal. 479.

15. The statutory provision that exception to the grand jury must be made at a particular time, is constitutional. The legislature have the right to prescribe rules of practice in criminal or civil cases, and among such rules are provisions as to the time and mode of excepting to irregularities of proceedings. *Ib.*

See CHALLENGE, CRIMES AND CRIMINAL LAW, INDICTMENT, JUROR, JURY.

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1. The sovereign power may, in disposing of the national domain, annex such conditions to a grant as it sees fit; and in such case, a restriction against alienation inserted in the grant, and authorized by law, will not be held void on the ground that it is against the policy of the law. *Suñol v. Hepburn*, 1 Cal. 283.

2. A grant made by an American alcalde not appointed by, nor holding office under the authority of the Mexican Government, to a citizen of the United States during the continuance of the war between the United States and Mexico, whilst California was in the temporary occupation of the American forces, and before the title of

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the United States to the country had become complete, was a grant without any authority in law, and no title could be derived from the grant. *Woodwoath v. Fulton*, 1 Cal. 305; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325, overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199; and *Hart v. Burnett*, 15 Cal. 616.

3. If there was a vested title in the national domain in the pueblos of California, an alcalde alien enemy of Mexico, and without authority from the American government, had no power or right to interfere with that vested estate, or grant it to others. *Woodworth v. Fulton*, 1 Cal. 306; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325, overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199; and *Hart v. Burnett*, 15 Cal. 616.

4. A grant of land by a Mexican alcalde before the war will be presumed to have been made in the course of his ordinary and accustomed duties and within the scope of his legitimate authority, and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer and in the form prescribed by law. *Reynolds v. West*, 1 Cal. 326; *Payne v. Treadwell*, 16 Cal. 227.

5. Mexican justices of the peace, before the war, had authority to make grants of land in San Francisco. *Reynolds v. West*, 1 Cal. 327.

6. Where the grantee was a married woman: held, that the question as to her capacity to take a concession of public lands was a question for the alcalde in the performance of his official duties to determine, and her incapacity must be established by the adverse party. *Ib.* 328.

7. Where it appeared that the petitioner's husband was the owner of two fifty vara lots at the time of the concession, it would be presumed that the act of the alcalde in making the grant was in conformity with law, until the contrary was shown by the adverse party. *Ib.*

8. Where a petition for a grant of land was presented to the alcalde without the signature of the petitioner, but the prayer of the petition was granted by a writing immediately following the petition, the grant was valid, notwithstanding the want of the petitioner's signature. *Ib.*

9. Where the boundaries of a lot of

land granted by an alcalde were uncertain: held, that the true location of the lot was a question of fact for the jury to determine. *Ib.*

10. A grant of a fifty vara lot at the Mission Dolores, by a Mexican alcalde in 1842, where the grantee took possession and occupied the lot, is a title under which a party may maintain ejectment against a naked trespasser. *Brown v. O'Connor*, 1 Cal. 419.

11. A grant of land made while the country was under the dominion of Mexico must be tested by the rules of law which then prevailed. The cession to the United States has worked no change in the legal rights of private persons. *Vanderslice v. Hanks*, 3 Cal. 37.

12. A grant made on a condition subsequent, where no time is limited for its performance and the condition becomes impossible, the grant becomes single and absolute in the grantee. *Ib.* 40.

13. A Mexican alcalde was the head of the ayuntamiento, or town council, and the executive officers of the town, and rightfully exercised the power of granting lots within the town which were the property of the town. *Cohas v. Raisin*, 3 Cal. 449; *Welch v. Sullivan*, 8 Cal. 199; *Hart v. Burnett*, 15 Cal. 616; overruling *Woodworth v. Fulton*, 1 Cal. 305; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325.

14. A grant of land in San Francisco made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Cohas v. Raisin*, 3 Cal. 450.

15. It is too late to question the authority of an alcalde elected in 1846. If invalid, his acts, as a de facto officer, must be held good by the courts of California. *Ib.* 452.

16. It is not the province of a jury to determine whether a grant could fairly be presumed from a possession of a certain character. *Castro v. Gill*, 5 Cal. 42.

17. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such a grant, on the ground of want of authority in the

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governor, is not sustainable. *Den v. Den*, 6 Cal. 82.

18. In an action of ejectment under a Mexican grant: held, that the supreme court is bound to regard the decisions of the United States supreme court establishing the rule that a conditional grant from Mexico conveys a good title without performance of the conditions sufficient to maintain the ejectment and admissible to qualify the plaintiff's actual possession. The land must belong either to the United States or the claimants under the grant, the question as to the rights of this State not being raised, and where the highest tribunal having authority to decide those questions has voluntarily abandoned the claim of title of the government, it would appear strange that the courts of this State should question the rule so established. Certainly a mere intruder cannot gainsay it. *Gunn v. Bates*, 6 Cal. 270.

19. Where the grantor of defendant obtained an alcalde's grant to a town lot in 1843, and was put into possession thereof and commenced building thereon, (his grant containing the usual condition of building within one year) and was compelled to suspend the erection of his house, and the lot remained unoccupied until 1849, when he went again into possession and built a house, which possession was maintained until the bringing of this suit; and the plaintiff's grantor obtained a grant of the same lot in 1847, but never went into possession: held, that there was no forfeiture of the grant of defendant's grantor on the ground of nonperformance within the time, unless something else was done to produce it. *Holliday v. West*, 6 Cal. 526.

20. And where the grant of plaintiff's grantor was never recorded, and it appears that owing to mistakes having occurred in the granting of lots, grants having in some instances been made to plaintiff's grantor, gave notice to all persons to appear and have their grants adjusted, which notice was complied with by defendant's grantor, but not by plaintiff's grantor, the former being then again placed in possession, it seems that no inference arises that the granting power had resumed the land as by a forfeiture of defendant's grantor for the purpose of granting the lot to plaintiff's grantor. *Ib.* 527.

21. The only conclusion is that the sec-

ond grant was made by mistake, and that the second grantee was perfectly aware of the invalidity of his grant and either made no legitimate effort to obtain possession, or did so and failed. *Ib.* 528.

22. Certified copies of grants made by the surveyor general of the United States are inadmissible in evidence, unless the absence of the originals is accounted for. *Hensley v. Tarpey*, 7 Cal. 289.

23. The government having by a solemn decree declared that the original title was in the ancestor, is estopped from denying such admission or regranting the premises to another. *Nieto v. Carpenter*, 7 Cal. 533.

24. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession or under the control of the county recorder, are void. *Chapin v. Bourne*, 8 Cal. 295.

25. The regulation forbidding grants to be made within two hundred varas of the water line of the bay had reference only to a portion of the present front of the city of San Francisco. *Norton v. Hyatt*, 8 Cal. 540.

26. The authority to make grants of lands was lodged solely in the governor, and with the approval of the departmental assembly it was discharged of the defeasance and became definitely and finally valid. *Ferris v. Coover*, 10 Cal. 615.

27. It was the duty of the governor to submit the grant to the departmental assembly for approval, and his neglect or refusal to make such submission could not impair the estate of the grantee in the land. *Ib.* 616.

28. The title of the land vested in the grant. An estate vested in the grantee subject to be defeated by the action of the Mexican government by direct rejection; or in case of noncompliance with its conditions, by proceeding to that end. *Ib.* 618.

29. The supreme government of Mexico possessed the power to reject, upon its own mere volition, an empresario grant to one of its citizens, made by the governors of its departments under the colonization laws, but it may be questioned whether this power passed to the United States. *Ib.* 620.

30. Whether or not the premises are included within a grant is a question of fact to be submitted to the jury. *Ib.* 622.

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31. A decree of confirmation of a grant cannot be impeached in an action in ejectment between a party claiming under a grant and a third party. *Rose v. Davis*, 11 Cal. 140.

32. A grant passed a present and immediate interest in the quantity of land specifically designated therein, to be afterward surveyed and laid off within the exterior limits of the general tracts by the government, and that such survey could only be made under the former government, by its officers, and could not be made by the grantees themselves; that the right of survey passed with other public rights to the government of the United States. *Waterman v. Smith*, 13 Cal. 415.

33. Occupation and cultivation could have no greater effect upon a grant than a private survey. They were without binding effect upon the former government and are equally inoperative under the new. *Ib.* 416.

34. The location of the specific quantity may be made by a survey of such quantity, or by grant with specific boundaries of such parts of the general tract as will reduce it to such specific quantity. *Ib.*

35. The patent of a grant is conclusive evidence of the right of the patentee to the land therein described—not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship. *Ib.* 419.

36. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of a general tract designated in the grants, do not constitute such third persons, against whose interests the final confirmation and patent are not conclusive; nor do parties who hold claims only upon the bounty of the government, nor intruders, nor even settlers having certificates of sale, unless the same antedate the presentation of the claim of the patentee to the board of land commissioners, to which period the patent takes effect by relation. *Waterman v. Smith*, 13 Cal. 420; *Moore v. Wilkinson*, 13 Cal. 488.

37. A grant of three leagues, within a much larger survey, where no survey had been made, gives no title to any specific three leagues of land which would enable the party to defend against ejectment on a

patent. *Waterman v. Smith*, 13 Cal. 422; *Moore v. Wilkinson*, 13 Cal. 486.

38. Royal grants made at the solicitation of the grantee are to be construed liberally for the king, and when made ex mero motu regis, the construction is in favor of the grantee. *Hyman v. Read*, 13 Cal. 452.

39. Legislative grants are to be construed liberally in favor of the grantee. *Ib.* 455.

40. In the case of a legislative grant there is no ground to impute surprise, imposition or mistake, to the same extent as in a mere private grant of the crown. *Ib.* 458.

41. Where a Mexican grant contained clauses, designated in the instrument as conditions, against alienation, mortgage, mortmain, and directing the grantee to obtain judicial possession thereof: held, that these clauses were not properly conditions, and that there was nothing in any of the provisions which were onerous or burthensome to the grantee, or which could be regarded as a valuable consideration, moving the government to make the grant. *Scott v. Ward*, 13 Cal. 471.

42. The consideration which induced the grant or donation cannot change its character, unless there is a positive provision of law which makes the exception, as in that given in the fuero real, where the thing granted is in remuneration of services rendered at the expense of the community. *Ib.* 475.

43. The survey and patent are conclusive upon it in actions of ejectment, except when in conflict with the prior rights of third persons, and then there inconclusiveness can be asserted only to the extent essential for the protection of such prior rights. *Moore v. Wilkinson*, 13 Cal. 486.

44. The ayuntamiento of San Francisco in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land in conformity with the survey of the town, as near as possible to the location of certain other lots which plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed to plaintiff a lot which had been previously granted by the town to one Gerke: held, that an action for a breach of the covenants of warranty in this deed will not lie against the city. *Findla v. City of San Francisco*, 13 Cal. 535.



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45. The true meaning of the order is, that the alcalde was to grant the city's land only, and that neither the town nor its successor is bound for an act done beyond the limit of its authority. *Ib.*

46. Charters of corporations are special grants of power. The corporation has no powers except those expressly given. *City of Oakland v. Carpentier*, 13 Cal. 546.

47. The expediente, consisting of the petition, plat, reference, report, act of concession, approval, grant, etc., filed in the archives of the Mexican government, is as much an original document as the grant delivered to the grantee. *Gregory v. McPherson*, 13 Cal. 570.

48. If by law, or usage having the force of law, a California grant was matter of record, then it would seem to follow that the record is proof of the grant, especially where the record itself is an exemplification of the grant, and contemporaneously signed by the same officers issuing the grant. *Ib.* 573.

49. There is no obligation resting upon the claimant of land under a Mexican grant, or upon the United States surveyor general, to give notice of the official survey directed by the final decree of confirmation to any one, and it is of no consequence how secretly or how openly the decree is made. *Boggs v. Merced Mining Co.*, 14 Cal. 358.

50. The grant to Alvarado, of "Las Mariposas," passed a present and immediate interest to ten square leagues, to be afterwards surveyed and laid off within the exterior limits of the general government. Such survey could only be made under the former government by its officers, and could not be made by the grantee himself. *Ib.* 360.

51. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up fraud in the survey or the procurement of the patent, to defeat the action. If the defendant have vested rights, so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent, not that it was void. *Ib.* 361.

52. It may be, and undoubtedly is, a very convenient rule, in determining con-

troversies between parties on the public lands, where neither can have absolute rights to presume a grant, from the government of mines, water privileges and the like, to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Ib.* 375.

53. A defendant in ejectment claiming under the government of the United States as a mere preëmtor, cannot show that the land described in the grant from the Mexican government and petition to the land commissioners is different from that embraced in the patent. *Yount v. Howell*, 14 Cal. 469.

54. A duly certified copy of a Mexican grant from the United States surveyor general's office is admissible in evidence against the objection that the absence of the original is not accounted for. But it is admissible only when the original itself would be. The statute simply removes the objection to the copy as secondary evidence. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 549.

55. A grant of a lot in San Francisco by a justice of the peace, under the Mexican government to the husband, subject to the conditions that within one year the lot shall be fenced and a house constructed thereon, and that certain municipal fees established by law be paid, is a donation and not a purchase, and the lot constitutes the separate property of the grantee. *Noe v. Card*, 14 Cal. 598.

56. The Pulgas grant, in San Mateo county, is a grant of boundaries, and not by quantity, the description being, "tract known under the name of Las Pulgas, the boundaries of which are: on the south the creek of San Francisquito, on the north that of San Mateo, on the east the estuaries, and on the west the cañada de Raimundo, and "the tract of which mention is made is of four leagues of latitude and one of longitude." *McGarvey v. Little*, 15 Cal. 30.

57. In ejectment for land within Sutter's Fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition "named New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing



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the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing "Sutter's Fort," and the enclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his enclosures at the Fort; the evidence would be prima facie, if not conclusive proof, that the premises were covered by the grant. *Morton v. Folger*, 15 Cal. 278.

58. Where a party in ejectment relies upon documentary evidence of title and prior possession, if he fail in the former, he may still rely upon the latter. The failure to prove the paper title does not impair the just force and effect of the possession. *Ib.* 283.

59. Where a Mexican grant refers, in its description of the premises, to the plat or map accompanying the expediente, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself, as if incorporated therein. *Seaward v. Malotte*, 15 Cal. 306.

60. Questions arising on a trial as to proper parties plaintiff, as to the validity and effect of a Mexican grant from which plaintiff deraigned title, as to its loss and contents, and as to the validity and effect of the mesne conveyances through which plaintiff claimed, and as to whether the proceedings in the probate court showed jurisdiction in said court to make orders, by virtue of which sales were had, resulting in deeds through which plaintiff in part claimed, were matters for the court alone, and not for the jury. *Id.* 307.

61. It is error for the court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of the line is of no moment. *Ib.*

62. The authority to grant lands in the city of San Francisco was vested in the ayuntamiento, and in the alcalde or other

officers who at the time represented it, or had succeeded to its powers and obligations. *Hart v. Burnett*, 15 Cal. 616.

63. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

64. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant. *Holladay v. Frisbie*, 15 Cal. 634.

65. The beach and water lot property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale on execution. *Ib.*

66. The third section of the act "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee, until performance of the conditions annexed—that is, until the reclamation of the lands. *Montgomery v. Kasson*, 16 Cal. 193.

67. This grant is a contract between the State and the grantees, by which the State grants certain lands, upon condition of work to be performed; the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely, upon performance of the acts specified as the consideration moving to the State. *Ib.* 194.

68. The grantees under the act, having surveyed the lines of the canals mentioned therein, and commenced the work of excavating one of them, and continued the same within and during the year after the passage of the act, have brought themselves within the first section thereof, and secure the right to proceed with the re-

lamation; and, when this is accomplished, to take one-half of the lands. And if, within the five years limited in the act, the reclamation be effected, the title to the alternate sections designated will vest in the grantees absolutely. *Ib.*

69. With the contract, and the rights of the grantees thereunder acquired by this part performance of its consideration, the legislature cannot interfere. They are protected by both the Federal and the State constitutions. *Ib.*

70. The act of April 20th, 1858, repealing the act of April 11th, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. *Ib.*

71. *Hart v. Burnett*, 15 Cal. 530, holding—first, that San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations; second, that such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes, could be granted in lots, by its municipal officers, to private persons in full ownership; third, that the authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who, at the time, represented it, or who had succeeded to its “powers and obligations;” fourth, that the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority, affirmed. *Payne v. Treadwell*, 16 Cal. 228.

72. A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city, in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo. *Ib.* 232.

73. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands were not suspended, ipso facto, by the war with Mexico, or by the conquest, and the fact that such officers, during the military

occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which, by the existing laws of the country, belonged to such municipal officers. And the same presumptions attach to their grants of lots, whether made before or after the conquest and cession. *Ib.* 240.

74. California, upon her admission into the Union, acquired, under the eighth section of the act of congress of September 4th, 1841, entitled “an act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights,” a vested and present interest in 500,000 acres of land, with a right to select and locate the same, in such manner as her legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of congress, or the proclamation of the President. *Doll v. Meador*, 16 Cal. 320.

75. This right of selection or location was not suspended until the United States had made their surveys, but locations made previous to the survey of the United States were subject to change, if, subsequently, upon the survey being made, they were found to want conformity with the lines of such survey. With this qualification, and the further qualification of a possible reservation by a law of congress, or a proclamation of the President, previous to the survey, which might have required further change, or the entire removal of the location, there was no limitation upon the right of the State to proceed at once to take possession and dispose of the quantity to which she was entitled by the grant. *Ib.*

76. The grant from Alvarado to Sutter, of June, 1841, passed to Sutter a title to the land it embraces, subject to be defeated by the subsequent action of the supreme government and departmental assembly, and carried with it a right to the possession, use, and enjoyment of the land, which right can be asserted in our courts. *Cornwall v. Culver*, 16 Cal. 425.

77. Such grant passed a present and immediate interest to the grantee in the quantity of land specifically designated—eleven leagues—to be surveyed and laid off within the exterior limits of the general tract designated in the grant, by the

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officers of the government. *Ib.* 426.

78. In ejectment for land in Sacramento county, claimed under Sutter's grant, the grant by Micheltorena to Leidesdorff, in October, 1841, is competent evidence to show that the tract of country now embraced by that county is included within the boundaries of the grant to Sutter. *Ib.*

79. *Ferris v. Coover*, 10 Cal. 589, holding that the map or plat referred to in the grant to Sutter must be regarded, for the purpose of identifying the land, as part of the grant itself; that the description given in the grant was to be taken in connection with the lines marked on the map, and if any portion was to be rejected, reference would be had to the circumstances under which the grant was made and the intention of the parties, and to ascertain these, parol evidence was admissible, and that such portion would be rejected and such construction adopted as would give effect to that intention, affirmed. *Ib.*

80. Circumstances under which the deposition of Vioget, now deceased, as to the boundary lines of the Sutter grant is admissible, stated. *Ib.* 427.

81. *Morton v. Folger*, 15 Cal. 275, holding the declarations—on a question of boundary—of a deceased person who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, to be admissible, whether the boundary was one of general or public interest, or were one between the estates of private proprietors, affirmed. *Ib.* 428.

82. The land upon which the city of Sacramento is situated is within the exterior limits of the grant to Sutter of June 18th, 1841. *Ib.*

83. *Morton v. Folger*, 15 Cal. 275, holding that the deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties, after his death, as hearsay evidence of the location of such lines, affirmed. *Ib.*

84. For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant, although no official survey and measurement has yet been made by the officers of the government, and although it may appear, when such survey and measurement are made,

that there exists within the exterior limits of the general tract a quantity exceeding the eleven leagues. *Ib.* 429.

85. Until such official measurement, no individual can complain, nor be permitted to determine in advance that any particular locality will fall within any surplus over and above the specified quantity, and thereby justify its forcible seizure and detention by himself. *Ib.*

86. The evidence in this case, showing that the land within Sacramento county was in possession of Sutter, by permission of the former government, for years previous to the cession to the United States; that it was subjected by him to such uses as he desired; that he had absolute control over it, without disturbance by any one, exercising the rights of a proprietor to the knowledge of the government, and with its recognition of their existence; that he asserted ownership of the land under the grant from Alvarado, and that for years after the conquest and treaty his claim and possession were unquestioned; his title, whether it be regarded as a legal or equitable one, is sufficient, under these circumstances, to enable him and those holding under him to recover or maintain possession in the courts of the State, at least until the United States intervene and determine, through the appropriate departments, that his claim under his grant shall be satisfied by land elsewhere selected. *Ib.* 430.

87. The words in the petition of Sutter: "not including in said eleven leagues the land which is periodically inundated with water in winter," and the words in the grant: "without including the lands inundated by the impulse and currents of the rivers," mean the land which is regularly inundated during the winter, and refer only to what are known as tule lands. No other lands will meet the terms of the petition. *Ib.* 430.

88. The governor and departmental assembly of California had power to make grants of lands within the general limits of pueblos, and the official acts of such officers, within the general scope of their powers, are presumed to have been done by lawful authority. *Brown v. City of San Francisco*, 16 Cal. 458.

89. The fact that such grant recites the law of 1824 and the regulations of 1828, and no others, does not raise the inference

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that the grant was made only under the authority of that law and those regulations. *Ib.* 458.

90. A grant may be made under other and different authority than that recited in the grant, and may be valid, although prohibited by the authority recited. *Ib.* 459.

91. The regulations of secularization by governor Figueroa, August 9th, 1834, limiting the extent of land to be granted to any one individual to four hundred varas square, did not apply to pueblo lands, and did not limit the general power of the governor and departmental assembly to grants of four hundred varas square. *Ib.* 460.

92. Where land within the general limits of the pueblo of San Francisco, and also within the limits of the old "Mission," was granted to an individual by the governor and departmental assembly, in 1839-40, before the "Mission" had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be presumed to be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Ib.* 460.

93. Query: Whether, after final confirmation of land granted by the governor and departmental assembly, and after patent by the United States, inquiry can be made as to the effect of any deviation on the part of the governor and assembly from the mode and manner prescribed by law for making grants—assuming that such grants were to be made solely by virtue of the law of 1824 and regulations of 1828. *Ib.*

94. In ejectment on a patent from the United States for land under a Mexican grant, in which patent there was incorporated a plat of survey, on the margin of which was a memorandum that the land was surveyed under the orders of the United States surveyor general, by Von S., deputy surveyor, and that the field notes from which it was made had been examined and approved by the United States surveyor general for California, and were on file in his office, plaintiff offered the patent in evidence, and defendant objected to the survey it set forth, on the ground that the deputy surveyor who made it was interested in the grant: held, that the objection is untenable; that it is

immaterial whether the deputy was at the time interested in the grant or not, as the approval of the survey by the surveyor general and by the proper department at Washington imparted validity to the survey and put it beyond the reach of attack in actions of ejectment; that such approval was the judgment of the appropriate tribunal; that the survey was in conformity with the final decree of confirmation—this case having arisen previous to the act of congress of 1860, giving the district court supervision over the action of the surveyor general, etc. *Mott v. Smith*, 16 Cal. 548.

95. Under the decision in Fossat's case, (21 How. 445) it may be true that the jurisdiction of the United States district court previous to this act of congress embraced all questions as to the location and boundaries of the lands confirmed, and could have been exercised to control the surveys of such lands until the issuance of the patent; but where no question was made as to the form or correctness of the survey by proper parties before the district court, pending the proceedings for confirmation, the approval of the survey by the surveyor general and by the department at Washington was final. *Ib.*

96. Of that approval, and also of the regularity and validity of all the different proceedings required by the acts of congress, from the filing of the petition of the claimant before the board of land commissioners to the issuance of the patent, the patent itself is, in an action of ejectment, not only evidence, but conclusive evidence against the government and all parties claiming under the government by title subsequent, and against parties claiming no higher title than mere possession. *Ib.*

97. Where, in ejectment on a patent from the United States, reciting that the patentee had presented his claim to the board of land commissioners, and that the claim was founded on a Mexican grant to Pablo Gutieras "in the summer of 1844, by captain John A. Sutter, who, according to the records of the board, derived his authority to grant from governor Micheltorena, on the twenty-seventh day of December, 1844," etc., it was objected to the introduction of the patent in evidence that it rested on a grant from one who had no authority to grant: held, that even conceding Sutter had no such authority,



Guaranty.

still the tribunals established by the United States government for the express purpose of ascertaining and determining the validity of grants claimed to have been issued by the Mexican government having passed upon this grant and pronounced it valid, its validity cannot be questioned, either by the government or individuals claiming under the government, either collaterally in ejectment or directly in any other form of proceeding; that the validity of the grant has become the law of the case. *Ib.*

See PATENT.

GUARANTY.

1. Where a promissory note was given on the sale of real estate, and the vendor had neither title nor color of title nor possession: held, that the defendant who had, as a part of the original transaction and without consideration, guaranteed the payment of the note, was not liable to pay the same. *Fisher v. Salmon*, 1 Cal. 414.

2. One who puts his name on a promissory note, out of the usual course of regular negotiability, is not an endorser, but a guarantor, no matter what words are used in the covenant. *Riggs v. Waldo*, 2 Cal. 480.

3. A guarantor of a promissory note is entitled to demand and notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Geiger v. Clark*, 13 Cal. 580.

4. A promissory note was endorsed by a third person, before delivery by the payee; such endorsement is prima facie an accommodation to the payee, but proof that his design was to become a guarantor would make him liable to the payee, and his default, with proper averment, dispenses with this proof. *Clark v. Smith*, 2 Cal. 606.

5. A complaint is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Lightstone v. Laurencel*, 4 Cal. 277.

6. Where one person guarantees the payment of the debt of another in consideration of the agreement of the creditor

to stay proceedings against the debtor, the promise of the creditor is a condition precedent, and its performance must be proven to entitle him to a judgment against the guarantor. *Smith v. Compton*, 6 Cal. 26.

7. A guaranty not under seal nor expressing consideration, made contemporaneous with the contract guaranteed, is a part of the contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds. *Jones v. Post*, 6 Cal. 104.

8. It is not material on what part of a note a secondary promisor places his name; if the character of his liability is made to appear, his rights are the same as those of an endorser. *Bryan v. Berry*, 6 Cal. 398.

9. A guaranty endorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words: "I hereby guarantee the fulfillment of the within charter on the part of the charterer," is good. *Hazeltine v. Larco*, 7 Cal. 34.

10. The instrument referred to in the guaranty becomes part thereof. If the guaranty were executed subsequently it would fail, for there either is no consideration for the promise in fact, or the new consideration is not expressed in the instrument referred to. *Ib.* 35.

11. Where the defendant, in consideration of the extension by plaintiffs of a note held by them against A, executed a guaranty that the same should be paid within a specified time, with increased interest by the checks of defendant, and from the proceeds of sales of his own property, and providing that a failure of defendant to comply with his guaranty should operate as a determination of the extension granted to A: held, that under the proviso, the plaintiffs must exhaust their remedy against A on the original demand; and that then they could compel the guarantor to make good the deficiency. *Donahue v. Gift*, 7 Cal. 242.

12. The difference between a maker and an endorser or guarantor is, that the contract of the first, by its terms, imports an unconditional obligation. *Aud v. Magruder*, 10 Cal. 290.

13. A guarantor may usually be a surety, but a surety is not necessarily a guarantor. *Ib.*



## Guaranty.—Guardian and Ward.

14. Where the holder of a note, after its maturity, obtained from a stranger to the note a guaranty of its payment within sixty days: held, that there was no presumption of law that the guaranty was taken for the benefit of the maker, or that it extended to him the time of payment. *Williams v. Covillaud*, 10 Cal. 428.

15. Such a guaranty is an independent contract, which does not suspend any right of action of the holder of the note against the maker. *Ib.*

16. Where a promissory note was made payable to S., and before its delivery was endorsed for the accommodation of the maker by H. and brother and the defendant, upon an agreement of the endorser with each other that each would become surety if the other would: held, that the endorser were jointly, and not severally, liable as guarantors in a suit by a payee or a third person taking the note after maturity. *Brady v. Reynolds*, 13 Cal. 32.

17. An outstanding liability as grantor or endorser, together with an express promise by such grantor or endorser to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount on demand. *Gladwin v. Gladwin*, 13 Cal. 334.

18. A note in this form: "Sixty days from date, for valued received, we jointly promise to pay F. Reeves, or bearer, the sum of four hundred dollars, etc. Oct. 11th, 1858. (Signed) E. B. Howe, J. E. Mayo;" was endorsed, "I guarantee the collection of the within note when due. (Signed) A. Hayward," contemporaneously with the signing of the note: held, that the engagement of Hayward is not original, but collateral; that he is a guarantor and not a promisor, and is entitled to legal notice of nonpayment of the note before he can be charged on his contract. *Reeves v. Howe*, 16 Cal. 153.

19. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument,

dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments, and at the different times in said agreement set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates of installments, at two, four, six and eight months from that date: held, that defendant is not liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff, having taken certificates dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. *Gross v. Parrott*, 16 Cal. 145.

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GUARDIAN AND WARD.

1. Letters of guardianship of a lunatic issued by the probate court cannot be questioned in a collateral proceeding. *Warner v. Wilson*, 4 Cal. 313.

2. The guardianship by nature extends only to the custody of the person of the ward, and not to his property. To enable the guardian to manage the property of his ward, he must be duly appointed by some competent public authority. *Kendall v. Miller*, 9 Cal. 592.

3. Where the infant is over the age of fourteen, the service of summons is only to be made upon him, as he may choose his own guardian. As the statute requires personal service of the summons upon the infant, although under the age of fourteen, it is clear that a copy of the summons should have been put into the post office, directed to the infant, in the same manner as if over the age of fourteen. The court had no right to appoint a guardian ad litem, until the infant was properly brought into court. *Gray v. Palmer*, 9 Cal. 638.

4. The statute of this State relative to guardians, and the disposition of the estate left to wards, only applies when there is no direction by will as to such disposition. *Norris v. Harris*, 15 Cal. 255.

5. Where a will appoints a guardian, there is no necessity for the issuance of

Guardian and Ward.—Habeas Corpus.

any letters of guardianship to authorize the guardian to act. The guardian's authority comes directly from the will. *Ib.* 256.

6. A party erecting buildings upon the property of an infant, under contract with his guardian, made without authority of law, has no equitable lien on the property for the value of the improvements—such party being fully informed of the title and condition of the property. *Guy v. Du Uprey*, 16 Cal. 200.

7. Where, upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and on the same day a guardian ad litem was appointed for such heirs, who, on the same day appeared and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed, and the order to show cause made on the same day. *Stuart v. Allen*, 16 Cal. 504.

8. The statute is silent as to the time when the guardian ad litem is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

9. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

GUEST.

See INNKEEPER.

HABEAS CORPUS.

1. In general, upon application to bail or discharge on habeas corpus, the courts

will look into the depositions, and without regarding the regularity or irregularity of the commitment, will remand, discharge or bail the prisoner, according to the circumstances, whether the facts as charged are sufficient to justify a detainer of a prisoner and putting him upon his trial. *People v. Smith*, 1 Cal. 14.

2. If the commitment be regular, the court will look into the depositions, and if there be not sufficient grounds laid to detain the party in custody, the court will discharge or bail him; on the other hand, if the commitment be irregular, the court will not discharge or bail the prisoner, without first seeing the proof whether there is sufficient evidence to detain him. *Ib.*

3. The authority of the supreme court to issue writs of habeas corpus is conferred by reason of the analogy to an appeal. A decision that the individual shall be imprisoned must always precede the application for a writ of habeas corpus. *Ex parte the Attorney General*, 1 Cal. 88; *People v. Turner*, 1 Cal. 147.

4. Where parties are brought before the court on return of writ of habeas corpus, and the person in whose custody they are neither shows nor claims any legal right to detain them, they will be discharged. *Ex parte the Queen of the Bay*, 1 Cal. 157.

5. A person will be discharged on habeas corpus from arrest, when the process, though proper in form, has been issued in a case not allowed by law. *Soule v. Hayward*, 1 Cal. 347.

6. In an action to recover money received by a person as agent, he cannot be arrested without the affidavit shows some fraudulent conduct on his part, or a demand on him for the money, and a refusal to pay. *Ex parte Holdforth*, 1 Cal. 439.

7. On finding a commitment illegal, if it appear that the party is guilty of an offense, the court will not discharge him without allowing time for his arrest by proper authority. *Ex parte Crandall*, 2 Cal. 145.

8. The arrest and commitment for deportation of fugitive slaves does not determine their slavery. It leaves that to future adjudication. *Ex parte Perkins*, 2 Cal. 428.

9. The power of hearing and determining writs of habeas corpus is vested in the judge of every court of record in the State.

The final determination is not that of a court, but the simple order of a judge, and is not appealable from or subject to review, and therefore not *res adjudicata*. *Ib.* 430.

10. A judgment upon one writ is not a bar to any further proceeding, but looks to a different result, and any prisoner may pursue his remedy of habeas corpus until he has exhausted the whole judicial power of the State. *Ib.*

11. The judiciary have jurisdiction by habeas corpus to investigate cases where a party is arrested as a fugitive from justice, escaped from another State. *Ex parte Manchester*, 5 Cal. 238.

12. Under a writ of habeas corpus, the supreme court cannot review the orders of the inferior court on the subject of contempt, as they are by our statutes declared to be final and conclusive. *Ex parte Cohen*, 5 Cal. 495.

13. A party committed for refusing to answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus, where it appears that the suit has abated; there being no longer parties or subject matter before the court, there is no longer a case in which the question can be asked. *Ex parte Rowe*, 7 Cal. 176.

14. A commitment for contempt for refusing to obey an unlawful order of court, can be reviewed and set aside by the appellate court on habeas corpus. *Ib.* 181; 183.

15. The writ of habeas corpus should not issue to run out of the county, unless for good cause shown; as the absence, disability or refusal to act of the local judge, or other reason showing that the object and reason of the law requires its issuance. *Ex parte Ellis*, 11 Cal. 225.

16. The legislature can never have intended that a party imprisoned under sentence of conviction for a misdemeanor should have the privilege of selecting from the judiciary of the whole State the individual to whom he prefers to make his application, however distant from the place of his detention, and compel the officer having him in charge to convey him at the expense of the county. *Ib.*

HARBOR.

1. A vessel in the harbor of San Francisco moored in the usual track of bay and river steamers should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, when there was neither gross negligence nor intentional wrong on the part of the steamer. *Kelly v. Cunningham*, 1 Cal. 366; *Innis v. Steamer Senator*, 1 Cal. 459.

2. Whether driving piles in Front street, in San Francisco, the street being laid out over the waters of the harbor, is an obstruction to the free use of the street by the public, is a question of fact for the jury, and where that question was not so submitted, a new trial was granted. *City of San Francisco v. Clark*, 1 Cal. 386.

3. A lot of land in the harbor of San Francisco, lying within the line of the streets as laid down and recognized by the city on its official map, and being in the actual possession of a person who claimed to be the owner, cannot be taken from him and appropriated to the public use without paying him a just compensation. *Gunter v. Geary*, 1 Cal. 465.

4. All that part of the harbor below low water is a public highway, common to all citizens, and if any person appropriates it to himself exclusively, the presumption is that it is a detriment to the public. *Ib.* 468.

5. Vessels plying between San Francisco and Sacramento, and San Francisco and Stockton, are liable to the payment of harbor dues to the city and county of San Francisco. *City of San Francisco v. California Steam Nav. Co.*, 10 Cal. 507.

HEARSAY EVIDENCE.

See EVIDENCE.

Heir.

HEIR.

1. If the heirs of a deceased wife be the children of the marriage, they have the right of succession on the death of the father to the whole estate, with the right of the father to dispose of one-fifth; but by the estate in law is understood the residue after all debts have been paid. *Panaud v. Jones*, 1 Cal. 516.

2. A having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage: held, that the children upon the death of the wife did not acquire a vested estate in the common property, and that the father had an absolute dominion in, and control over, and power to dispose of such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts contracted after as well as before the death of his wife. *Ib.* 517.

3. The words of an acknowledgment of the paternity of an illegitimate child, for the purpose of making it an heir, must be clear and exclude all except one interpretation. *Estate of Sandford*, 4 Cal. 13.

4. The statute provides that any other of the next of kin who would be entitled to share in the distribution of the estate shall be entitled to administer; it must be construed to mean the next of kin capable of inheriting, or who would be entitled to distribution if there be no nearer kindred. *Anderson v. Potter*, 5 Cal. 64.

5. After twenty years acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California. *Castro v. Castro*, 6 Cal. 161.

6. Treaties made by the United States, removing the disability of aliens to inherit, are valid, and within the intent of the constitution of the United States. *People v. Gerke*, 5 Cal. 383.

7. A nonresident alien cannot inherit* land in this State, and consequently cannot maintain ejectment for such alleged inheritance. *Seimssen v. Bofer*, 6 Cal. 252.

8. The provisions of the constitution giving to aliens who are bona fide residents the right to inherit, by the rules of construction exclude nonresident aliens. *Seimssen v. Bofer*, 6 Cal. 253; *Farrell v. Enright*, 12 Cal. 456.

9. The probate court has no power to direct that the portion of an estate of an intestate, originally allotted to one of the heirs-at-law, a nonresident, shall be distributed among the other heirs, if the nonresident heir shall fail to appear and claim it within a year. *Pyatt v. Brockman*, 6 Cal. 418.

10. A judgment at common law was no evidence in an action against an heir, and the petition to sell the real estate of an intestate is the substitute under our system for the action against the heir. The latter is required to be cited and allowed to be heard, and it would be singular if he was concluded by proceedings to which he was no party. *Beckett v. Selover*, 7 Cal. 228.

11. The heirs of the deceased have the right to go behind the allowance of claims against the estate by the administrator, and the approval by the probate judge, and to require proof of the original indebtedness, upon the hearing of the petition for the sale of real estate to pay debts. *Ib.* 228.

12. By the settled doctrine of the common law, an alien could not acquire title to real property by descent or other mere operation of law. *Farrell v. Enright*, 12 Cal. 456.

13. A subsequent residence of an alien will not retroact so as to confer upon him any right to inherit any portion of real estate of which the ancestor died possessed. *Ib.*

14. The act of April 19th, 1856, permitting nonresident aliens to inherit real and personal estate, is constitutional. The rights which the constitution gives to bona fide resident aliens may be enlarged, but cannot be abridged by the legislature. *State v. Rogers*, 13 Cal. 165.

15. Possession of land at the death of a party gives prima facie title to his heirs or representatives. *Gregory v. McPherson*, 13 Cal. 572.

16. An allegation in the complaint that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of

*The act of April 19th, 1856, enlarged the powers of inheritance and extended it to nonresident aliens. See *State v. Rogers*, 13 Cal. 165.

Heir.—Homestead in general.

heirship. *Castro v. Armesti*, 14 Cal. 39.

17. Citation to heirs, to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abilla v. Padilla*, 14 Cal. 106.

18. Where, upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and on the same day a guardian ad litem was appointed for such heirs, who on the same day appeared, and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed, and the order to show cause made on the same day. *Stuart v. Allen*, 16 Cal. 504.

19. The statute is silent as to the time when the guardian ad litem is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

20. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

21. Query: Whether the various circumstances of this case, the irregularities, the price for which the property was sold, its real value, its consideration, the effect of these things upon the sale, entitle the infant heirs to come into a court of equity to set aside the sale. *Ib.*

See ESTATES, PROBATE COURT.

HIGHWAYS.

See STREETS AND HIGHWAYS.

HOMESTEAD.*

- I. In general.
- II. Not existing in joint Tenancy.
- III. Mortgage of a Homestead.
- IV. Sale of a Homestead.
 - 1. On Execution.
- V. Abandonment of a Homestead.

I. IN GENERAL.

1. The homestead act does apply to and affect property acquired previous to its passage. *Cook v. McChristian*, 4 Cal. 25; *Moss v. Warner*, 10 Cal. 297.

2. In the absence of any statute regulation, requiring a record of the selection of the homestead or indicating any mode in which the intention to dedicate property as a homestead shall be made by filing a notice in the recorder's office of the county, it could have no legal effect, and would not be conclusive on purchasers or creditors. *Cook v. McChristian*, 4 Cal. 26; *Reynolds v. Pixley*, 6 Cal. 167.

3. The homestead is the dwelling place of the family, where they permanently reside, and by common law such residence raises a presumption that the premises so held are the homestead, and every one is bound to take notice of the character of the occupants' claim. *Cook v. McChristian*, 4 Cal. 26; *Taylor v. Hargous*, 4 Cal. 272.

4. In an action of ejectment, the purchaser of a homestead from the husband without the concurrence of the wife is not entitled to recover the excess of its value over \$5000. *Cook v. McChristian*, 4 Cal. 27.

5. The fact of the dedication of the premises by possession as a homestead, was properly submitted to the jury. *Ib.*

6. It becomes a sort of tenancy, with the right of ownership as between husband and wife, and this estate cannot be altered or destroyed except by the concurrence of both in the manner provided by law, un-

*The homestead act was passed in 1851, statutes p. 286. In 1854, the opinion in *Taylor v. Hargous*, 4 Cal. 272, held that there could be no abandonment of the homestead, except by the joint act of husband and wife. This decision was repeatedly affirmed until 1859, when the court, in *Oee v. Moore*, 14 Cal. 478, reversed all previous cases, and held that there could be an abandonment without the concurrence of the wife, which latter decision has been adhered to in several later cases. In 1880, statutes, p. 311, the act has been amended so as to require a registry of the homestead, and an abandonment must be by deed acknowledged and recorded after execution by husband and wife.

In general.

less it be in favor of an innocent purchaser without notice. *Taylor v. Hargous*, 4 Cal. 273.

7. As soon as the place acquires the character of homestead the nature of the estate becomes changed, without reference to the manner in which the title to the property originated, whether it was the separate estate of either husband or wife, or the common property of both. *Ib.*

8. In case of a successive occupancy of several places of residence, the recovery of any one of them as a homestead by the wife would bar her recovery of another. *Ib.*

9. The plaintiff is entitled to make out of the lot claimed as a homestead only the actual amount of the purchase money and interest remaining due, and for the excess over such purchase money he must proceed on his other security or against the party, but not against the homestead. *Dillon v. Byrne*, 5 Cal. 457.

10. An insolvent sold certain property to the plaintiff in order to disencumber his homestead and save it for himself, of which plaintiff was aware: held, that the sale was fraudulent and void as to creditors, and it would seem to be only fair that the homestead should remain answerable for the debts charged upon it, and not after becoming a source of credit be relieved intentionally by the disposition of all other property of the debtor, leaving nothing for the satisfaction of the other creditors. *Riddell v. Shirley*, 5 Cal. 490.

11. A wife cannot sue to recover a homestead; it is a joint estate with the right of survivorship, and both husband and wife must join in the action. *Poole v. Gerrard*, 6 Cal. 73.

12. The homestead is the family residence, and in order to constitute a homestead there must be an actual occupancy with the intention of dedicating the premises to such purpose. Residence is prima facie evidence of such intention, and imports notice. *Holden v. Pinney*, 6 Cal. 235.

13. The question of homestead is a fact, and the presumption arising from evidence may be defeated by facts and circumstances aliunde. *Ib.* 236.

14. A widow who has once applied to the probate court to have the last residence of her husband and herself set aside as a homestead, and has acquiesced for eighteen months in the order so setting it aside, is concluded by her own acts from

afterwards claiming a lot on which they formerly resided, merely because she has ascertained that there are liens on the one first set aside. *Ib.*

15. The constitution is inoperative in itself and looks to legislation to determine how far and in what manner the homestead should be protected from forced sale. *Cary v. Tice*, 6 Cal. 630; *Pfeiffer v. Riehn*, 13 Cal. 649.

16. The separate property of the husband acquired before marriage may become the homestead, as well as the common property of husband and wife. *Revalk v. Kraemer*, 8 Cal. 71.

17. Where the homestead was claimed by the husband, in an action in which he was alone defendant, to foreclose a mortgage made by him alone, since marriage, neither the rights of the husband or wife could be affected by the proceedings in that case, the wife not being a party. Legal proceedings to be conclusive against either must embrace both. *Revalk v. Kraemer*, 8 Cal. 72; *Kraemer v. Revalk*, 8 Cal. 75; *Cook v. Klink*, 8 Cal. 353; *Marks v. Marsh*, 9 Cal. 97.

18. Any individual, whether married or not, may be the head of a family or as such entitled to a homestead right, but this right may cease. *Revalk v. Kraemer*, 8 Cal. 73.

19. The homestead being held in a sort of joint tenancy passes on the death of the husband to the wife, by right of survivorship, and forms no part of the common property. *Estate of Buchanan*, 8 Cal. 509.

20. In an action in which a homestead right is asserted, in which an issue of fact is made as to the marriage of the parties claiming to be husband and wife, the declarations of the alleged wife to the effect that she is not married are admissible in evidence. *Poole v. Gerrard*, 9 Cal. 595.

21. In an action by the wife against the husband for a divorce, the defendant cannot have a portion of the homestead set apart to him, where it is not shown that the property claimed as a homestead has been at any time during the existence of the marriage the residence of the family. *Elmore v. Elmore*, 10 Cal. 226.

22. The residence of the husband with his family upon the premises, impresses upon them the character of homestead. *Moss v. Warner*, 10 Cal. 297.

In general.

23. Where the defendant was indebted in the sum of \$1000, which he secured by a mortgage on his homestead and some time afterwards became insolvent, and after several attachments had been issued in suits against him and levied on his store, he took money which he had and paid off the debt secured by the mortgage: held, that the payment was not an act to hinder, delay and defraud his creditors. *Randall v. Buffington*, 10 Cal. 494.

24. The homestead estate is a sort of joint tenancy, with the right of survivorship as between husband and wife, and cannot be destroyed except by the concurrence of both in the manner prescribed by law. *Estate of Tompkins*, 12 Cal. 125.

25. The homestead does not constitute any portion of the assets to be administered upon by his personal representatives. *Ib.*

26. A homestead right cannot be asserted merely to a building, independent of the land upon which the building is erected. *Smith v. Smith*, 12 Cal. 225.

27. The homestead right is as much for the benefit of the children as for the benefit of the wife. *Lies v. DeDiablar*, 12 Cal. 330.

28. It does not matter when or how the homestead was acquired, or whether it was common or separate property; it can only be conveyed in the manner prescribed by law. *Ib.*

29. Land on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. And after this right has attached, the husband cannot without the assent of his wife charge the land by agreement to pay interest in addition to the purchase money. *McHendry v. Reilly*, 13 Cal. 76.

30. The constitution contemplates legislation to exempt the homestead from forced sale, but not to restrain voluntary alienation. The statute goes beyond the constitution. *Gee v. Moore*, 14 Cal. 474.

31. The husband alone has the legal title to the homestead, and his absolute power of alienation is restricted only so far as is necessary to protect the homestead. *Ib.*

32. The constitution and statute are based upon the idea that the homestead is to be carved out of the husband's property, or at least out of common property. *Ib.*

33. A sale of the homestead alone vests

the estate in the vendee, subject only to the use and occupation by husband and wife until another homestead is acquired, or until the character of the premises as a homestead is otherwise gone. *Ib.* 476.

34. In such cases, upon the death of the wife without issue living, the premises cease to be a homestead, and the vendee of the husband is entitled to possession. *Ib.* 477.

35. The death of the wife after suit brought by herself and husband for the homestead, defeats a recovery by the husband, though the right to recover existed at the commencement of the suit. *Ib.*

36. The appropriation of premises as a homestead gives the wife a right to insist that their character as a homestead shall continue until she consents to their alienation, or another homestead is provided, or they are otherwise abandoned. *Gee v. Moore*, 14 Cal. 477; *Guiod v. Guiod*, 14 Cal. 507.

37. The wife, if surviving her husband, takes the homestead as property set apart by law from her husband's estate, for her benefit, and that of her children, if there be any. *Gee v. Moore*, 14 Cal. 478.

38. The wife has no right in the homestead independent of the husband, which she can enforce against his consent. She cannot maintain a suit for it in her individual name. *Guiod v. Guiod*, 14 Cal. 507.

39. The statute affords protection to the husband, as head of the family, and through him to the wife and children. *Ib.*

40. If at the date of the conveyance by the husband, he had only removed from the premises temporarily, for some specific purpose, he could still claim their enjoyment and use as a homestead. The wife must follow her husband when he changes his residence. *Ib.* 508.

41. A complaint by husband and wife to recover the homestead conveyed away by the deed of the husband alone must aver, either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been previously abandoned. *Harper v. Forbes*, 15 Cal. 203.

42. Ejectment for land as a homestead. The husband alone had executed a deed to defendant. There was evidence tending to show that the premises were never

In general.

occupied by plaintiffs with the intention of making them the homestead; and also evidence tending to prove an abandonment of their occupancy, and a residence on other property as that of the family. The court below submitted a series of questions to the jury, for a special verdict, the first of which was: "Did the plaintiffs ever dedicate and set apart the real estate described in the complaint as a homestead, by living upon it with the intention so to dedicate it?" and told the jury if they answered this question in the negative, the answer would constitute their entire verdict, but if they found in the affirmative, they should then proceed to answer the other questions: held, that such direction was proper, as a negative answer to this question was conclusive against a recovery, and that such directions are convenient in practice, and no abuse of discretion. *Broadus v. Nelson*, 16 Cal. 81.

43. Where a writ of assistance is granted, and the mortgagee and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continuously ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Skinner v. Beatty*, 16 Cal. 158.

44. A judgment recovered against the husband does not become a lien on the homestead, and the sale of a homestead upon an execution issued on such judgment is void. *Ackley v. Chamberlain*, 16 Cal. 182.

45. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ib.* 183.

46. In this case, the premises, consisting of a principal building, with a barn, store-house and out-houses appurtenant thereto, were held to be a homestead, although the principal building was used as a hotel, as well as a dwelling for the fami-

ly—it appearing that the land, one hundred and sixty acres, was taken up, and said building originally intended as a residence for the family, and that the nature and extent of the hotel-keeping did not interfere with the general character of the premises as such dwelling, and that the entire premises were not worth over \$2000. *Ib.* 183.

47. Query: Whether premises devoted chiefly to business purposes, though occupied by the family, can be claimed as a homestead? *Ib.* 183.

48. Under the act of 1851, prior to its amendment in 1860, mortgages upon the homestead executed by the husband alone, were not absolutely void, but were invalid only to the extent required for the protection of the husband and wife in the enjoyment of their homestead rights. *Bowman v. Norton*, 16 Cal. 217.

49. Where, under the act of 1851, both husband and wife unite in a conveyance of the homestead, the homestead rights are relinquished, and persons to whom the husband alone had mortgaged the homestead previous to such conveyance may enforce their mortgages against the property in the hands of the grantee. *Ib.* 218.

50. The act of 1860 materially changes the provisions of the act of 1851, and renders any mortgage hereafter of the homestead, except to secure or pay the purchase money, invalid for any purpose whatever. *Ib.*

51. A conveyance by the husband and wife of the homestead does not transfer the homestead rights. Such rights may be released and abandoned, but are, in their nature, incapable of sale and transfer. The exemption from forced sale is the personal right of both husband and wife, and the restraint upon the husband's alienation is the personal right of the wife alone, and they cannot be assigned to others. *Ib.*

52. A decree in insolvency, discharging the husband, and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not be thus divested; nor was such the intention of our insolvent act. *Ib.*

53. In this State, a judgment cannot become a lien upon the homestead. It can

Not in a joint Tenancy.—Mortgage of a Homestead.

become a lien only upon the real property of the judgment debtor. *Ib.* 220.

II. NOT EXISTING IN A JOINT TENANCY.

54. The statute does not contemplate that homesteads should be carved out of land held in joint tenancy or by tenancy in common, because it has provided no mode by which to separate or ascertain it. *Wolf v. Fleishacker*, 5 Cal. 245; *Reynolds v. Pixley*, 6 Cal. 167; *Holden v. Pinney*, 6 Cal. 236; *Giblin v. Jordan*, 6 Cal. 147; *Kellersberger v. Kopp*, 6 Cal. 565.

55. As a husband and wife may, by joining in a conveyance, destroy a homestead right already acquired by selling the whole, so they may equally destroy it by selling an undivided portion of it. *Kellersberger v. Kopp*, 6 Cal. 565.

III. MORTGAGE OF A HOMESTEAD.

56. Treating the mortgage as a mere security for the purchase money of a homestead, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt. *Dillon v. Byrne*, 5 Cal. 457; *Carr v. Caldwell*, 10 Cal. 385.

57. B bought premises and executed a note for part payment, which was afterwards transferred to plaintiff, who then loaned an additional sum, and took his note and a new mortgage on the same lot and another lot, and canceled the first mortgage. In a suit to foreclose the mortgage, B's wife intervened and claimed the premises as a homestead: held, that the land was liable for the remainder of the purchase money, no matter to what purpose it might be devoted. *Carr v. Caldwell*, 10 Cal. 385; *Dillon v. Byrne*, 5 Cal. 457; *Birrell v. Schie*, 9 Cal. 107; *Swift v. Kræmer*, 13 Cal. 530.

58. Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to an adjustment of the controversy, and should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 507.

59. Where a married man whose wife

never resided in this State, purchased a lot of land and resided upon it, which he then mortgaged, his wife not joining therein, and subsequently his wife came to this State and resided with him on the mortgaged premises: held, that the character of homestead was never impressed upon the premises until the actual residence of the family thereon, and therefore the homestead exemption cannot be sustained against the mortgage. *Cary v. Tice*, 6 Cal. 630; *Rix v. McHenry*, 7 Cal. 91; *Benedict v. Bunnell*, 7 Cal. 246.

60. A mortgage of the homestead signed by the husband alone is absolutely void where its value does not exceed \$5000. When the husband ceases to be the head of the family the right to a homestead also ceases. *Revalk v. Kræmer*, 8 Cal. 74; *Van Reynegom v. Revalk*, 8 Cal. 76.

61. Where A, a married man, mortgaged the homestead to B without the concurrence of his wife, and A and his wife subsequently mortgaged to C, and B and C both foreclosed their mortgages, neither making the other a party; whereupon C filed a bill against B, to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value \$5000: held, that C could urge the same objection to the mortgage of B that A and his wife could; that B's decree was a cloud upon the title and impaired the security, and that C was entitled to have it set aside. *Van Reynegom v. Revalk*, 8 Cal. 76; *Dorsey v. McFarland*, 13 Cal. 346.

62. Where, after judgment of foreclosure had been taken in an action against the husband solely on a mortgage on the homestead premises, executed by him alone, the husband and wife joined in a mortgage to a third party: held, that the foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead. *Van Reynegom v. Revalk*, 8 Cal. 76.

63. Where A, who is a married man, is occupying premises as the tenant of B, and concludes to purchase the same, and to do so borrows the whole of the purchase money from C, and to secure the payment thereof to C, mortgages the premises to him, but the wife does not sign the mortgage: held, that the homestead right was subject to the mortgage. *Lassen v. Vance*, 8 Cal. 274.

Mortgage of a Homestead.—Sale of a Homestead.—On Execution.

64. The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Cook v. Klink*, 8 Cal. 353.

65. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or, by permission of the court, be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegation. *Moss v. Warner*, 10 Cal. 297.

66. Where commissioners were appointed by the court to select and set apart as a homestead a portion of the tract of land mortgaged, such portion to be of the value of \$5000, in form as compact as possible, including the place where the dwelling house is situated, and to report their action to the court; and the commissioners acting under oath, made the selection and the report was approved: held, that the proceeding was proper. *Ib.* 298.

67. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *Montgomery v. Tutt*, 11 Cal. 193.

68. A mortgage of the homestead of the family executed by the husband only is void. To make such mortgage valid the wife should join with the husband in the execution of it. *Lies v. De Diablar*, 12 Cal. 329.

69. An order of the probate court setting apart property as a homestead will not defeat a mortgage which has properly vested as a lien upon the property, where the mortgagor was not a party to such proceedings. *Ib.* 330.

70. Action to recover certain real estate as the homestead of plaintiffs. Complaint avers that plaintiff K. alone executed to C. his note, and a mortgage on the property in question to secure its payment. C. foreclosed, making K. and wife, and also several persons holding subsequent mortgages, parties. K. and wife made default, but the other defendants answered, asking for a sale of the property and a decree settling priorities, etc. The court ordered a sale of the property, and that, in case of insufficiency of the pro-

ceeds to satisfy all the mortgages, they be paid in a certain order—C.'s mortgage being last: held, that plaintiffs cannot recover without showing that these subsequent mortgages were invalid and insufficient to pass the title, because the complaint avers the sale to have been made under them as well as under the mortgage to C. *Klink v. Cohen*, 15 Cal. 201.

IV. SALE OF A HOMESTEAD.

71. A sale or alienation of the homestead property without the signature of the wife is void only as to the homestead value. Any excess over \$5000 is subject to the control of the husband, and may be disposed of in any manner by him. *Sargent v. Wilson*, 5 Cal. 506; *Moss v. Warner*, 10 Cal. 298.

72. To make a valid sale of the homestead requires the joint deed of the husband and wife. The husband must make the contract, and the wife must assent to it by an examination separate and apart from her husband. *Poole v. Gerrard*, 6 Cal. 73; *Dorsey v. McFarland*, 7 Cal. 346; *Dunn v. Tozer*, 10 Cal. 172.

73. Where the husband and wife execute a conveyance of their homestead, which the husband delivers to the purchaser before the purchase money therefor is paid, which is afterwards fraudulently attached in a suit brought by the real, though not the ostensible purchaser against the husband alone: held, that equity will compel a cancellation of the deed so obtained. *Still v. Saunders*, 8 Cal. 286.

74. Where the premises are abandoned, the husband may then convey by his sole deed. *Guiod v. Guiod*, 14 Cal. 508.

1. On Execution.

75. A sale by a sheriff under execution of a house claimed as a homestead by the defendant in execution, and ascertained by appraisement to be worth over \$5000, should not be made until an exact appraisement of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest

Abandonment of a Homestead.—Hospital.

therein. *Gary v. Easterbrook*, 6 Cal. 459.

76. It follows that a deed of premises claimed as a homestead, given by the sheriff to the purchaser at the execution sale for the excess of value of the premises over \$5000, conveys an undefined and uncertain interest, upon which the purchaser cannot maintain an action for possession and mesne profits. *Ib.*

77. The homestead right cannot be tried on a motion to set aside a sale under the mortgage. *Cook v. Klink*, 8 Cal. 354.

78. No damage can result from a sale of the homestead by a sheriff under an execution against the husband alone. If the property was a homestead, the sheriff's deed conveyed nothing. *Kendall v. Clark*, 10 Cal. 18.

V. ABANDONMENT OF A HOMESTEAD.

79. *It is the duty of the wife to live with the husband, and her removal with him from the homestead is no abandonment as will prevent a recovery thereof.* *Taylor v. Hargous*, 4 Cal. 273; *Revalk v. Kraemer*, 8 Cal. 71; *Holden v. Pinney*, 6 Cal. 236; *Dunn v. Tozer*, 10 Cal. 171; *Moss v. Warner*, 10 Cal. 297; overruled in *Gee v. Moore*, 14 Cal. 478; *Guiod v. Guiod*, 14 Cal. 507; *Harper v. Forbes*, 15 Cal. 204.

80. The fact that both husband and wife were anxious and willing to sell the homestead for the reasons stated, and repeated efforts were made by the husband to accomplish this purpose, does not show an intention to abandon, but to sell their homestead. *Dunn v. Tozer*, 10 Cal. 171.

81. Abandonment and adultery on the part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. De Diablar*, 12 Cal. 330.

82. The appropriation of premises as a homestead gives the wife a right to insist that their character as a homestead shall continue until she consents to their alienation, or another homestead is provided, or they are otherwise abandoned. *Gee v. Moore*, 14 Cal. 478.

83. If the premises in controversy were in fact abandoned, with no intention on the part of the head of the family to reoccupy them as a homestead at the date of the conveyance, the entire estate passed

to the grantee absolutely; but if not thus abandoned—if the removal were temporary in its nature, made for a specific purpose, for the repair or reconstruction of the building, which had fallen—the premises remained subject to his right to claim their enjoyment and use as such homestead. *Guiod v. Guiod*, 14 Cal. 507; *Bowman v. Norton*, 16 Cal. 218.

84. As by the husband's act the premises were originally impressed with the character of a homestead, so by his act they may be abandoned as such. The wife, from the nature of her dependent relation to her husband—a relation not only essential to the peace and happiness of the family itself, but to the well being of society—must abide the consequences of such abandonment. *Guiod v. Guiod*, 14 Cal. 507; *Harper v. Forbes*, 15 Cal. 204; *Broadus v. Nelson*, 16 Cal. 81.

85. A complaint by husband and wife to recover the homestead conveyed away by deed of the husband alone, must aver either that the premises were occupied as a homestead at the date of the conveyance, or that they had not been abandoned previously. *Harper v. Forbes*, 15 Cal. 203.

86. To rebut the presumption of abandonment in such case, it must be shown that the removal was temporary, made for the specific purpose, with the intention of reoccupying the premises. *Ib.* 204.

HOSPITAL.

1. Where the charter of a hospital was repealed and a charter granted to the new one, and the officers of the former were directed to deliver to the trustees of the latter "all property, real and personal, held by them in trust and for the old institution; and that the latter pay out of the funds in its hands all the debts owing by the old one": held, that the new corporation was bound to pay all such debts without regard to the sufficiency of the fund derived from the corporation. *Johnson v. State Marine Hospital*, 2 Cal. 319.

2. In a suit by a physician against a county, on a contract for his services for

In general.

one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless it distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

HUSBAND AND WIFE.

- I. In general.
- II. Rights of the Wife.
 - 1. As Sole Trader.
- III. Rights of the Husband.
- IV. Deed of Separation.

IN GENERAL.

1. Our statute has done away with the common law right of dower, and substituted in place of it a half interest in the common property, of which the husband and wife are jointly seized during coverture, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives, whether the wife resides in the State or not. *Beard v. Knox*, 5 Cal. 256; *Scott v. Ward*, 13 Cal. 469.

2. In an action for divorce, the desertion of the husband entitles the wife to her own domicile for the purposes of maintaining the action. *Moffatt v. Moffatt*, 5 Cal. 281.

3. In an action for divorce and a partition of the property acquired during coverture, the district court alone has jurisdiction and in an unlimited amount, and can also provide for the support of the wife and child. *Deuprez v. Deuprez*, 5 Cal. 388.

4. Where suit is brought in the name of husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterward defendant executes an undertaking on appeal to the husband and wife, and suit is afterward brought on the undertaking in the name of the husband and wife; held, that

the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking. *Tissot v. Darling*, 9 Cal. 285.

5. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama and causing her detention there and consequent illness and other injuries, though based on a contract, sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner v. Steamer Uncle Sam*, 9 Cal. 729.

6. Willful desertion of the other by either party for the period of two years is ground for a divorce under the statute; and desertion for a less period is not sufficient to bar a decree. *Conant v. Conant*, 10 Cal. 256.

7. An action at law which prays for a judgment against the party who executed the note sued upon may be joined with an equitable demand to foreclose a mortgage given by that party and his wife to secure the payment of the note. *Rollins v. Forbes*, 10 Cal. 300; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Rowland v. Lieby*, 14 Cal. 157.

8. The statute does not affect property after acquired in this State, if acquired by a husband or wife whose marriage occurred elsewhere, unless they "resided and acquired the property herein." *Dye v. Dye*, 11 Cal. 167.

9. The reasonable presumption which attends the possession of property by either spouse during the existence of the community can only be overcome by clear and certain proof that it was owned by the claimant after marriage, or acquired afterward in one of the particular ways specified in the statutes, and that it is property taken in exchange for or in the investment, or as the price of the property so originally owned or acquired. *Meyer v. Kinzer*, 12 Cal. 253; *Tryon v. Sutton*, 13 Cal. 493.

10. The joining of the husband in the conveyance of a wife of her separate estate is not for the purpose of passing title, for he has none to convey. It is only a precaution against imposition, or to afford her his protection, or similar reasons of policy, or to evidence his renunciation of the right to manage or control it. *Ingoldsby v. Juan*, 12 Cal. 576.

In general.—Rights of the Wife.

11. A deed by a husband of his separate real estate to a trustee for the benefit of his wife, whether executed in compliance with an antenuptial contract, or by way of settlement upon his wife, independent of any previous contract, the husband being at the time free from debts and liabilities, is valid. *Barker v. Koneman*, 13 Cal. 10.

12. The law allows, and even regards with favor, provisions made by the husband when in solvent circumstances for his wife and family against the possible misfortunes of a future day, by setting apart a portion of his property for their benefit. *Ib.* 11.

13. Where husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife, and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer v. Reihn*, 13 Cal. 649.

14. Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds and execution against the property of the husband for any deficiency; and after the entry of the decree the husband died: held, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 Cal. 641.

15. The refusal of the wife to accompany her husband on a change of residence, followed by actual cessation of matrimonial cohabitation, and unattended by any excusing or explanatory circumstances, is evidence of desertion, and authorizes a divorce. *Hardenburgh v. Hardenburgh*, 14 Cal. 656.

16. Desertion consists of an actual cessation of matrimonial cohabitation between the parties, coupled with the intent to desert in the mind of the offending party. *Ib.* 657.

II. RIGHTS OF THE WIFE.

17. Where the grantee was a married woman, her capacity to take a concession of public lands is a question for the alcalde in the performance of his official duties to

determine, and her incapacity must be established by the adverse party. *Reynolds v. West*, 1 Cal. 328.

18. Where it appeared that the petitioner's husband was the owner of two fifty vara lots at the time the concession was made to her: held, that it would be presumed that the act of the alcalde, in making the grant, was in conformity with law, until it should be shown that petitioner's husband had received the lots which he had held as a concession of public lands, and not by purchase from an individual. *Ib.*

19. By the Mexican law, the wife during the continuance of the marriage has a revocable and feigned dominion in, and possession of one-half the property jointly acquired by her and her husband; but the husband is the real and veritable owner, and has the irrevocable dominion in all the gananciales, and may sell and dispose of the same. *Panaud v. Jones*, 1 Cal. 515.

20. The code gives to a married woman the right to sue without her husband, in an action concerning her separate estate. *Snyder v. Webb*, 3 Cal. 86.

21. Property owned by the wife before marriage, and that acquired afterwards by gift, bequest, devise or descent, shall be her separate property, and the rents and profits of the separate property are declared to be common property. *Ib.*

22. The statute confers on the parties before marriage an unlimited right to make whatever stipulation they may agree upon in respect to property, and this is not confined to property in esse, but contemplates property to be acquired, and the rents and profits of the present estate. *Ib.* 87.

23. It does not dispense with the interposition of trustees to protect the wife, except with respect to the property specified in the act. In all other respects the common law remains unaltered, and the wife may resort to trustees for all purposes of security. *Ib.*

24. If the husband should take the rents and profits he will be held to account for her benefit, and to the same extent as if he had undertaken a specific trust. *Ib.* 88.

25. The law which deprives a married woman of the right to make contracts, is not altered by the statute, unless in respect to the property specified by it, and she

Rights of the Wife.

cannot bring suit in her own name upon a contract which she is not authorized by statute to make. *Ib.*

26. The code permits the wife to sue alone when the action is between herself and her husband, and takes away the necessity of suing by *prochein ami*. It is a remedial statute, and must be beneficially construed. *Kashaw v. Kashaw*, 3 Cal. 321.

27. Where a wife claims property as her separate estate, it must be shown to have been conveyed to her before marriage, and if afterwards, it must have been by gift, devise or descent. *Bessie v. Earle*, 4 Cal. 200.

28. A femme covert cannot contract under the laws of this State. *Rowe v. Kohle*, 4 Cal. 285; *Luning v. Brady*, 10 Cal. 267.

29. Courts of equity will enforce the stipulations of a deed of separation whenever it affects rights to property or income, and sometimes, where the jurisdiction has attached on account of questions relating to property, it will even lend its aid, collaterally, to enforce the stipulation for a separation. *Joyce v. Joyce*, 5 Cal. 164.

30. The interest of the wife in the common property is a present, definite and certain interest, which becomes absolute at the death of the husband. *Beard v. Knox*, 5 Cal. 256.

31. Taking a legacy by a wife, under the will of the husband, will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property to others; she is entitled to her own share and to the legacy out of the share of her husband. *Ib.* 257.

32. The desertion of the husband entitles the wife to her own domicile. *Moffat v. Moffat*, 5 Cal. 281.

33. A wife may defend for her own right, as well when sued jointly with her husband, as if the trial were separate; her defense, if a special one, could come in in either case. *Deuprez v. Deuprez*, 5 Cal. 388.

34. A married woman has no right to make a contract, and a promissory note executed by her is void, unless it is a well defined exception of the law. *Simpers v. Sloan*, 5 Cal. 458; *Poole v. Gerrard*, 6 Cal. 72.

35. By the Mexican law, all property

acquired during the marriage was common property, and the wife could neither be bound as security for her husband, nor liable as a joint contractor, except where it was shown that the contract was advantageous to the wife. *Hames v. Castro*, 5 Cal. 110.

36. To establish that a contract is advantageous to the wife, means that it accrued to the benefit of her separate estate, and where she survives her husband she is liable for one-half the community debts by the Mexican law, if there is no common property and the community is insolvent. *Ib.* 111.

37. The objection that the wife is improperly joined in an action as party plaintiff should be taken advantage of as demurrer, and comes too late on appeal. *Tissot v. Throckmorton*, 6 Cal. 473.

38. Where a femme sole becomes the owner of shares of stock in a company, and afterwards marries, and after marriage the husband and wife execute an endorsement on the certificate of stock, purporting to sell the same to A. without any privy examination of the wife, and there being at the time no inventory of the separate property of the wife on record: held, that such sale was void as against a subsequent purchaser, under an instrument duly signed and acknowledged. *Selover v. American Russian Comm. Co.*, 7 Cal. 270.

39. The capacity of the wife to hold separate property is created by the constitution, and her title thereto depends upon the mode of acquisition, and vests before the inventory can be filed. *Ib.* 271.

40. Under the statute, the sale of the separate property of the wife, whether real or personal, must be in writing, signed and acknowledged in the manner pointed out by the statute, or it is void. *Ib.* 273.

41. A married woman can to some extent avoid the inconvenience of the privy examination, in the sale of articles of personal property, by executing a power of attorney. *Ib.* 274.

42. From the position that the capacity of the wife as to her separate property is equal to that of the husband as to his separate property, grave doubts exist as to the validity of some of the provisions of our statute. *Ib.*

43. Defective deeds and acknowledgments of married women cannot be re-

Rights of the Wife.

formed in chancery. *Selover v. American Russian Com. Co.*, 7 Cal. 275; *Barrett v. Tewksbury*, 9 Cal. 15.

44. The acknowledgment is a necessary part of a conveyance of the real estate of a married woman. *Selover v. American Russian Com. Co.*, 7 Cal. 275; *Kendall v. Miller*, 9 Cal. 592.

45. In this State the wife can appear in and defend an action separately from her husband. To enable her to do so she must possess, as defendant, all the rights of a femme sole, and be able to make as binding admissions in writing in the action as other parties. *Alderson v. Bell*, 9 Cal. 321.

46. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a justice of the supreme court, judge of a district court, county judge or notary public. *Kendall v. Miller*, 9 Cal. 592.

47. A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson v. Jones*, 10 Cal. 12.

48. By the common law, a married woman cannot bind herself by contract, and the statute of this State has not changed the law in this respect, except in certain particular cases. *Luning v. Brady*, 10 Cal. 267.

49. An arrangement with a tenant, a married woman, is void, as she has no capacity to contract, and any agreement on the part of plaintiff to accept her as purchaser and release a third party is void for want of consideration. *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 401.

50. The certificate of the acknowledgment of a married woman to a deed must state that the contents of the deed were explained to her, otherwise it is defective and will not pass her interest in the estate. *Pease v. Barbiers*, 10 Cal. 440.

51. Under our law, no presumption of knowledge on the part of a married woman of the contents of a deed arises from the fact of executing it. *Ib.*

52. M., a married woman, had a sum of money left her by bequest during coverture. She and her husband joined in a power of attorney to O., authorizing him to demand and receipt for the money. O. received the money under said power, and then the husband of M. died. M. brought

suit against O. for the money. O. set up as a defense: 1. That the money was collected for the husband, and a settlement and discharge since his death with his administrator. 2. Money advanced from time to time to the husband during his lifetime, with the knowledge of M.: held, that the money was the separate property of M., and when O. received it he received it as the trustee of M., and that it could not be charged with money advanced to the husband; nor could the settlement with the administrator have any effect on M.'s right. *Dickinson v. Owen*, 11 Cal. 75.

53. In an action for the division of the common property of husband and wife after a decree of divorce, the former plaintiff, to bring herself within the provisions of the act "defining the rights of husband and wife," must affirmatively state such facts as give her the right to the property under the act. *Dye v. Dye*, 11 Cal. 167.

54. The law, knowing the necessity of strictly guarding the wife from the influence of the husband as indispensable to the existence of such a thing as a separate estate, or a right of property in her, has by a uniform and consistent policy thrown a safeguard around the acts of disposition of such estate, and exacted a strict respect to them. *Bours v. Zachariah*, 11 Cal. 291.

55. An affidavit which avers that affiant, on the day named, "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action," is insufficient. *McMillan v. Reynolds*, 11 Cal. 378.

56. Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was at the time of such purchase cognizant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside. *Ib.* 378.

57. The law will not support a voluntary disposition of the common property, or any portion of it, with the view of defeating any claims of the wife. *Smith v. Smith*, 12 Cal. 226.

58. Abandonment and adultery on the

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part of the wife will not divest the homestead of its character as such, nor will it defeat or impair her right to it as a homestead. *Lies v. De Diablar*, 12 Cal. 330.

59. A deed properly executed and acknowledged by the wife of her separate property, with the assent of her husband underwritten, not under seal, but properly acknowledged, is sufficient to pass the title. *Ingoldsby v. Juan*, 12 Cal. 575.

60. The words "undue influence" being omitted in the acknowledgement of the wife does not render it invalid. *Goode v. Smith*, 13 Cal. 83.

61. A justice of the peace can take the acknowledgement of the wife to a deed of the homestead. *Goode v. Smith*, 13 Cal. 84. See *Kendall v. Miller*, 9 Cal. 952.

62. A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. *Baker v. Baker*, 13 Cal. 103.

63. A woman who has been pregnant over four months by a stranger is not at the time in a condition to bear children to her husband, and the representation in this instance was false and fraudulent. *Ib.*

64. The wife cannot convey her separate estate, acquired before the act of 1850, whether legal or equitable, except by the joint deed of herself and husband. *Morrison v. Wilson*, 13 Cal. 497.

65. The doctrine of estoppel in pais has no application to the estates of married women. *Ib.*

66. A conveyance by a femme covert, not executed according to the forms prescribed by statute, is invalid. *Ib.* 498.

67. The title of a married woman cannot be divested by an estoppel based upon the fact of her taking possession under a bad title. *Ib.*

68. A deed to a married woman is prima facie valid, and where it recites that the consideration is paid by another, for her exclusive benefit, the deed prima facie creates a separate estate for her. *Ib.* 500.

69. Where the jury and court are satisfied that the wife understood English at the time of executing and acknowledging a note and mortgage upon the homestead, there was no necessity for an interpreter to explain the contents of the mortgage. *Pfeiffer v. Riehn*, 13 Cal. 649.

70. In a suit by a female against two

partners in a ranch for services as servant to the firm, under an implied contract, as on a quantum meruit, proof that plaintiff is the wife of one defendant is good under the general issue, as showing that there was no implied contract to pay for the service. *Angulo v. Sunol*, 14 Cal. 402.

71. From domestic service rendered in such case by the wife of one partner, all living in the same house, the law does not imply a contract to pay for the services. *Ib.*

72. Where a wife makes a contract with her husband by which she gives him money, her separate property, for steamboat stock owned by him: held, that assuming the contract to be void, because made between husband and wife, the husband is in the position of having taken his wife's money without her assent and converted it into stock, and that thereby he becomes her trustee; than she can follow the money into whatever property it goes; that being in possession of the stock, she can hold it until fully indemnified, and that his creditors cannot reach it. *George v. Ransom*, 14 Cal. 660.

73. L. conveys real property by deed to the wife of M. for \$4,000, which sum is recited in the deed as the consideration. Subsequently, M. and wife convey, by their joint deed, the property to plaintiff, for the consideration recited therein of \$9,500. This deed was acknowledged by both husband and wife, and of the acknowledgment two certificates were endorsed by the notary, both of which were sufficient in form as to the acknowledgment of the husband, but only one of them was sufficient as to the acknowledgment of the wife; the other was defective. The deed was recorded with the defective certificate, the other being omitted. Later still, defendants, H. & H., recovered judgment against M., which was duly docketed and became, from the time of its docketing, a lien on his property in the county in which was situated the property embraced in the deed from L. to M. and wife. Upon this judgment execution was issued, placed in the hands of the sheriff, who levied it on the property in said deed and advertised for sale all the right, title and interest which M. had therein at the time said judgment became a lien, etc. Plaintiff files his bill to enjoin this sale: held, that an injunction lies; that the

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property acquired under the deed from L. to the wife of M. became community property, and as such was subject to the absolute disposal of the husband, and passed in full title to plaintiff under the deed to him. *Pixley v. Huggins*, 15 Cal. 121.

74. Held, further, that the fact that the deed from L. was taken in the name of the wife alone created no inference that the property was her separate property, the deed having been made on a purchase; that the fact of purchase excludes the supposition of acquisition by gift, bequest, devise or descent, and that in the absence of proof that the property was purchased with the separate funds of the wife, the presumption that it is community property is absolute and conclusive; that the husband could sell the property by his sole deed, without the concurrence or consent of his wife, and that the fact that the deed was recorded with the defective certificate of her acknowledgement was immaterial, and that her signature was unnecessary and added nothing to the validity or completeness of the transfer to plaintiff. *Ib.*

75. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff. *Van Maren v. Johnson*, 15 Cal. 310.

76. In the exceptional cases mentioned in section seven of the practice act, the statute is obligatory on the wife to sue or defend alone; it confers only a privilege which in many cases it may be important for her to assert for the protection of her interests, and in the exercise of which the fullest liberty should be accorded her. When the action concerns her separate property, and is not between herself and husband, she may sue with or without him. *Ib.* 311.

77. Where suit is brought against a female who subsequently marries, her husband must be made codefendant. But this should be done and an averment of the marriage be made by a supplemental complaint, and not by an amendment to the original. *Ib.*

78. If the husband be made a party at the trial upon suggestion of the marriage in open court with the consent of all parties, by an order of the court, and the complaint is then and there amended by simply inserting the names of the husband

and wife in place of the female defendant alone, and they then file an answer, it cannot be for the first time objected in the supreme court that a supplemental complaint should have been filed. *Ib.*

79. Nor is it any objection in such case that, after the amendment of the complaint, the suit was against defendants jointly, while the evidence failed to show any cause of action against the husband. The action being for services rendered the defendant, wife, previous to her marriage, the liability of the common property of defendants and the necessity of making the husband a party arise from the subsequent marriage; and as the orders and proceedings of the court, however informal and irregular, show the true facts of the case, the judgment will be a bar to any future action against the defendants for the same cause. *Ib.*

80. Facts which occur subsequent to the filing of the original complaint, and which change the liabilities of the defendants, and in consequence the character of the judgment which is sought, cannot be incorporated into the original complaint by an amendment, without presenting averments inconsistent with the date of the commencement of the action. *Ib.*

81. In suit against husband and wife for services rendered by plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced only against the separate property of the wife and the common property of both. *Ib.*

82. The title of the common property is in the husband, and he can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor. *Ib.*

83. The common law constitutes the basis of our jurisprudence, and rights and liabilities must be determined in accordance with its principles, except so far as they are modified by statute. *Ib.* 312.

84. By the common law, the husband, during coverture, is liable for the debts of the wife contracted dum sola. Our statute modifies this law in two respects: it renders the separate property of the wife liable and exempts the separate property of the husband. Beyond this exemption of his separate property, the liability of

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the husband exists—that is, he is liable to the extent of the common property. *Ib.*

85. The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage, and judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately. *Ib.*

86. Neither the husband nor his creditor can claim the proceeds or fruits of the separate estates of the wife. A law giving them such fruits is unconstitutional. *George v. Ransom*, 15 Cal. 323.

87. The term “separate property,” in the fourteenth section of article eleven of the constitution, is used in its common law sense, and by that law “separate property” means an estate held, both in its use and its title, for the exclusive benefit of the wife. *Ib.* 324.

88. The property of the wife may be mortgaged by joint deed of herself and husband for the debt of the husband. *De Leon v. Higuera*, 15 Cal. 496.

89. The wife cannot mortgage her separate real estate unless her husband unites in the conveyance in the mode prescribed by our statutes—at least, as to property acquired after the passage of the statutes; and these statutes, when operating in *futuro*, are constitutional. *Harrison v. Brown*, 16 Cal. 290.

90. The act of February 14th, 1855, (Wood’s Digest, 490) makes an exception in case the husband be not, and for one year next preceding the execution of the conveyance of the wife has not been, *bona fide* residing in this State. *Ib.*

91. But the fact that the husband abandons his wife, or suffers her to act as a *femme sole*, and take care of herself, does not give her a right to mortgage either his or her separate property—whatever may be the effect of such acts of the husband in rendering her personally liable for contracts. *Ib.* 291.

92. A married woman cannot invest another with power to sell any interest she may possess in real estate, in the absence of any statute to that effect, and there is no such statute in this State. *Mott v. Smith*, 16 Cal. 556.

93. To the efficacy of a conveyance of her real estate by a married woman, it is essential that she join with her husband in

its execution, and state on a private examination at the time, separate and apart from him, and without his hearing, that she executed the same freely, without fear of him, or compulsion, or undue influence from him, and that she does not wish to retract its execution. The private examination—this determination of the will as to the retraction of the execution—are not matters which can be delegated to another. *Ib.*

94. Where, in ejectment, plaintiffs, husband and wife, introduced in evidence a patent to one Johnson, covering the premises, a deed from Johnson to one Robinson, and a deed from Robinson to the wife, reciting as its consideration one hundred dollars, proved defendant to be in possession and rested, and defendant moved for a nonsuit, on the ground that the evidence had not established any joint seizin or right of possession in plaintiffs, but had affirmatively established that there was no joint seizin or right: held, that the nonsuit was properly denied; that the monied consideration recited in the deed to the wife raises the presumption that the property was common property, the entire management and control of which, with the absolute right of possession and disposition, were vested in the husband. *Ib.* 557.

95. Held, further, that this presumption can be overcome only by clear and satisfactory proof that the property was acquired with the separate funds of the wife. *Ib.*

96. In ejectment for common property, the action should be in the name of the husband alone. But if the wife be joined, the misjoinder is no ground for nonsuit on the trial, though it would be ground for demurrer if the defect appeared on the face of the complaint, or for motion to dismiss, as to the wife, on the trial. *Ib.*

97. Mrs. L., defendant, when a *femme sole*, contracted a debt, upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid, by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit was

As Sole Trader.—Rights of the Husband.

brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her—the judgment of the supreme court, being conclusive as long as it stands, cannot be attacked collaterally on the ground that the parties to it did not prosecute the appeal, but must be set aside, if at all, by a direct proceeding impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

1. As Sole Trader.

98. In an action against a femme sole trader, it is improper to join her husband with her as defendant, and a complaint so drawn is demurrable. *McKune v. McGarvey*, 6 Cal. 498.

99. The effect of our statute is to make a femme sole of a married woman who is a sole trader as to the particular business in which she is engaged. *Ib.*

100. In an action brought by a married woman concerning property belonging to her as a sole trader, the husband need not be joined. *Guttman v. Scannell*, 7 Cal. 458.

101. By the provisions of the sole traders' act, the legislature designed to afford to every married woman an opportunity of providing against the improvidence or misfortunes of her husband, by engaging in any legitimate calling, by protecting her earnings against her husband and his creditors, and enabling her, by her own energy and industry, to support herself and children. *Ib.*

102. So far from forbidding, the law, by the plainest implication, intends that the capital invested by the wife as a sole trader, to the extent of \$5,000, may be furnished by the husband. *Ib.*

103. If the husband at the time was insolvent, the transfer as to his creditors would be fraudulent and void. *Ib.*

104. The act does not confine sole traders to any particular trade or occupation, nor prohibit the husband from being employed by or acting for his wife in the business. *Ib.* 459.

105. The fact that the business was unsuited to the sex of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it.

106. The right of the wife to acquire property by purchase, during the marriage, can only exist as an exception to the general rule as laid down by the act defining the rights of husband and wife, and this exception exists in the case of a sole trader by statute. *Alverson v. Jones*, 10 Cal. 12.

III. RIGHTS OF THE HUSBAND.

107. After the death of the wife, the husband may dispose of the gananciales, without being obliged to reserve for the children of the marriage, either the property in or proceeds of the gananciales. *Panaud v. Jones*, 1 Cal. 575.

108. If the heirs of the deceased wife be the children of the marriage, they have the right of succession on the death of the father to the whole estate, with the right of the father to dispose of one-fifth; but byt he estate the law is understood to mean the residue after all the debts have been paid. *Ib.* 516.

109. A having married, and there being children of the marriage, and his wife having died, and there being common property acquired during the marriage, the children upon the death of the wife did not acquire a vested estate in the common property, but the father had the absolute dominion in, and control over, and power to dispose of such property during his life, and the power by last will and testament to direct the sale of the same for the payment of debts contracted during marriage and after the death of the wife. *Ib.* 157.

110. A husband defendant cannot object in a foreclosure suit that his wife, who joined in the execution of the mortgage, is not made a codefendant. *Powell v. Ross*, 4 Cal. 198.

111. The husband has no power to convey the common property by devise or will, and thus defeat the rights of the surviving wife. *Beard v. Knox*, 5 Cal. 256.

112. The purchase of land by the husband after marriage, with his separate funds, acquired by him before marriage, and the taking of a conveyance therefor in the name of his minor children by a former wife, is not a fraud upon the rights of his wife. *Smith v. Smith*, 12 Cal. 223.

113. The law, in vesting in the husband

Deed of Separation.—Identity.

the absolute power of disposition of the common property, as of his separate estate, designed to facilitate its bona fide alienation and to prevent clogs upon its transfer by claims of the wife. *Ib.* 224.

114. Where the husband deliberately builds upon the property of the children by his first marriage, after his second marriage, he cannot have any claim upon it or its proceeds. *Ib.* 226.

IV. DEED OF SEPARATION.

115. An agreement for separation between husband and wife, entered into through the intervention of a trustee, is not invalid as against public policy, and will be upheld and enforced, if followed by immediate separation, or if separation has previously taken place. *Wells v. Stout*, 9 Cal. 494.

116. A conveyance of land on the part of the husband to a trustee, securing the payment of an annuity to the wife in consideration of an indemnity by the trustees against all debts of the wife, for maintenance or other account, is valid and supported by a sufficient consideration. *Ib.* 495.

117. A provision made by the husband for the wife is not void as against subsequent creditors, provided the husband is solvent at the time. *Ib.* 497.

118. Subsequent reconciliation and cohabitation will avoid a deed of separation; the maintenance of the wife becoming thereupon obligatory upon the husband, the consideration of the deed fails. *Ib.* 498.

119. Mere hearsay evidence of the wife having given birth to a child more than a year after the separation, and connecting therewith the name of a third party as its reputed father, raises no presumption of access by the husband. *Ib.*

See ADULTERY, COMMON PROPERTY, CRUELTY, DESERTION, DIVORCE, GUARDIAN AND WARD, HEIRS, HOMESTEAD, INFANCY, MARRIAGE, PARENT AND CHILD.

IDENTITY.

1. A judgment was obtained against one John P. Manrow, in the city of New York, and an action was brought upon the judgment against one John P. Manrow, in the city of San Francisco: held, that the identity of the person was to be presumed. *Thompson v. Manrow*, 1 Cal. 428.

2. The object of the provision of the chattel mortgage act of 1857, requiring the residence and occupation of the mortgagor and mortgagee to be stated in the mortgage, is identification. It is not an indispensable requisite to the validity of a mortgage, which would be valid if it stated the parties to have no occupation or profession. *Ede v. Johnson*, 15 Cal. 57.

3. Where a deed of land in Yuba county, California, describes the grantor, William Johnson, as "of the Island of Hawaii, Sandwich Islands," and, after designating the property in which the interest of the grantor is conveyed as the tract situated in the county of Yuba, and known as "Johnson's ranch," and giving its boundaries, proceeds to state that the ranch was originally granted to Pablo Gutieras by the Mexican government, and has since been confirmed to the party of the first part, by the board of commissioners to ascertain and settle private land claims in California; and then in ejectment on a patent from the United States to William Johnson for his land—the patent being in evidence, and referring to Johnson as claimant, and as the person filing the petition before the land commissioner for confirmation of his claim under the grant to Pablo Gutieras, but not mentioning the residence of Johnson—this deed is offered in evidence, and objected to, on the ground that there was no proof of the identity of the William Johnson of the deed with the William Johnson of the patent: held, that the deed, from the identity of the names, and by its reference to the source of title, contains sufficient prima facie evidence as to identity of person to admit it in evidence; that before additional proof of such identity could be required, some circumstances must be shown to create doubts upon the point. *Mott v. Smith*, 16 Cal. 555.

Iguala, Plan of.—Illegitimacy.—Impeaching a Witness—Imprisonment.

IGUALA, PLAN OF.

1. The plan of iguala and the Mexican constitutions of 1836 and of 1843, and the decrees of 1812 and 1813, did not resume the restrictions on alienations of land by Indians. *Sunol v. Hepburn*, 1 Cal. 280.



ILLEGITIMACY.

1. The words of an acknowledgment of the paternity of an illegitimate child, for the purpose of making it an heir, must be clear, and exclude all except one interpretation. *Estate of Sanford*, 4 Cal. 13.

2. Marriage by our law is a civil contract, and may be avoided for material and substantive fraud in its procurement; and antenuptial pregnancy by a stranger is a fraud going to the very substance of the contract, vitiates it ab initio, and authorizes a divorce. *Baker v. Baker*, 13 Cal. 102.



IMPEACHING A WITNESS.

1. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This last has been the uniform practice in this State, and no injury has resulted from such practice. *Stevens v. Irwin*, 12 Cal. 308.

2. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of these contradictions, and the time and place of the contradictory statements, must be brought to the knowledge of the witness on cross examination. *Baker v. Joseph*, 16 Cal. 178.

3. And this rule as to evidence of contradictory statements applies equally to evidence of declarations or acts of hostility or ill feeling on the part of the witness. There is no distinction between admit-

ting declarations of hostility of witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned. *Ib.*

4. Where the objection to such impeaching evidence was general, and the court excluded the testimony without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below; and the appellant must show error to his prejudice, by putting his exception in the proper shape. *Ib.*

5. To impeach the testimony of F., a witness for plaintiff, by showing that on a former occasion he had sworn differently, defendant offered in evidence a statement on motion for a new trial and on appeal, in a former suit between the parties, purporting to contain all the evidence, and agreed to as correct by the attorneys therein, in which statement there appeared the testimony of F. on the trial: held, that the statement was not admissible; that it was made for a particular purpose, and was not proof except for that purpose—certainly not to impeach F., who neither made nor signed it. *Payne v. Treadwell*, 16 Cal. 239.



IMPRISONMENT.

1. The constitution prohibits imprisonment for debt, except in cases of fraud; consequently, every intendment must be in favor of the liberty of the subject and his right to trial by jury, which is likewise secured. *Mattoon v. Eder*, 6 Cal. 60; *Ex parte Prader*, 6 Cal. 240.

2. A party cannot be imprisoned under a judgment in a civil action for assault and battery. *Ex parte Prader*, 6 Cal. 240.

3. The act to suppress gaming must be construed with the general act concerning criminal proceedings, and where a fine is imposed on a conviction for gaming, the defendant may be imprisoned to enforce its payment. *People v. Markham*, 7 Cal. 209.

See ARREST, CRIMES AND CRIMINAL LAW, HABEAS CORPUS.

Improvements.

IMPROVEMENTS.

1. One who knowingly and silently permits another to expend money upon land, under a mistaken impression that he has title, will not be permitted to set up his right. *Godeffroy v. Caldwell*, 2 Cal. 492.

2. A parol promise to pay for improvements made upon land is not within the statute of frauds. *Ib.*

3. Plaintiff and defendant took a joint lease for improving certain property; plaintiff at the instance and request of the defendant furnished the necessary funds on interest, and the defendant drew the contract. Plaintiff sued to recover the half portion of outlay: held, that a decree in his favor was proper, and that the improvements were not made at plaintiff's own risk. *Young v. Polock*, 3 Cal. 211.

4. A plaintiff is as much entitled to recover the improvements, which are fixtures, as the land. *McMinn v. Mayes*, 4 Cal. 211.

5. Improvements made by an owner of property, after the surrender of a lease by a tenant, upon whose leasehold interest a mechanic's lien had previously attached, can no more impair this lien than if made by the tenant himself. *Gaskill v. Moore*, 4 Cal. 235.

6. The amendments to the charter of the city of Marysville provide that the common council shall not take any stock "in any public improvement, or effect a loan for any purpose:" held, that this could not be extended to improvements other than municipal in their character, and the legislature did not intend to invest the city with authority to embark in speculative enterprises of improvement. *Low v. City of Marysville*, 5 Cal. 215.

7. The words public improvements, when applied to a municipal government, must be taken in a limited sense as applying to those improvements which are the proper subject of police and municipal regulation, such as gas, water, almshouses, hospitals, etc., and cannot be extended to subjects foreign to the object of the incorporation and beyond its territorial limits. *Ib.* 217.

8. If the term public improvements in the amended charter could be construed to extend to commercial speculations, then it would be in violation of said section of the

constitution, as it would be granting powers to a corporation by a special act for other than municipal purposes. *Ib.*

9. At common law no allowance was ever made for improvements; but our practice act permits it to the extent of being used as a set off to the damages for withholding the property recovered. *Ford v. Holton*, 5 Cal. 321.

10. In an action of ejectment, where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on the property. *Ib.*

11. A party who has erected improvements on land, and has sold them to another, cannot afterwards, by making a survey and filing affidavit with the county recorder, acquire any right to the possession of land in the possession of another. *Sweetland v. Froe*, 6 Cal. 147.

12. If he conveys subsequently to the same person who purchased the improvements, the latter acquires no rights to any portion of the land attempted to be pre-empted, except that covered by his actual enclosure. *Ib.*

13. An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of the purchase money of land under covenant for a good title, while in fact the grantor had not title as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession; nor does the allegation that the purchaser has put valuable improvements on the land take the case out of the rule. *Jackson v. Norton*, 6 Cal. 189.

14. When the plaintiff leased a tract of land claimed by him under a Mexican grant, to defendant, upon condition that he was not to pay any rent for two years, and if the title was confirmed within that time, defendant was to give up his improvements; but if not confirmed within that time, defendant was to remain on until confirmation, with the privilege of buying in case of sale, and if not confirmed defendant was to hold it as public land; and the defendant at the end of two years took up the tract as public land: held, in an action for the possession and damages, that defendant's improvements, erected before and after he thus terminated his tenancy, were only the substitute for the

Improvements.

first two years' rent, and he was chargeable with rent thereafter accruing; and any improvements erected by defendant after the termination of his tenancy were at his own risk, and he is not entitled to their value as an offset. *Gunn v. Pollock*, 6 Cal. 241.

15. The settlers' act of 1856 does not discriminate between an innocent and a tortious possession, nor is it a mere attempt to avoid circuitry of action, by providing for an equitable adjustment of the whole subject in one suit. By its terms, it applies to past as well as present cases. It takes from a party that which before was his; for if he refuses to pay for the improvements on his land against his will by a trespasser, he loses not only the improvements but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the constitution. *Billings v. Hull*, 7 Cal. 9.

16. Where a landlord agreed to allow his tenant a reasonable time after the expiration of his lease to remove his improvements and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties must be confined to its legal expiration and not to the wrongful act of the lessee in terminating it, and the lessee can claim no rights under the contract. *Whipley v. Dewey*, 8 Cal. 39.

17. Where the defendant in ejectment occupied and improved the land bona fide under color of title, the improvements erected by him constitute an equitable set-off to the extent of their value to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 202, 511.

18. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek a dam or embankment of certain specified dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embankment was completed it was broken by a sudden freshet and a large body of water, confined by it, rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock of merchandise. The employers exercised no supervision, gave

no directions, furnished no materials, nor had they accepted the work. Plaintiff having brought suit to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable. *Boswell v. Laird*, 8 Cal. 489.

19. Where the enterprise undertaken is a lawful one and is entrusted to competent and skillful architects, the mere fact that the improvements are erected upon the land of the proprietor is no just reason why liability should attach to him during its progress, any more than if such enterprise be executed elsewhere. *Ib.* 498.

20. The fact that the plaintiff in ejectment stood by and saw the defendant erect improvements on the land cannot be plead as an estoppel by a trespasser, where the fact of title is open and notorious, or can be easily ascertained as by reference to the recorder's office. *Ferris v. Coover*, 10 Cal. 631.

21. If a party with the knowledge of, or having the means of ascertaining the title to real property, proceeds to occupy such property and expend the money in improvements, he is not entitled to any relief in law or in equity. He has no right to complain, because he has not been misled by any one, and if mistaken it has been his own fault. *Ib.* 632.

22. Where a lease contained the usual covenants for payment of rent and re-entry for nonpayment, and provided for the appraisal of improvements erected by the lessee, and payment of their value by the lessor at the expiration of the term, and the lessor reentered for nonpayment of rent: held, that the lessee could not maintain an action upon being evicted for the value of his improvements. *Lawrence v. Knight*, 11 Cal. 303.

23. In an action to recover the value of improvements standing on certain lots, proof that one C., through whom plaintiff claimed on the day of his entry, applied to one of the defendants for his consent to the erection of the buildings, is sufficient to authorize the jury to infer knowledge on the part of C. of defendants' title at the time of such entry. *Kneeland v. Wilson*, 12 Cal. 243.

24. It is not the making of improvements or expending of money on another's property which entitles the person so expending to hold the property or even the improvements; but it is the fraud of the

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owner, who silently or otherwise encourages the expenditure. *Mc Garrity v. Byington*, 12 Cal. 431.

25. A mortgage on public land or the improvements thereon is not void because it does not follow the provisions of the chattel mortgage act. The act gives a new remedy, but does not take away the old. *Haffley v. Maier*, 13 Cal. 14.

26. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Merritt v. Judd*, 14 Cal. 72.

27. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lease. There the question is between grantor and grantee, and the latter holds all fixtures whether for trade or manufacture, agriculture, or habitation. *Ib.* 73.

28. Under the second section of the revenue act of 1857, taxing all property within the State except certain descriptions of property, among which are mining claims, a flume constructed by a mining company in the bed of the river is not exempt. *Hart v. Plum*, 14 Cal. 154.

29. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 466.

30. The act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right of entry upon the mineral lands of this State in cases where no such right existed anterior to its passage, is invalid. *Gillan v. Hutchinson*, 16 Cal. 155.

31. A party erecting buildings upon the property of an infant, under contract with his guardian, made without authority of law, has no equitable lien on the property for the value of the improvements—such party being fully informed of the title and condition of the property. *Guy v. Du Uprey*, 16 Cal. 200.

32. It is not disputed that the city of San Francisco received the benefits of the improvements to the streets, for which the plaintiff seeks to recover; and so far as these improvements are concerned, the question is, whether there was any contract, express or implied, to pay. The fact that the improvements were con-

structed for the benefit of the city, is sufficient to raise the presumption of a contract; and it will not be contended that there is anything in the evidence to destroy the effect of this presumption. But, in our opinion, the plaintiff is entitled to recover upon the contracts under which the improvements were made. It is true, that there is no evidence that the agent who signed these contracts on behalf of the city was *expressly* authorized to do so; but it sufficiently appears that the city authorities were cognizant of the facts, and their silence, under the circumstances, was equivalent to a direct sanction of the acts of the agent, and estops the city from denying his authority. It was well known that these contracts, involving, as was supposed, the liability of the city, were the only considerations inducing the construction of the improvements; and now that the improvements have been completed, and the city has received the benefit of them, it is too late to repudiate the contract and avoid responsibility. It is unnecessary to enumerate the various acts of the city government in relation to these contracts. They were acquiesced in from the commencement to the completion of the improvements, and until the city had received all the benefit to be derived from their performance, their validity was never called in question. We think that upon no principle of law or equity can this be done now. It would be a fraud upon the plaintiff to permit it, and it is a proper case in which to invoke the protection of an estoppel. *Argenti v. City of San Francisco*, 16 Cal. 274.

33. The improvements for which the claim is brought in the present case were local in their character, and though, to some extent, of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. It is for this reason that assessments for such improvements are generally levied upon adjacent property. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general rule, that when one takes a benefit which is the result of another's labor, he is bound to pay for the same, does not apply in cases of this kind. The benefit is immediately to the adjacent property holders,

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and only indirectly to the city at large. *Ib.* 283.

34. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin v. City of San Francisco*, 16 Cal. 286.

35. Where a lease of a lot in San Francisco, for ten years, stipulated that the lessee should place "on said premises a building thirty by eighty feet, which has been shipped from the port of New York, to be put up immediately on arrival; or if lost, a similar one is to be ordered, got up, and put up in the shortest possible time," and also, in the final clause, that if no agreement was made between the parties for a renewal of the lease for a further period, "then the valuation of the *buildings* is to be made by three disinterested persons," etc., and the lessor was to pay to the lessee the amount agreed on; and the lessee erected a building worth about \$1,000, which was burned, and then another similar one, and subsequently sublet the premises to plaintiff, who put up a valuable building, costing \$50,000—defendants, who had bought the lot, notifying him before he erected his building, that they would not pay for it: held, that at the expiration of the term, defendants were not bound to pay plaintiff for his improvements; that the term "*buildings*," though in the plural, refers to the building mentioned in the fore part of the lease, and not to any building the lessee might erect—especially when the conduct of the parties, the nature of the transaction, and the surrounding circumstances are considered. *Wooward v. Payne*, 16 Cal. 448.

INCORPOREAL HEREDITAMENT.

1. A mere right to collect wharfage and dockage for a term of years, is nei-

er real estate nor personal property, but a franchise, or incorporeal hereditament—an uncertain profit arising out of the realty. *De Witt v. Hays*, 2 Cal. 468.

2. The right to water must be treated, in this State, as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil; and as such has none of the characteristics of mere personalty. *Hill v. Newman*, 5 Cal. 446.

See FRANCHISE.

INDEBTEDNESS.

1. The language of the constitution is without ambiguity, and expressly forbids the legislature from creating a debt of more than \$300,000 in any way, unless the same is left to the vote of the people. *People v. Johnson*, 6 Cal. 500; *Nouquez v. Douglass*, 7 Cal. 67.

2. This feature of our constitution was admirably designed to check the improvident expenditure of money and the accumulation of taxes. *People v. Johnson*, 6 Cal. 503.

3. The legislature can adopt the present indebtedness of the State over and above the constitutional amount, and submit the same to the people for ratification, in conformity to article eight of the constitution; and also make appropriations for the future necessary expenses of the government over and above the revenues. *Ib.* 506.

4. If the legislature has no right to create a State debt beyond the limit fixed by the constitution, that body has no constitutional right to tax the people to pay a void debt. *Nouquez v. Douglass*, 7 Cal. 70.

5. The act of 1851, creating the board of fund commissioners of San Francisco, was a law authorizing a contract between the city and her creditors, who surrendered her old indebtedness and took a new security bearing a different rate of interest. The transaction was in the nature of a new contract, and the law authorizing it entered into and became a part thereof, and cannot be altered or amended so as to impair or destroy the right of parties under contract. *People v. Woods*, 7 Cal. 584.

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6. The act of May 1, 1851, authorizing "the funding of the floating debt of the city of San Francisco, is substantially a trust deed, whereby she agrees, on a reliable consideration, to place in the hands of certain trustees so much of her revenue and property, to be applied by the trustees to the redemption of her obligations, in the mode and according to the terms of her agreement. *People v. Bond*, 10 Cal. 571; *People v. Tillinghast*, 10 Cal. 585; *People v. Supervisors of San Francisco County*, 12 Cal. 300.

7. The act being of this character, it is not competent for the legislature to change its terms substantially without the sanction of the creditors. *People v. Bond*, 10 Cal. 571; *People v. Tillinghast*, 10 Cal. 585.

8. In a bill to enjoin the issuance of bonds of the city and county of San Francisco, by the commissioners of the funded debt created by the act of April 20th, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued should be made parties to the action. *Hutchinson v. Burr*, 12 Cal. 103.

9. The supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing, or refusing to audit, of the board, are alike immaterial. *People v. Supervisors of San Francisco County*, 12 Cal. 301.

10. The eighth article of the constitution, prohibiting the State from creating debts over \$300,000, or loaning its credit, only applies to the State as a corporation, as a political sovereign represented by her law making power; and does not prevent the State authorizing counties or municipal corporations to create debts when the debt of the State itself is up to the constitutional limit. *Pattison v. Supervisors of Yuba County*, 13 Cal. 182.

11. The legislature may authorize a municipal corporation to pay an indebtedness invalid in law, but equitable and just in itself. *People v. Burr*, 13 Cal. 349.

12. The act of 1858, amendatory of the act of May 1st, 1851, authorizing the funding of the floating debt of the city of San Francisco, and to provide for the payment of the same, is constitutional.

People v. Burr, 13 Cal. 349; *Thornton v. Hooper*, 14 Cal. 11.

13. If, under the act, a large surplus accumulates, it may be applied to the purchase of bonds, even if no provision exists in the act for payment before the bonds are due. *Thornton v. Hooper*, 14 Cal. 12.

14. The commissioners of the funded debt of the city of San Francisco have power, under the act of 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund, created by the ordinance of said city, to receive the three per cent. scrip of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts. *People v. Commissioners of the Funded Debt of the City of San Francisco*, 14 Cal. 541.

15. The act of March 21st, 1856, creating a board of State prison commissioners and defining their duties, is constitutional. It does not create a debt or liability against the people of the State, in contravention of the eighth article of the constitution, and the contract made with Estill under the act is valid and binding upon the State. *State of California v. McCauley*, 15 Cal. 454; *People v. Brooks*, 16 Cal. 28.

16. The support of the convicts is as much the duty of the State as to provide for the salaries of her officers. It constitutes one of the ordinary sources of the State's expenditures; and a law authorizing a contract for keeping the prisoners at a fixed price—the payment and service being future acts—it is not in conflict with the constitution. *State of California v. McCauley*, 15 Cal. 455.

17. Under the contract made with Estill for the payment to him of \$10,000 per month on his lease of the prison and convicts, that sum per month is appropriated by the act; but these appropriations are to take effect, and the services are to be rendered, in future. Until the services are rendered, there is no debt on the part of the State. The State became indebted only as the services were each month performed. The lessee could not have claimed, at any time after the contract was made, the aggregate of all the monthly installments, because the State never owed him that amount. *Id.*

18. The eighth article of the constitution was intended to prevent the State

Indebtedness.—Indemnity.

from running into debt, and to keep her expenditures, except in certain cases, within her revenues. These revenues may be appropriated in anticipation of their receipt, as effectually as when actually in the treasury. The appropriation of the moneys, when received, meets the services as they are rendered, thus discharging the liabilities as they arise, or rather anticipating and preventing their existence. The appropriation accompanying the service operates as a cash payment. *Ib.*

19. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

20. To an appropriation, within the meaning of the constitution, nothing more is requisite than the designation of the amount, and the fund out of which it shall be paid. *People v. Brooks*, 16 Cal. 28.

21. When the constitution, therefore, says that "no money shall be drawn from the treasury but in consequence of appropriations made by law," it only means that no money shall be drawn except in pursuance of law. *Ib.*

22. When the act of April 13th, 1854, provides that no warrants shall be drawn except there be "an unexhausted, specific appropriation" to meet the same, it means only that the controller shall not draw a warrant for a specific object when he has already drawn for the full amount of the appropriation made for that object. *Ib.*

23. The act of March 29th, 1860, providing for the construction of a State capitol in the city of Sacramento, is not unconstitutional, as creating an indebtedness or liability on the part of the State exceeding the limit of \$300,000 prescribed by the constitution. The act authorizes the commissioners therein named to contract only to the extent of \$100,000. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

24. The provision in section five, article three, of the charter of San Francisco of 1851, as to not creating liabilities beyond \$50,000 over and above the annual revenue of the city, etc., is directory, and

not a limitation upon the power of the city to contract debts. The legal effect of this provision is entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Argenti v. City of San Francisco*, 16 Cal. 264.

See COMMISSIONERS OF THE FUNDED DEBT, COMMISSIONERS OF THE SINKING FUND.

INDEMNITY.

1. A certificate of deposit is a negotiable instrument, and an allegation of loss or destruction thereof must be accompanied with the tender of a bond of indemnity against all future claims against it, before payment can be enforced by law. *Welton v. Adams*, 4 Cal. 39.

2. An action cannot be maintained on a lost instrument without first tendering the defendant a bond of indemnity against contingencies. *Welton v. Adams*, 4 Cal. 39; *Grover v. Hawley*, 5 Cal. 484.

3. Under the code, it is necessary for a plaintiff to tender the sheriff a sufficient bond of indemnity where there has been a trial of the right of property by a sheriff's jury and a verdict for the claimant, before he could require him to seize the property. *Strong v. Patterson*, 6 Cal. 157.

4. A sheriff's right to notice and demand of claim of property is not affected by the fact that he had obtained indemnity before seizing the goods, for the notice of another's claim to them might materially affect the character of the indemnity which he might require. *Taylor v. Seymour*, 6 Cal. 514.

5. Where a trustee executes a covenant of warranty to a purchaser of a portion of trust lands, but was fully indemnified against loss thereby by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Peralta v. Castro*, 6 Cal. 357.

6. Where property was seized under two attachments and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it and paid the pro-

ceeds to the first attaching creditor, the amount not equaling his judgment, and afterward the party claiming the property obtained judgment against the sheriff for the value of the property: held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Davidson v. Dallas*, 8 Cal. 251; doubted in same case, 15 Cal. 80.

7. Where property attached is claimed by a third person, the sheriff may protect himself before a jury of six persons, and if the verdict be in favor of the claimant, he may relinquish the levy, unless indemnified. If he gives a bond of indemnity, it will only inure to the benefit of the property so far as the consequences which result from his own acts are concerned. *Davidson v. Dallas*, 8 Cal. 258; doubted in same case, 15 Cal. 80.

INDIANS.

1. A deed of conveyance from an Indian to a white person is a nullity on its face, and no one can derive title from it. Such conveyance is contrary to the policy of Spanish and Mexican, as well as American law, and is strictly forbidden. *Sunol v. Hepburn*, 1 Cal. 274.

2. The Mexican constitution admitting the Indians to citizenship did not remove the restrictions on alienations of land by them. *Ib.*

3. The civil and criminal codes provide that no Indian or negro shall be allowed to testify as a witness in any action in which a white person is a party: held, that these terms are generic of the three races, and that Indian includes Chinese and other Mongolians. *People v. Hall*, 4 Cal. 399; *Speer v. See Yup Co.*, 13 Cal. 73; *People v. Elyea*, 14 Cal. 146.

INDICTMENT.

1. An indictment may be transferred from the court of sessions to the district court without the endorsement of the clerk of the court of sessions. *People v. Stuart*, 4 Cal. 226; *People v. Thompson*, 4 Cal. 241.

2. Wherever an indictment substantially follows the statute so as to put the prisoner on fair notice of the offense charged, and the time, place and circumstances necessary to constitute the crime, it will be sufficient. *People v. Thompson*, 4 Cal. 240.

3. A bare negative qualification need never be averred in an indictment, but must be relied upon as matter of defense in the progress of the trial. *People v. Nugent*, 4 Cal. 341.

4. The defendant was indicted for murder, tried, convicted of manslaughter only, and then obtained a new trial: held, that on the new trial upon the same or another indictment, he can plead the former conviction of manslaughter as an acquittal of the crime of murder, but may be convicted again of manslaughter. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

5. An indictment found by a grand jury composed of twenty-four persons is worthless, and all proceedings based upon it are void. *People v. Thurston*, 5 Cal. 69.

6. It is not error to charge the defendant as principal and accessory in the same indictment. *People v. Davidson*, 5 Cal. 134.

7. An indictment is sufficiently certain as to time if it appear from it that the offense was committed at some time prior to the finding of the indictment. *People v. Littlefield*, 5 Cal. 356.

8. An indictment is sufficiently certain which charges the defendant with feloniously taking three head of cattle, without showing the particular species of cattle taken. *Ib.*

9. Words used in an indictment are to be construed according to their common acceptance, except words or phrases specifically defined by law. *Ib.*

10. An indictment charging a felony and setting forth that the defendant was an accessory before the fact, is good under the statute, by which no distinction exists

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between a principal and an accessory before the fact. *People v. Cryder*, 6 Cal. 23.

11. In an indictment for murder, it is sufficient to describe the deceased by the name by which he was commonly known. *People v. Freeland*, 6 Cal. 97.

12. A motion to set aside an indictment for murder on any ground which would have been good ground for challenge either to the panel or any individual grand juror, cannot be made in the district court when the defendant has been held to answer in the court of sessions before indictment. *Ib.*

13. The objection that one of the witnesses sworn before the grand jury was not endorsed on the indictment, must be taken by motion to set aside the indictment. *Ib.* 98.

14. To reduce the crime of murder, charged in the indictment, to manslaughter, a provocation must be established apparently sufficient to render the passion irresistible. *Ib.*

15. An indictment charging the commission of an offense at a certain city and county which are within the jurisdiction of the court, lays the venue sufficiently. *People v. Lafuente*, 6 Cal. 202.

16. It is not necessary under our statute that the precise day should be stated, unless time is of the essence of the offense, and a particular day having been laid on which the offense is charged to have been committed anterior to the finding of the indictment, there is no necessity for an averment that the crime was committed before the bringing of such indictment. *Ib.* 203.

17. An indictment must contain a statement of the acts constituting the offense. *People v. Aro*, 6 Cal. 208; *People v. Hood*, 6 Cal. 238; *People v. Wallace*, 9 Cal. 31.

18. In an indictment for murder, the time of the death must be stated, so that it can be legally considered the consequence of the felony charged. *People v. Aro*, 6 Cal. 209; *People v. Lloyd*, 9 Cal. 56; *People v. Steventon*, 9 Cal. 275.

19. An indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment and within one year and a day before death ensued from the wound or assault. *People v. Kelly*, 6 Cal. 212.

20. The provision of the criminal code

directing that when the accused is indicted under a wrong name, and he gives his true name when arraigned, it shall be so entered on the minutes and the prisoner tried under his true name, is not in violation of act one, section eight of the constitution. *Ib.*

21. The constitution directs that the accused shall be presented by indictment, not the accused by his true name but the person, himself, leaving the precise form of words to be determined by the legislature. *Ib.* 213.

22. Under our statute, the only object of a name in the indictment is to identify the party, and in this respect there is no difference between a christian name and a surname. *Ib.*

23. Where a grand jury consisted of twenty-three persons, nine of whom were challenged for cause by a prisoner and the charge was sustained by the court, and nine jurors excluded from the investigation of the case, and an indictment was found by the remaining fourteen: held, that the indictment was found by a legally constituted grand jury. *People v. Roberts*, 6 Cal. 216; *People v. Butler*, 8 Cal. 439.

24. An indictment for arson charging that the accused "did on a certain day burn or cause to be burned a certain dwelling house" is bad, because the charge is laid in the alternative, whereas it should be special. *People v. Hood*, 6 Cal. 238.

25. An indictment for perjury, charging that the accused in a certain proceeding, describing it, "did willfully, corruptly and falsely swear," etc., but not alleging that the perjury was committed "feloniously," is sufficient. *People v. Parsons*, 6 Cal. 488.

26. The definition of a crime being given by statute, an indictment charging the offense in the words of the statute and fully complying with the criminal code, gives the defendant all the information necessary to enable him to answer the indictment. *People v. Parsons*, 6 Cal. 488; *People v. Rodriguez*, 10 Cal. 59.

27. Where the defendant was indicted and convicted of murder, and on appeal a new trial was ordered, on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling of the grand jury, and subsequently a new indictment

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was found by a new grand jury under which the prisoner was convicted: held, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not in jeopardy by the first trial, which had been held to be erroneous. *People v. March*, 6 Cal. 546.

28. The provision of the criminal code which empowers courts to set aside indictments on motion of the prosecution is not limited to cases of defects in the instrument itself, and such a dismissal is no bar to a subsequent prosecution for the same offense when it amounts to a felony. *Ib.*

29. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction of every material allegation, and is therefore a conviction for murder. *Ib.*

30. The insufficiency of an indictment should be taken advantage of by demurrer. *People v. Josephs*, 7 Cal. 130; *People v. Apple*, 7 Cal. 290.

31. An indictment under the criminal code for an offense committed on a vessel, on her voyage in the inland waters of the State, should set forth all the facts, giving the extra-territorial jurisdiction under the code. *People v. Dougherty*, 7 Cal. 398.

32. Under any other rule, an acquittal or conviction would be no bar to another indictment found in another county, having like jurisdiction over the same offense. *Ib.*

33. When the indictment fully sets forth the offense, the word "feloniously" need not be used. *People v. Olivera*, 7 Cal. 404.

34. Indictments under the statute against bailees should distinctly set forth the character of the bailment, the mode of conversion, the description of the property and its value. *People v. Cohen*, 8 Cal. 43.

35. An indictment which charges the defendant with converting moneys, goods, and chattels of the value of four hundred thousand dollars, without any particular specification of the articles, is bad. *People v. Cohen*, 8 Cal. 44; *People v. Winkler*, 9 Cal. 234; *People v. Peterson*, 9 Cal. 315.

36. An indictment for burglary charging with an intent to steal certain goods, must specify the value of the goods intended to be stolen, as burglary under our statute can only be committed with intent

to commit a felony. *People v. Murray*, 8 Cal. 520.

37. In an indictment for murder, a statement of the manner of the death, and means by which it was effected, is indispensable. It is also necessary to state the time and place as well as the infliction of the wound, as of the death of the party in order to fix the venue, and that it may appear on the record that the deceased died within a year and a day after receiving the injury. *People v. Wallace*, 9 Cal. 32; *People v. Cox*, 9 Cal. 33.

38. It is unnecessary in an indictment for murder, to state the degree of the offense. *People v. Lloyd*, 9 Cal. 55; *People v. Cox*, 9 Cal. 33.

39. Under our statutes the essential averments of an indictment should be the same as at common law; every averment that is substantially necessary for the information of the defendant, so that he may know the particular circumstances of the charge alleged against him and how to defend himself, is still necessary. *People v. Lloyd*, 9 Cal. 55.

40. An indictment for murder which charges, at the time and place mentioned, defendant feloniously assaulted, cut and stabbed the deceased, and inflicted on him one mortal wound—of which mortal wound he on the same day died, is sufficient; a description of the weapon used is not material; an objection that an indictment does not state the length and depth of the wound, nor in what part of the body it was inflicted, goes to the form rather than the substance of the indictment. *People v. Steventon*, 9 Cal. 275.

41. An indictment charging "murder in the first degree" is good, as that offense includes the second degree and manslaughter. *People v. Dolan*, 9 Cal. 583.

42. The substantial facts necessary to constitute the crime charged must appear in the indictment with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge; but they need not be stated with the particularity required at common law. *Ib.*

43. It is sufficient if a man of ordinary intelligence can understand from the indictment that, under such circumstances as showed a felonious intent, a mortal wound was inflicted by the defendant upon the deceased, of which wound he died

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within a year and a day from its infliction. *Ib.*

44. The absence of the word "deliberate" in such an indictment, where the crime is alleged to have been committed "with malice aforethought" is immaterial, the expressions being synonymous. *Ib.*

45. It is sufficient if the indictment charge the offense in the language of the statute defining it. *Ib.*

46. An indictment for murder, which describes the weapons used by which death was produced as a "loaded pistol," is sufficient, though it omits to state the manner in which the weapon was charged. *People v. Choiser*, 10 Cal. 311.

47. In an indictment for murder it is not necessary that the indictment should specifically aver that the killing "was willful, deliberate and premeditated." It is sufficient to charge the crime in the words of the statute. *People v. Murray*, 10 Cal. 310.

48. Where an indictment charged the defendants with the crime of murder, committed by them at a designated place and upon a designated day, by "shooting and wounding the deceased through the body, with a leaden bullet, discharged from a rifle, of which wound the deceased then and there died:" held, that it was not necessary to state in the indictment on what part of the body of the deceased the wound was inflicted, and that the indictment stated sufficiently that the wound was mortal. *People v. Judd*, 10 Cal. 314.

49. It is not necessary to a conviction under an indictment for forging an order for the delivery of goods, that the order should be signed in the name of a party having goods in possession of the drawee. *People v. Way*, 10 Cal. 336.

50. Where the defendants were sureties in a recognizance for the appearance of one H., who was charged with the crime of receiving two mules, alleged to have been stolen, and in a suit on such recognizance against the sureties, the court found that an indictment was found by the grand jury, at a subsequent term to the date of the recognizance, "entitled, an indictment against H. for receiving stolen goods:" held, that it does not follow from this general description in the indictment that it was for the same crime mentioned in the recognizance. *People v. Hunter*, 10 Cal. 503.

51. Accessories may, by the act of this State, be indicted and tried with the principal, or separately, and either may be convicted or acquitted without reference to the previous conviction or acquittal of the other. *People v. Bearss*, 10 Cal. 69.

52. When an indictment for murder is used as a substitute for and in the place of an indictment for manslaughter, it must, where time is material, contain the averment as to time which would be essential in an indictment for manslaughter. *People v. Miller*, 12 Cal. 294.

53. It is generally true that every essential fact must be stated in the indictment, and this means every fact material to the offense of which the party may be convicted, and the allegation of a day within the period of limitation is material whenever the offense is subject to limitation. *Ib.*

54. If the defendant is out of the State a portion of the time, it must be so averred in the indictment. Prima facie, the lapse of time is a good defense, and where the statutory exception is relied on, it must be set up. *Ib.* 295.

55. There is no distinction between an indictment for murder, which, if good for manslaughter shows on its face that the crime for manslaughter is barred, and an indictment for the special offense of manslaughter within the same statement as to time. *Ib.*

56. An indictment which charges an offense in the following language is insufficient: "In and upon one John Provisso, did feloniously make an assault with a deadly weapon, to wit, a pistol, loaded with powder and ball, with intent then and there to kill said Provisso, without any just cause or provocation, but with an abandoned and malignant heart." *People v. Urias*, 12 Cal. 327.

57. An indictment must allege premeditation, or malice aforethought, which is a necessary ingredient to the crime of murder, or of assault with intent to commit such a crime. *Ib.*

58. No appeal lies to the supreme court from an order below overruling a demurrer to an indictment. *People v. Ah Fong*, 12 Cal. 424.

59. An indictment under the act of 1857, for dealing the game of monte for money, need not state the particulars of the offense—as the persons present, the

Indictment.

room, and the like. Under our law, an indictment is good if it state the acts constituting the offense, in ordinary and concise language, and in such a way that a person of ordinary understanding can know what was intended. *People v. Saviers*, 14 Cal. 30.

60. Where the statute introduces a new offense without reference to anything else, an indictment describing the offense in the words of the statute is sufficient. *Ib.*

61. An indictment for larceny describing the money as "\$3,000, lawful money of the United States," is insufficient. The particular denomination or species of coin must be set forth. *People v. Ball*, 14 Cal. 101.

62. Upon a trial on an indictment for an attempt to contract an incestuous marriage, something more must be shown than mere intention to contract such marriage. Preparation for the attempt indicates the intention, but between this and the attempt itself there is a wide difference. *People v. Murray*, 14 Cal. 160.

63. An indictment for grand larceny found at the special term of the court of sessions, is valid. Under the statute authorizing that court to hold special terms in certain cases, the court, when specially called, has the same powers as at a regular term. *People v. Carabin*, 14 Cal. 439.

64. An indictment in the court of sessions in San Francisco may be entitled either as of the county of San Francisco or as of the city and county of San Francisco. *People v. Beatty*, 14 Cal. 571.

65. An indictment for dealing faro, designating the offense as "felony," is insufficiently specific as to name, and without this word the indictment is good, where it states the facts which constitute the offense. *Ib.*

66. On an indictment for murder, the verdict must state whether it be murder in the first or second degree. *People v. Marquis*, 15 Cal. 38.

67. Where the convention of justices of the peace, for electing two associate justices of the court of sessions, was presided over by the then acting county judge, his official acts at such convention were legal and valid—although it was afterwards determined that another person had been legally elected to that office; and a court of sessions, composed of said other person, as county judge, and of the two

associates, elected by such convention, was legally organized. *People v. Wyman*, 15 Cal. 74.

68. The trial on the main charge in an indictment will not be postponed because of an appeal on the issue of insanity. *People v. Moice*, 15 Cal. 331.

69. An indictment charging defendant with "stealing, taking and leading or driving away," the property stolen, etc., is not defective under our statute as charging the offense in the disjunctive. The gravamen of the offense is taking and removing the stolen property, and it is immaterial whether the asportation be by means of leading the animals stolen or driving them. The offense is complete by the union of either of these acts and the seizure or appropriation. *People v. Smith*, 15 Cal. 409.

70. Either leading or driving away horses charged to have been stolen, etc., is a carrying away within the law. *Ib.*

71. An indictment for larceny describing the property as "a black or brown mare or filly, branded with a small mule shoe on the left shoulder," is sufficiently particular in description. To state the color is not necessary, and putting it in the alternative is not a fatal objection, especially when other terms of description are given, which identify the property. Our statute does not require *more* exactness than obtained at common law. *Ib.* 410.

72. An assistant prosecuting district attorney, appointed by the board of supervisors of the city and county of San Francisco, under the act of April 23d, 1858, (238) is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court, and shall assist the district attorney in the discharge of his various legal duties. *People v. Magallones*, 15 Cal. 428.

73. One of these duties is the prosecution of charges before the grand jury, and if the assistant may perform the duty, he must be deemed to be clothed with the powers and privileges necessary for that purpose. While acting for the district attorney, his acts possess the same validity, and must be regarded in the same light, as if done by that officer in person. *Ib.*

74. It is no objection to an indictment found in said court of sessions, that such assistant prosecuting district attorney was

Indictment.—Infancy.

present during the session of the grand jury, while the charge embraced in the indictment was under consideration. *Ib.*

75. An indictment for larceny, describing the property stolen as "fifteen twenty dollar pieces, and twenty-five ten dollar pieces, and ten five dollar pieces, of the gold coin of the United States, of the value of five hundred and fifty dollars," is not defective, as not averring the value of each particular piece of coin. *People v. Green*, 15 Cal. 513.

76. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently, the people appeal from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People v. Wooster*, 16 Cal. 435.

INDORSEMENT.

See ENDORSEMENT.

INFANCY.

1. Infancy is a good defense to an action on an executory contract, though the defendant did not disaffirm it on coming of age. *Buzzell v. Bennett*, 2 Cal. 102.

2. District courts of this State have the same control over the persons of minors, as well as their estates, that the courts of chancery in England possess. This is conferred by the constitution and cannot be divested by statute. *Wilson v. Roach*, 4 Cal. 366; *Bell v. Rogers*, 9 Cal. 129.

3. Where infants are deprived of apparent rights by a decree of court, they have the power in a new action to attack it, and this too, whether or not they were made parties to the first suit. *Joyce v. Joyce*, 5 Cal. 164.

4. Where a parent executes to his infant son a conveyance of property in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. Such a deed is therefore void against the creditors of the parent, if made when his remaining property is insufficient to pay his debts. *Swartz v. Hazlett*, 8 Cal. 126.

5. The principle upon which the infant is allowed to collect his wages is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Swartz v. Hazlett*, 8 Cal. 124.

6. The failure to deposit in the post office a copy of the complaint and summons directed to an absent minor, is not cured by the appearance of its mother in her own behalf. *Gray v. Palmer*, 9 Cal. 638.

7. There is no precise age within which children are excluded from giving testimony. Their competency is to be determined, not by their age, but by the degree of their understanding and knowledge. *People v. Bernal*, 10 Cal. 67.

8. It is essential that they should possess sufficient intelligence to receive just impressions of the facts respecting which they are examined, sufficient capacity to relate them correctly, and sufficient instruction to appreciate the nature and obligation of an oath. *Ib.*

9. It is for the court to decide the question of their competency when they are offered as witnesses. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn. *Ib.*

10. A child born in lawful wedlock is presumed to be the child of the husband. The marriage is an acknowledgment by the husband that the child is his; but to be effective, there must be knowledge at the time of the fact admitted. *Baker v. Baker*, 13 Cal. 99.

11. A woman to be marriageable must at the time be able to bear children to her husband, and a representation to this effect

Infancy.—Injunction in general.

is implied in the very nature of the contract. *Ib.* 103.

12. A wife divorced from her husband for extreme cruelty on his part is entitled to the custody of their female child of tender years, the wife being blameless. The father has a right to see a child at all convenient times. *Wand v. Wand*, 14 Cal. 517.

13. A party erecting buildings upon the property of an infant, under contract with his guardian made without authority of law, has no equitable lien on the property for the value of the improvements, such party being fully informed of the title and condition of the property. *Guy v. Du Uprey*, 16 Cal. 200.

See GUARDIAN AND WARD, PARENT AND CHILD.

INHERITANCE.

See HEIRS.

INJUNCTION.

- I. In general.
- II. Answer in an Injunction Suit.
- III. To Restrain Trespass.
- IV. To Restrain a Sale.
 - 1. On Execution.
- V. Against a Judgment.
- VI. Against Taxation.
- VII. Dissolution of an Injunction.
- VIII. Undertaking on an Injunction.
- IX. Writ of Injunction.

I. IN GENERAL.

1. An injunction order restrains the acts of the party, but it does not stay the running of time, and the effect of it cannot be to postpone the statute time required in giving notice of a motion for a new trial. *Elliott v. Osborne*, 1 Cal. 397.

2. The court may order a referee to

ascertain the damages sustained by an injunction issued without cause. *Russell v. Elliott*, 2 Cal. 246.

3. The simple allegation "irreparable injury" is not sufficient basis for an injunction; it should appear to the court from the facts set forth in the bill. *Dewitt v. Hays*, 2 Cal. 469; *Waldron v. Marsh*, 5 Cal. 120; *Merced M. Co. v. Fremont*, 7 Cal. 322; *Burnett v. Whitesides*, 13 Cal. 157; *Branch Turnpike Co. v. Supervisors Yuba County*, 13 Cal. 190.

4. Granting writs of injunction in every conceivable case has been carried to so great an extent as to impair the efficiency of and benefits arising from the judicious exercise of this power, and these abuses ought to be checked. *Dewitt v. Hays*, 2 Cal. 469.

5. An injunction granted by a court of concurrent jurisdiction in a previous suit between the two parties respecting the subject matter, restraining the parties from proceeding further, when brought to the notice of another court in which proceedings had been subsequently instituted, in disregard of this injunction, should be respected by that court, and operate as a stay of proceedings in a subsequent suit, on the ground of judicial comity. *Engels v. Hooper*, 3 Cal. 32.

6. To entitle a party to an injunction in a case of nuisance, the injury to be restrained must be such as cannot be adequately compensated by damages, or it must be irremediable or lead to irremediable mischief. *Middleton v. Franklin*, 3 Cal. 241.

7. Where the petition set forth a lease and contract to pay in kind, a refusal to pay rent and an allegation of removing the crop with intent to defraud the plaintiff of his rent, and a prayer for an injunction: held, that the injunction could not issue unless plaintiff averred the insolvency of defendant, and an inability to make the rent on attachment or execution. *Gregory v. Hay*, 3 Cal. 834.

8. The injunction is a mere remedial process, and where the party obtaining it has also obtained judgment upon his cause, the court will not revise the propriety of granting the writ. *Hicks v. Davis*, 4 Cal. 70.

9. An order of injunction, whereby the bringing of an action is restrained, will be reversed, notwithstanding a good bond has

In general.

been given, because it will prevent the defendant from exercising any remedial process guaranteed him by statute. *King v. Hall*, 5 Cal. 84.

10. The grant of authority to the county judge, to award an injunction in cases brought in the district court, is mere power to issue mesne process, auxiliary to the proper jurisdiction of the district court, and is not trenching upon it. *Thompson v. Williams*, 6 Cal. 89; *Crandall v. Woods*, 6 Cal. 451; *Borland v. Thornton*, 12 Cal. 448; *Ruthraff v. Kresz*, 13 Cal. 639.

11. Where suits have been commenced before a magistrate against the drawers of prizes in a lottery to forfeit the prizes drawn to the State under the statute, a bill for an injunction against the owner of the lottery to restrain him from disposing of the prizes until the decision of those suits will properly lie in the district court. *People v. Kent*, 6 Cal. 90.

12. An action on the case will not lie for improperly suing out an injunction, unless it is charged in the declaration as an abuse of the process of court through malice and without probable cause. *Robinson v. Kellum*, 6 Cal. 400.

13. If the act complained of is destitute of these elements, the remedy of the injured party is on the injunction bond. *Ib.*

14. An appeal does not lie from an order refusing an injunction.* *Richards v. McMillan*, 6 Cal. 422.

15. A ferry owner, prevented from obtaining a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises, has a right to an injunction to restrain another party from running a ferry under an illegal license granted by the county judge, within a mile of the first established ferry. *Chard v. Stone*, 7 Cal. 117.

16. Where a district court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction; held, that a mandamus may issue to compel the district judge to issue the attachment, the plaintiff's remedy by appeal being inadequate. *Merced Mining Company v. Fremont*, 7 Cal. 132.

17. The writ of injunction, though remedial, must be based on some equitable circumstances. *Coker v. Simpson*, 7 Cal. 342.

18. The allegation in a complaint that defendants wrongfully claim some pretended and fictitious right to the use of water, does not prejudice the right of the plaintiff to an injunction. *Tuolumne Water Company v. Chapman*, 8 Cal. 397.

19. There is no occasion that the plaintiff should first establish his title at law before he can obtain the injunction, when the averment of his right in the complaint is admitted by demurrer.

20. When an injunction granted on an ex parte application was modified on motion of defendant, without notice to plaintiff, on defendant giving bonds: held, that subsequent acts of defendant, in violation of the original injunction, were not in contempt. The remedy of the plaintiff, if there was error in the order modifying the injunction, is by appeal, but he cannot have a mandamus to compel the issuance of attachment for contempt. *Fremont v. Merced Mining Co.*, 9 Cal. 19.

21. Pending a motion for a new trial, defendants violated the injunction: held, that plaintiffs were entitled to a mandamus for an attachment against them for contempt of court. The pending of a motion for a new trial did not operate as a suspension of the injunction. *Ortman v. Dixon*, 9 Cal. 24.

22. The subsequent institution of suits by attachment and injunction to obtain and secure the repayment of the amount alleged to have been overpaid in the redemption, destroys the operative effect of the payment as a redemption. *McMillan v. Richards*, 9 Cal. 420.

23. Parties can only intervene to restrain the proceedings or control the action of the commissioners of the funded debt of San Francisco, when the funds are in danger of being wasted or impaired; or that a liability will be incurred, or an injury done by threatened or probable malfeasance, for which the agent's bonds or personal responsibility would afford no probable or adequate redress. Until this is shown, no injunction can issue to prevent them, as such commissioners, from receiving the trust fund. *City of San Francisco v. Commissioners of the Funded Debt*, 10 Cal. 588.

*The amendment to the code of March 28th, 1859, permits appeals to be taken from an order granting or dissolving, or an order refusing to grant or dissolve an injunction.

In general.

24. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners created by the act of April 2d, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued should be made parties to the action. *Hutchinson v. Burr*, 12 Cal. 103; *Pattison v. Supervisors of Yuba County*, 12 Cal. 106.

25. When a restraining order or an injunction is sought upon the complaint itself, it is the usual practice to present the complaint, in advance of the filing, to the judge, and obtain the order or the allowance of the writ, and such practice is regular and not in conflict with the statute. *Heyman v. Landers*, 12 Cal. 110.

26. An injunction ought not to be granted unless equitable circumstances beyond the mere allegation of irreparable injury be shown, as insolvency, impediments to a judgment at law or to adequate legal relief, or a threatened destruction of the property, or the like. *Burnett v. Whitesides*, 13 Cal. 157; *Branch Turnpike Co. v. Supervisors of Yuba County*, 13 Cal. 190.

27. Where suit is pending in one court on a note of defendant, though no summons has been served and no appearance made, he cannot bring a bill in equity in another court, to enjoin the collection of the note, or to cancel it, the averment being simply that he has a good defense to the note. *Lewis v. Tobias*, 10 Cal. 574; *Smith v. Sparrow*, 13 Cal. 597.

28. Plaintiffs obtained a preliminary injunction restraining defendants from obstructing a road leading to plaintiff's mine. Upon the answer being filed, the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge below thereupon made an order that upon such an appeal being effected by filing a bond, etc., as required by him, the order granting the injunction should be revived and continued in force. Plaintiffs perfected the appeal, and apply to the supreme court for an injunction pending the appeal, on the ground that defendants are disregarding said reviving order, and obstructing the road, to the ruin of plaintiffs: held, that the application must be denied, if this court had the power to grant it; that the remedy of plaintiff under the reviving order is ample

to protect him, until the appeal can be heard, or the injunction be dissolved by some competent authority. *Eldridge v. Wright*, 15 Cal. 89.

29. Where, under the one hundred and sixteenth section of the practice act, an order is made to show cause why an injunction should not be granted, and restraining defendants until the hearing, and on the hearing upon the order the injunction is refused, the restraining order expires by limitation. *Hicks v. Michael*, 15 Cal. 109.

30. An appeal from an order refusing to grant an injunction upon such hearing, or from an order dissolving an injunction, does not create an injunction or prolong the restraining order in the former case, nor revive it in the latter, pending the appeal. *Ib.*

31. It is only of orders or judgments which command or permit acts to be done, that a stay of proceedings on appeal can be had. *Ib.*

32. The court below may, on proper showing, revive an injunction once dissolved, or grant an injunction previously denied, and this is the extent of its power when the matter has been once disposed of. *Ib.* 110.

33. The supreme court has no power to grant an injunction pending an appeal. *Ib.* 114.

34. Where, on motion for a temporary injunction, an order is made requiring defendants to show cause why such injunction should not issue, and defendants file their answer contradicting the allegations of the complaint, and setting up new matter in defense of the action: held, that plaintiff may, at the hearing of the rule, read affidavits in support of his complaint. *Ib.* 117.

35. The object of the practice of issuing an order to show cause before granting the injunction, is to enable the parties to present the case on the merits. *Ib.*

36. Granting and continuing injunctions rest very much in the sound discretion of the court, to be governed by the nature of the case. *Ib.*

37. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by

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them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 499.

38. Under the act of 1857, (ch. 236) regulating fees in office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmondson v. Mason*, 16 Cal. 388.

39. The clerk is entitled to charge, under that act, fees for certified copies of summons and injunction, if the copies, though prepared by plaintiff, were certified by the clerk at plaintiff's request. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk. *Ib.*

II. ANSWER IN AN INJUNCTION SUIT.

40. Where the answer to a bill for an injunction denies all the equity, if any, of the bill, a preliminary injunction should not be granted. *Crandall v. Woods*, 6 Cal. 452.

41. Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction if the answer denies all the equities of the bill. The exceptions to the rule depend upon the special circumstances of the particular cases. *Gardner v. Perkins*, 9 Cal. 553.

42. The entire equity of the bill being denied in the answer, and there being no support of the bill, the injunction was dissolved. *Burnett v. Whitesides*, 13 Cal. 157.

43. The privilege of moving for a dissolution of an injunction upon the filing of an answer is limited to cases where the injunction is originally granted without notice, or expressly reserved when the injunction is granted on a rule to show cause. *Natoma W. & M. Co. v. Clarkin*, 14 Cal.

551; *Natoma W. & M. Co. v. Parker*, 16 Cal. 85.

44. Where an injunction was granted on the complaint restraining defendants from surveying or selling the premises, pending suit, it was dissolved on filing an answer setting up paramount title in defendants: held, that the injunction was properly dissolved, because the validity of defendant's title should be judicially determined before its assertion be enjoined. *Curtis v. Sutter*, 15 Cal. 263.

III. TO RESTRAIN TRESPASS.

45. Injunctions as to the performance of the conditions contained in the grant can only be made by the grantor, and not by a mere naked trespasser; and an injunction will lie to restrain the trespass, where the grant is admitted. *Buckelew v. Estell*, 5 Cal. 108.

46. An injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. *Waldron v. Marsh*, 5 Cal. 119.

47. A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction is correct. *Gates v. Kieff*, 7 Cal. 125.

48. A complaint which joins an action of "trespass quare clausum fregit," ejectment, and prays for an injunction, will be held bad on demurrer. *Bigelow v. Gore*, 7 Cal. 135.

49. A writ of injunction will lie to restrain trespass in entering upon a mining claim and removing the auriferous quartz from it, where the injury threatens to be continuous and irreparable. *Merced Mining Co. v. Fremont*, 7 Cal. 320.

50. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Ib.* 321.

51. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by the plaintiffs, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was

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sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 341.

52. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius v. Bicknell*, 10 Cal. 224.

53. The remedy by injunction to restrain the removal of fixtures, under section two hundred and sixty-one of the code, is only presumptive; it is not exclusive of any other remedy. *Sands v. Pfeiffer*, 10 Cal. 265.

54. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528.

55. Where the bill avers that plaintiffs are the owners and in possession of a tract of land, that defendants are insolvent and threaten to and will enter upon said land, and by excavations, embankments and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance and create a cloud upon plaintiff's title, injunction lies. *Bensley v. Mountain Lake W. Co.*, 13 Cal. 313.

56. Where premises containing deposits of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises for the purpose of extracting the gold. *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, 14 Cal. 464.

57. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass, in the nature of waste pending the action, but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 548.

58. The complaint avers title in plaintiff to a tract of land, that the possession of defendants is forcible and unlawful, that an action for forcible entry has been commenced by plaintiff against defendants,

and is still pending and undetermined, and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action: held, that injunction lies, although no action at law has been brought to try the title; that jurisdiction of equity in such cases to grant, first, a temporary, and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 115.

59. Where the title of plaintiff is disputed in the answer, the usual practice has been to ask the assistance of equity in aid of an action at law; but there are many cases in which the powers of a court of equity have been invoked in the first instance. And equity generally directs an issue at law as to the title, and awaits the action of the court of law upon that issue. *Ib.* 116.

60. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Ib.*

61. In cases of waste, if anything is about to be abstracted from the land which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Ib.*

62. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Ib.*

63. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleg-

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ing that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages: held, that the averments are insufficient to entitle plaintiffs to an injunction; the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 148.

64. Held, further, that plaintiffs should be permitted, if they desire, to so amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *Ib.*

65. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of insolvency of defendants, and complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 206.

66. In such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not

alone a ground for equitable interference. *Ib.*

67. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes the kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. *Halleck v. Mixer*, 16 Cal. 578.

IV. TO RESTRAIN A SALE.

68. The right of a party to enjoin a sale of his property for another's debt is not denied, and is supported by several decisions of the supreme court. *Hickman v. O'Neal*, 10 Cal. 294; *Ford v. Rigby*, 10 Cal. 449.

69. The authority of the board of commissioners, under the act of May 1st, 1851, relative to a sale of the State's interest in the water line front of the city of San Francisco, as defined by the act of March 26th, 1851, is limited to the property within the boundaries defined by the act, and a sale by them of lots not within these boundaries is a nullity, and cannot constitute cloud of title. Hence, an injunction against such sale will not lie. *Kisling v. Johnson*, 13 Cal. 57.

70. The jurisdiction of a court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be canceled a deed of such property. It is not necessary for its assertion in the latter case that the deed should be operative, if suffered to remain uncanceled, to pass the title, or that the defense to the deed should rest in extrinsic evidence, lia-

To Restrain a Sale.—Against a Judgment.

ble to loss, or be available only in equity. It is sufficient to call into exercise the jurisdiction of the court that the deed casts a cloud over the title of the plaintiff; as in such case the court will remove the cloud by directing the cancellation of the deed, so it will interfere to prevent a sale, from which a conveyance creating such a cloud must result. *Pixley v. Huggins*, 15 Cal. 132.

71. Every deed from the same source through which plaintiff derives his real property must, if valid on its face, necessarily cast a cloud upon the title. *Ib.*

72. Under section two hundred and fifty-four of the practice act, suit only lies with reference to property of which the plaintiff is in possession; and where suit is brought under that section to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's title. And if the grantees under such conveyances should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Curtis v. Sutter*, 15 Cal. 263.

73. As to that portion of the ranch occupied by settlers, such suit has nothing to do. If they are trespassers, ejectment lies, with an injunction to restrain waste pending suit. *Ib.*

74. Where in such suit an injunction was granted on the complaint, restraining defendants from surveying or selling the premises pending suit, it was dissolved on filing an answer setting up paramount title in defendants: held, that the injunction was properly dissolved, because the validity of defendants' title should be judicially determined before its assertion be enjoined. *Ib.* 265.

1. On Execution.

75. A sheriff may be enjoined from selling real property belonging to the wife, under an execution against the husband. *Alverson v. Jones*, 10 Cal. 12.

76. Defendant, as coroner and acting sheriff, levied on and advertised for sale

all the right, title and interest of T. in certain horses and cattle in the hands of a receiver, appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and that this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

77. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might under our statute be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 Cal. 106.

78. Plaintiff, on obtaining his sheriff's deed, can then institute the necessary proceedings to enforce his rights, and the purchaser at the sheriff's sale under Wemple's decree will occupy no better position than Wemple himself. But so long as Pender has any interest in the property, plaintiff cannot, in advance of his own title, or of the extinction of Pender's, come into equity to enjoin the sale. *Ib.*

V. AGAINST A JUDGMENT.

79. An injunction will not lie to restrain the collection of a judgment against the plaintiff, on the ground that the judgment was for a balance of purchase money of land under covenant for a good title,

Against a Judgment.

while in fact the grantor had no title, as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession; nor does the fact that the defendant has put valuable improvements on the land, and that he has paid a portion of the purchase money, and that his grantor and judgment creditor is insolvent and without visible property, take the case out of the rule. *Jackson v. Norton*, 6 Cal. 189.

80. An injunction will not lie to enjoin a judgment by default, on the ground that the sheriff's return on the summons does not show the place in which service was made on the defendant, where it is proven on the hearing of the application for injunction that defendant was served in a certain county of this State more than forty days before entry of his default. *Pico v. Sunol*, 6 Cal. 295.

81. Courts of equity will not interfere to enjoin a judgment at law rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agent. *Phelps v. Peabody*, 7 Cal. 52.

82. When a party has neglected to apply for a new trial in the time appointed by the proper court of law, courts of equity will not entertain a bill for an injunction on the ground that the original demand was unconscientious. *Ib.* 53.

83. One district court cannot by injunction restrain the execution of the orders or decrees of another court of coördinate jurisdiction. *Rickett v. Johnson*, 8 Cal. 35; *Revalk v. Kraemer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; *Phelan v. Smith*, 8 Cal. 521; *Anthony v. Dunlap*, 8 Cal. 27; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 614.

84. A State court cannot enjoin the proceedings of a federal court. *Phelan v. Smith*, 8 Cal. 521.

85. The only exception to the rule that one court cannot enjoin the proceedings of another court of coördinate jurisdiction is where the court in which the action or proceeding is pending is unable, by reason of its jurisdiction, to afford the relief sought. Where several fraudulent judgments are confessed in several courts, it would not be necessary for a creditor to bring a different suit in each different court, and this must affirmatively appear. *Uhlfelder v. Levy*, 9 Cal. 614.

86. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, if the neglect were excusable; full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 445.

87. A defendant, having no defense to an action, cannot go into equity and enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceedings. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286; *Logan v. Hillegass*, 16 Cal. 202.

88. Where a party moves for a new trial and fails, he cannot on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 226.

89. The rule inhibiting one court from restraining the enforcement of the judgment of another and coördinate court does not apply to a proceeding brought, not to stay execution issued against the property of the judgment debtor, but to prevent a sale of the property of plaintiff under the claim that it is the property of the debtor. *Pixley v. Huggins*, 15 Cal. 134.

90. Section two hundred and fifty-four of the practice act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie, and upon the verdict, if a new trial be not granted, the court can act by dismissing the bill, or by adjudging the adverse estate or interest claimed to be invalid, and awarding a perpetual injunction against its assertion to the property in question. *Curtis v. Sutter*, 15 Cal. 265.

91. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

92. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by

Against Taxation.—Dissolution of an Injunction.

motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Ib.*

VI. AGAINST TAXATION.

93. Where an assessment is laid on land in the city of San Francisco, it is not within the province of a court to interfere and order a sale of the court by a decree rendered in an injunction suit instituted by the owner of the land for the purpose of preventing a sale under an ordinance of the city. *Weber v. City of San Francisco*, 1 Cal. 456.

94. In all cases involving simply the question of taxation, the issue is simply one at common law, and courts of equity can take no cognizance thereof, and in such case it is error to grant an injunction. *Minturn v. Hays*, 2 Cal. 593.

95. Claimants to land are either owners or not; if they are, they must pay taxes on it, and if not, they have nothing to do with the matter, and cannot enjoin the collection of taxes, because the land belongs to the United States. *Robinson v. Gaar*, 6 Cal. 275.

96. A bill in equity will lie to restrain a sale of property for illegal taxes, since a tax deed is made prima facie evidence of title. *Palmer v. Boling*, 8 Cal. 388; and *Fremont v. Boling*, 11 Cal. 387, overruling *Dewitt v. Hays*, 2 Cal. 463, and *Robinson v. Gaar*, 6 Cal. 275.

97. A tax payer cannot enjoin the collection of the tax due the county, on the ground that he has in former years paid into the county treasury taxes assessed on his property which were illegally assessed and collected. *Fremont v. Mariposa County*, 11 Cal. 362.

98. An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection to the owner would be irreparable. An averment of this character must appear in the bill, and if denied, it must be sustained at the hearing. *Ritter v. Patch*, 12 Cal. 299.

99. Query: Whether a tax payer can interfere by injunction to restrain the per-

formance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation? *Pattison v. Supervisors of Yuba County*, 13 Cal. 181.

VII. DISSOLUTION OF AN INJUNCTION.

100. An injunction is not dissolved or superseded by appeal taken. *Merced Mining Co. v. Fremont*, 7 Cal. 132.

101. No appeal will lie from an order refusing to dissolve an injunction; it should be from the order granting an injunction.* *Martin v. Travers*, 7 Cal. 253.

102. Where a motion to dissolve an injunction is made upon bill and answer alone, the general rule is to dissolve the injunction, if the answer denies all the equities of the bill. There are exceptions to the rule, but they depend upon the special circumstances of the particular cases. *Gardner v. Perkins*, 9 Cal. 553.

103. Where an order granting an injunction is made ex parte, the injunction may be dissolved without notice. *Borland v. Thornton*, 12 Cal. 448.

104. The entire equity of the bill in this case being denied in the answer, and there being no support in the bill, the injunction should be dissolved. *Burnett v. Whitesides*, 13 Cal. 158.

105. An injunction granted upon an order to show cause, and after a full hearing on the merits, cannot be dissolved on motion before the final hearing. The only remedy is to appeal from the order granting the injunction. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551; *Natoma W. & M. Co. v. Parker*, 16 Cal. 85.

106. The right to move to dissolve an injunction before final hearing exists only where it was granted without notice, according to section one hundred and eighteen, practice act. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551; *Natoma W. & M. Co. v. Parker*, 16 Cal. 85.

*The amendment to the code of March 28th, 1859, permits appeals to be taken from an order granting or dissolving, or an order refusing to grant or dissolve an injunction.

Undertaking on Injunction.—Writ of Injunction.

VIII. UNDERTAKING ON INJUNCTION.

107. An order for an injunction must be deemed inoperative until an undertaking be given, otherwise the party enjoined would have no security for any damages which he might sustain by reason of the injunction. *Elliott v. Osborne*, 1 Cal. 397.

108. In an action upon an injunction bond to recover damages for the wrongful issuing out of an injunction, counsel fee to procure a dissolution of the injunction was properly allowed as part of the damages. *Ah Thaie v. Quan Wan*, 3 Cal. 217; *Summers v. Farish*, 10 Cal. 353; *Hoffman v. Sanders*, 12 Cal. 111; overruling *Heath v. Lent*, 1 Cal. 412.

109. Where an injunction is dissolved, and the suit in which it issued is dismissed by the party obtaining it, that is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Gelston v. Whitesides*, 3 Cal. 311.

110. In an action on an injunction bond the judgment of dissolution is conclusive, and the only question is the amount of damage sustained. *Ib.*

111. In an action on an undertaking for an injunction, the sureties cannot plead that the business which was enjoined was a public nuisance. *Cunningham v. Breed*, 4 Cal. 385.

112. An injunction bond, though given to all the obligees by name, and using no words decidedly expressing a several obligation, yet necessarily creates a several liability. *Summers v. Farish*, 10 Cal. 351.

113. In a suit on an injunction bond, defendant, to show that the injunction suit was still pending, offered in evidence an order from the supreme court directing the court below to fix the amount of a suspensive appeal bond, that court having dissolved the injunction: held, that the order was properly rejected, the defendant not offering to show that the bond and notice of appeal were given, and the transcript filed in the appellate court. *Woodbury v. Bowman*, 13 Cal. 635.

114. The usual bond being given, an order was made to show cause why an injunction should not issue; a restraining order "in the meantime" was issued. The case was continued a while, and on

hearing the order, was dissolved, injunction denied and suit dismissed. Suit was brought on the bond, and it was held, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond the continuance, and that counsel fees may also be recovered. *Prader v. Grim*, 13 Cal. 587.

115. On an injunction bond given to plaintiff and others, as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

116. In an action on such bond, no demand for payment of unliquidated damages need be made on the parties for whom the sureties—that is, the obligors—stipulated. *Ib.*

IX. WRIT OF INJUNCTION.

117. Giving verbal information of an order of injunction is insufficient to affect the party to whom it is given. If a party be in court at the time the order is made, and has personal knowledge of the order, he might be bound by it. *Elliott v. Osborne*, 1 Cal. 397.

118. No particular form is necessary for a writ of injunction; the substantial thing is an authentic notification to the defendants of the mandate of the judge, which they must then at their peril obey. *Summers v. Farish*, 10 Cal. 353.

119. The statute points out no mode for service of an injunction; but in conformity with the provisions relative to the summons, delivery of a copy is essential to personal service where that is required; but whether it would be necessary to exhibit the original, unless specially requested by the party served, no opinion is here expressed. *Edmondson v. Mason*, 16 Cal. 388.

INJURY.

1. The street commissioner of the city of San Francisco is empowered to use the necessary force, but no more than is necessary, to prevent an injury to the public streets of the city, and no action can be maintained against him or those who act under his orders for using such force. *Clark v. McCarthy*, 1 Cal. 453.

2. The mere allegation of irreparable injury is not of itself sufficient in a complaint for an injunction, but the complaint must show the facts. *Dewitt v. Hays*, 2 Cal. 469; *Waldron v. Marsh*, 5 Cal. 120; *Merced Mining Co. v. Fremont*, 7 Cal. 322; *Burnett v. Whitesides*, 13 Cal. 157; *Branch Turnpike Co. v. Supervisors of Yuba County*, 13 Cal. 190.

3. Where one partner sues for an injury to the partnership property, and makes his copartner a defendant for the want of his consent to join as plaintiff, the recovery must be entire for the whole injury. *Nightingale v. Scannell*, 6 Cal. 509.

4. A writ of injunction will lie to restrain trespass in entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. *Merced Mining Co. v. Fremont*, 7 Cal. 322.

5. If the estate of the tenant suffers irreparable injury, the right to restrain it would seem to be as clear as the right to sustain ejectment or trespass under proper circumstances. *Merced Mining Co. v. Fremont*, 7 Cal. 327; *Hicks v. Michael*, 15 Cal. 116.

6. There is no doubt that the owners of a ditch would be liable for wanton injury or gross negligence, but not for a mere accidental injury where no negligence is shown. *Tenney v. Miners' Ditch Co.*, 7 Cal. 340.

7. Where the complaint alleged that the defendant had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 341.

8. Every error in the court below, in

the rejection of evidence, is prima facie an injury, and it rests with the other party clearly to show that no hurt could have been or was done by the error. *Jackson v. Feather River Water Co.*, 14 Cal. 25; *Grimes v. Fall*, 15 Cal. 66.

9. Excavating ditches, digging up the soil and flooding a portion of the premises for the purpose of extracting the gold, are injuries calculated to destroy the entire value of the land for all useful purposes. *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, 14 Cal. 464.

10. The cutting, destroying and removing of growing timber on the premises in controversy constituted, without other matter, sufficient ground for the issuance of the injunction. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 551.

11. On an injunction bond given to plaintiff and others as obligees, plaintiffs alone may sue, if the property on which the injunction operated was his sole property and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

12. Injury is presumed from evidence erroneously admitted, and the adverse party must show clearly that no injury accrued, or the judgment cannot stand. *Grimes v. Fall*, 15 Cal. 66.

13. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver, appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and that this must appear by a clear showing of plaintiff's right to the property and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

See DAMAGES, INJUNCTION, TRESPASS, TORT.

INNKEEPER.

1. The declarations of a bar-keeper to a third person as to the contents of a package left by a guest in the charge of the innkeeper, when not made in any way in the discharge of his duty as bar-keeper, are

not admissible in an action against the innkeeper to prove the contents of the package. *Mateer v. Brown*, 1 Cal. 225.

2. An innkeeper, like a common carrier, is the insurer of the goods of his guest, and is bound to keep them safe from burglars and robbers without, as well as from thieves within the house; but he can be held to this strict liability only for such goods as are brought into his house by a traveler in the character of guest. *Ib.* 226.

3. The liability of the innkeeper results from the relation in which he stands to the guest, and extends only to those things which properly pertain to him in that relation. *Ib.* 230.

4. The jury should decide whether the article was taken to the inn by the guest in his character of guest, in which event the innkeeper's liability would cover all losses, or whether, after he become a guest, it was deposited there in the nature of an ordinary bailment. *Ib.* 231.

5. A claim for possession of real property, with damages for its detention, cannot be joined with a claim for consequential damages, arising from a change of a road, by which a tavern keeper may have been injured in his business. *Bowles v. The Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

INSANE ASYLUM.

1. The act to establish an insane asylum, providing that the resident physician shall hold his office for two years and until his successor is appointed and qualified: held, that on the failure of the legislature to elect at the expiration of the incumbent's term, the office becomes de jure vacant, and can be filled by the governor under art. 5, sec. 8, of the constitution. *People v. Reid*, 6 Cal. 289; *People v. Langdon*, 8 Cal. 11.

2. The legislature having failed to classify the trustees of the insane asylum, extended the term of all the trustees to five years, and the appointments to fill vacancies could not extend beyond the original term. *People v. Baine*, 6 Cal. 510.

INSANITY.

1. Letters of guardianship of a lunatic, issued by the probate court, cannot be questioned in a collateral proceeding, and are admissible in evidence. *Warner v. Wilson*, 4 Cal. 213.

2. Insanity of the prisoner at the instant of the commission of the offense can only be established by evidence tending to prove that he was insane at some period before or afterwards. *People v. March*, 6 Cal. 547.

3. The trial on the main charge in an indictment will not be postponed because of an appeal on the issue of insanity. *People v. Moice*, 15 Cal. 331.

INSOLVENCY.

- I. In general.
- II. Jurisdiction.
- III. Averment of Insolvency.
- IV. Description of Liabilities.
- V. Decree of Discharge.

I. IN GENERAL.

1. An insolvent debtor may prefer certain creditors in an assignment of his property.* *Billings v. Billings*, 2 Cal. 113.

2. A voluntary assignment executed for the benefit of the creditors is void if not made in conformity to the insolvent act. *Cheever v. Hays*, 3 Cal. 472; *Naglee v. Lyman*, 14 Cal. 456.

3. The intention of the insolvent act was to throw all the assets into a common fund, for the benefit of all the creditors, and they cannot be deprived of any rights by not being named in the schedule. *Lambert v. Slade*, 4 Cal. 337.

4. Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge, or obtaining his proportion of the assets, wheth-

*This decision was rendered upon an assignment made in 1850, prior to the passage of the insolvent act of 1861.

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er he be named in the assignment or not. *Ib.* 338.

5. Our statute, though not strictly speaking a bankrupt law, may be treated as such, or as an insolvent act, or both. *Cohen v. Barrett*, 5 Cal. 209.

6. It was the intention of the legislature by this act to do away with all voluntary assignments. *Ib.* 210.

7. The mere right of discharge cannot properly be said to be the only relief resulting to the debtors. The exemption from arrest upon mesne or final process, as well as from costs and expenses of harassing litigation, are certainly to be considered a relief to the insolvent, who may be upon the very threshold of a prison, to answer debts fraudulently contracted. *Ib.* 212.

8. The act makes no provision for an involuntary surrender, and the mere permission of an exercise of volition on the part of an insolvent debtor will be found to amount to no protection at all, particularly where the benefits of the act are denied and the real incentive to an honest surrender of all his assets is thus removed. *Ib.*

9. Parties appointed as assignees of an insolvent firm in a proceeding in insolvency which was illegal and void, are merely the custodians, receivers or bailees of the fund in their hands by virtue of an order of the court, and only hold it subject to the direction of the court. *Adams v. Haskell*, 6 Cal. 115.

10. The date of publication of notice to creditors, under our insolvent act, is the first day on which the notice is published. *Clarke v. Ray*, 6 Cal. 604.

11. The fact that the court was adjourned, though not for the term, at the time set for the hearing of objections of creditors, and that the hearing took place before the judge, is no objection to the regularity of the proceedings under the statute. *Ib.* 605.

12. The insolvent law is not obnoxious to any provision of the constitution. *Ib.*

13. Where the estate of the insolvent is subject to liens or mortgages created before the application in insolvency, proceedings therein do not affect such lien or mortgages, and the right of the assignee is confined to the surplus. *Rix v. McHenry*, 7 Cal. 91.

14. A purchaser having been agent or

clerk of an insolvent, cannot necessarily raise the inference that his purchase of the insolvent's property was fraudulent. *Kinder v. Macy*, 7 Cal. 207.

15. A party who seeks the benefit of the insolvent law must strictly comply with its provisions. *McAllister v. Strode*, 7 Cal. 430.

16. A joint application of two partners for the benefit of the insolvent act is void, there being no authority for such application in the act. *Meyer v. Kohlman*, 8 Cal. 47.

17. A schedule attached to such a petition showing a surrender of all the joint property of the partners, is not a compliance with the act which requires a surrender of all the property of the insolvent. *Ib.*

18. Where an insolvent after his discharge expressly promises his creditor to pay his debt, it can be enforced, the debt being a sufficient consideration to support the subsequent promise, even if verbal. *Feeny v. Daly*, 8 Cal. 85.

19. Where a person clearly insolvent purchases goods from another on credit, and conceals the fact of insolvency from the vendor, he is guilty of such fraud as vitiates the sale. *Seligman v. Kalkman*, 8 Cal. 215.

20. If a purchaser is not only insolvent and knew the fact, but had performed an open and notorious act of insolvency, it was his duty arising out of his previous dealing with the vendors to disclose the fact before the sale, and that a violation of that duty amounted to a fraud. *Ib.*

21. Return of nulla bona on an execution is only one mode of proving insolvency. Any other competent proof would be sufficient. *Walker v. Sedgwick*, 8 Cal. 403.

22. In a bill of equity to enforce a vendor's lien, it is not necessary to allege the issuance of execution under a judgment at law previously obtained by the vendor against the purchaser for the amount due, and the return of the nulla bona, to sustain the allegation of insolvency. *Ib.*

23. Where G. & Co., concealing their insolvency, obtained an extension from their creditor B., and before the maturity of the notes B., apprehending that G. & Co. would fail before their paper became due, and that the other creditors of G. & Co. would exhaust their assets by attachment, ob-

In general.

tained by an arrangement with G. & Co. an ante-dated note for the amount due him at the date thereof by G. & Co., on which suit was commenced by an attachment and a levy made on the property of G. & Co.: held, that B's attachment and claim was valid against subsequent attaching creditors, the case not being one either of actual or constructive fraud. *Brewster v. Hodges*, 8 Cal. 505.

24. It is only in cases of insolvency that the equitable rule for a pro rata distribution will apply, and then as of a necessity. If the firm be solvent, a creditor whose claim is due cannot be placed on a par with others whose claims are not yet due, or who have been less diligent in securing claims already due. *Adams v. Woods*, 9 Cal. 26.

25. The requirements of the insolvent law must be strictly followed; a failure to comply with its provisions will deprive the petitioner of its benefits. *Judson v. Atwill*, 9 Cal. 478.

26. An order of court made, staying all proceedings against a petitioner under the insolvent law for a discharge from his debts pending his petition, would not prevent the issuance on an execution on a judgment rendered against the petitioner and a sale of property under the same, within the time limited for the lien of said judgment. *Isaac v. Swift*, 10 Cal. 82.

27. The statute which provides that no assignment of any insolvent debtor otherwise than as provided in that act shall be legal or binding upon creditors, was to do away with all voluntary assignment by a debtor, in failing circumstances, for the benefit of his creditors. *Dana v. Stanfords*, 10 Cal. 274.

28. There is no rule of law which prevents a debtor, in insolvent circumstances, from the application of his property to the payment of one debt rather than another. *Dana v. Stanfords*, 10 Cal. 275; *Randall v. Buffington*, 10 Cal. 494.

29. A conveyance giving a preference is not fraudulent, though the debtor be insolvent and the creditor be aware at the time that it will have the effect of defeating the collection of other debts. *Dana v. Stanfords*, 10 Cal. 277.

30. On a petition for a discharge of the debts of the petitioner under the insolvent act, it is unnecessary for the petitioner to allege that his debts were created in this

State. *Sharp v. His Creditors*, 10 Cal. 419.

31. Where the defendant was indebted in the sum of \$1,000, which he secured by a mortgage on the homestead, and sometime afterward became insolvent, and after several attachments had been issued in suits against him and levied on his store, he took money which he had and paid off the debt secured by the mortgage: held, that the payment was not an act to hinder, delay and defraud his creditors. *Randall v. Buffington*, 10 Cal. 494.

32. The insolvency of a party against whom a set-off is claimed in equity, is sufficient ground for the exercise of the jurisdiction of the court of equity. *Russell v. Conway*, 11 Cal. 102.

33. If a creditor who assigned his stock, to be sold to pay his debts, were insolvent at the time of the assignment, the party contesting the validity of the assignment should affirmatively show such fact, when insolvency does not appear in the language of the instrument. *Morgenthau v. Harris*, 11 Cal. 247.

34. Upon the issue of fraud in an application of an insolvent to be discharged from his debts, where it was alleged that the applicant had made and recorded a sham deed of his property before his application, which property was not included in his schedule: held, that it was error for the court to instruct the jury "that to find the charge of fraud sustained, they must believe the deed made with the intent to defeat, hinder and delay creditors, and to have been actually delivered to the grantees; that proof of record was no proof of delivery, etc." The fraud is as complete without the delivery as with it. *Fisk v. His Creditors*, 12 Cal. 282.

35. To constitute an assignment within the insolvent law, there must be a trust in favor of the assignor or a third person. *Wellington v. Sedgwick*, 12 Cal. 474.

36. It seems that the appearance of an attorney wholly unauthorized, there being no fraud and no allegation of insolvency, would not give the party a right to assail the judgment on that ground. *Holmes v. Rogers*, 13 Cal. 201.

37. Where goods were fraudulently purchased by an insolvent, the creditor may attach before the maturity of the debt, and other creditors, subsequently attaching, cannot complain that the suit was

In general.—Jurisdiction.

prematurely brought. *Patrick v. Montader*, 13 Cal. 442.

38. After a petition and schedule in insolvency are filed, the control and dominion of the insolvent's property are transferred to the court. A creditor cannot after such filing seize the property. The order operates by its own force from its date, and no notice need be given of it to a sheriff with a writ against the insolvent. *Taffts v. Hill*, 14 Cal. 52.

39. A judgment recovered against a bankrupt after the issuance of the commission and before he obtains his discharge upon a preëxisting indebtedness, occupies the exact position of the original debt, and is equally within the purview and operation of the discharge. *Imlay v. Carpentier*, 14 Cal. 175.

40. Relief against such judgment may be by motion to discharge it, unless there be suspicion of fraud in the release of the insolvent. *Ib.* 177.

41. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: "plaintiff further shows that after said note was executed, etc. * * * defendant, by virtue of * * * proceedings in insolvency, etc. * * * claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about * * * defendant promised" the payee and other persons that he would pay said note to said payee on demand, etc., and that defendant thereby revived said obligation: held, that the complaint does not set up two causes of action; that the gravamen of the action was designed to be the promise, the previous indebtedness being averred as a matter of inducement. *Smith v. Richmond*, 15 Cal. 502.

42. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that the defendant might well have been taken by surprise,

and supposed it unnecessary to introduce proof of his discharge. *Ib.*

See ASSIGNMENT, IV.

II. JURISDICTION.

43. Proceedings in insolvency are not stricti juris either proceedings at law or in equity, but a new remedy or proceedings created by statute. *Cohen v. Barrett*, 5 Cal. 210.

44. The district court, acting as a court of limited or inferior jurisdiction in these matters, must first ascertain that the person, the subject matter and the relief sought are within the statute, before its jurisdiction will be attached. *Ib.* 211.

45. A court has no jurisdiction of an application under the insolvent act, it appearing upon his petition that a portion of the indebtedness therein set forth was contracted in the business of banking—as the act forbids it.* *Ib.* 213.

46. Cases of insolvency under the act of 1852 are special cases within the meaning of the constitution, and the legislature in conferring jurisdiction in these cases in both the district and county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

47. A party whose assets are forty per cent. above his liabilities cannot be considered insolvent. *Hunt v. His Creditors*, 9 Cal. 46.

48. Where an insolvent in his petition to the district judge of the fourth judicial district, stated that he was "a resident of the city of San Francisco:" held, that the averment was sufficient that his residence was within the fourth judicial district. *Slade v. His Creditors*, 10 Cal. 485.

49. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court on questions of fraud, made on the petition of an insolvent for the discharge of his debts. *Fisk v. His Creditors*, 12 Cal. 281.

*The amendment of the insolvent act of March 12th, 1858, permits bankers, brokers, etc., to apply for a distribution of their assets, but not for a discharge from their fiduciary liabilities.

Averment of Insolvency.—Description of Liabilities in the Schedule.

III. AVERMENT OF INSOLVENCY.

50. Where the petition sets forth a lease and contract to pay in kind, a refusal to pay rent, and an allegation of removing the crops to defraud the plaintiff of his rent, and a prayer of injunction, it should also allege the insolvency of the defendant, and inability to make the rent on attachment, or execution; or an injunction will not lie. *Gregory v. Hay*, 3 Cal. 334.

51. Defendant, as coroner and acting sheriff, levied on, and advertised for sale, all the right, title and interest of T. in certain horses and cattle, in the hands of a receiver, appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable, and that this must appear by a clear showing of plaintiff's right to the property, and defendant's insolvency. *More v. Ord*, 15 Cal. 206.

52. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at Stockton, claiming that the trees were not paid for, and not subject to W.'s debts, for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State is in law insolvent, without reference to any property in another State:" held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson v. Paige*, 16 Cal. 79.

53. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property destroyed: held, that

these allegations are insufficient to authorize an injunction—there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 206.

IV. DESCRIPTION OF LIABILITIES IN THE SCHEDULE.*

54. The petition in insolvency must state the name of each creditor if known, and if unknown, such fact must be stated. *McAllister v. Strode*, 7 Cal. 431.

55. Where an insolvent was liable on a note made by S. to him, and endorsed by him to R., and by him over to M., and describes the same in his schedule, "To R. I am contingently liable for one thousand dollars and interest, as endorser for one S. upon a promissory note, made and executed by said S. to said R.:" held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *Ib.*

56. Where an insolvent was liable on a note, and describes the same incorrectly in his schedule: held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strode*, 7 Cal. 431; *Judson v. Atwill*, 9 Cal. 478.

57. Where there is a misdescription of a note and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwill*, 9 Cal. 478.

58. If an insolvent does not know the name of the owner of notes executed by him, he must state this circumstance in the schedule. In the suit on the notes, the absence of such statement cannot be obviated by proof at the trial. *Ib.*

59. A defective statement in the schedule of an insolvent of certain promissory notes which constitute a portion of his debts and liabilities, does not invalidate the entire proceedings. If the statute as

*The amendment of April 27th, 1880, to the insolvent law of 1851 discharges the debt, whether imperfectly described or not described at all.

Decree of Discharge.—Inspector.—Instructions in general.

to the particularity with which debts and liabilities are required to be set forth by the insolvent, is not substantially complied with, a creditor cannot be prejudiced by the decree of discharge in any suit which he may institute to enforce his claim. *Slade v. His Creditors*, 10 Cal. 485.

60. The discharge by a decree under the insolvent act from the payment of the note does not release the lien of the mortgage executed to secure its payment. *Luning v. Brady*, 10 Cal. 267.

61. A note for five hundred dollars to the order of Alfred McCarty is insufficiently described in an insolvent's schedule, where he simply states "Alfred McCarty, borrowed money, April, 1855, five hundred dollars," and a discharge in such case is no bar to a suit on a note. *McCarty v. Christie*, 13 Cal. 81.

V. DECREE OF DISCHARGE.

62. An application for a discharge in insolvency is a special proceeding in the nature of an action. The petition, schedule and affidavit are the pleadings on the part of the petitioner who is the plaintiff, and if they are sufficient to entitle him to his discharge, any irregularity or defect in form must be taken advantage of before judgment by his creditors, who are defendants in the proceedings. *Kohlman v. Wright*, 6 Cal. 231.

63. An insolvent's discharge under the statute must be by the judgment of the court, and in the same county in which the proceedings were instituted. *Turner v. McIlhenny*, 6 Cal. 288.

64. A discharge made in chambers by the district judge in the same district, but in another county from that in which the proceedings were instituted, is no defense to an action against the insolvent. Objections which go to the jurisdiction may be properly taken on the trial. *Id.*

65. A discharge under the insolvent act, to be a bar to actions on indebtedness mentioned in the petitioner's schedule, must be in strict conformity with the various provisions of the law, otherwise it is void. *Meyer v. Kohlman*, 8 Cal. 47.

66. A decree of discharge under the insolvent act from the payment of the note secured by mortgage does not release the

lien of the mortgage; it only operates to limit the recovery of the mortgage to the proceeds of the mortgaged premises. *Luning v. Brady*, 10 Cal. 267.

67. A decree of insolvency, discharging the husband, and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not be thus divested; nor was such the intention of our insolvent act. *Bowman v. Norton*, 16 Cal. 218.

INSPECTOR.

1. Whether the place or employment of inspector of customs is a lucrative office of the United States, within the constitution of this State, making such person ineligible to a State office? Query. *Saunders v. Haynes*, 13 Cal. 154.

INSTRUCTIONS.

- I. In general.
- II. In Civil Cases.
- III. In Criminal Cases.
- IV. When they may be reviewed.

I. IN GENERAL.

1. A jury should make up their verdict from the facts and the law as given them by the court, and it seems that it is improper for the court to instruct the jury "to take into consideration all of the facts, and do equal justice between the parties," inasmuch as an instruction so general in its terms may mislead them. *Kelly v. Cunningham*, 1 Cal. 367.

2. Instructions of the court to the jury must all be taken together, and if when thus viewed the case appears to have been fairly presented to the jury, the verdict will not be disturbed. *Dwinelle v. Henriquez*, 1 Cal. 390.

3. The whole charge of a district judge

In general.

to the jury should be taken together, and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted, although some of the instructions may in slight respects be repugnant to each other. *Carrington v. Pacific Mail S. S. Co.*, 1 Cal. 478.

4. It is not incumbent on the court to instruct the jury upon mere abstract questions of law, irrelevant to the case as serving only to bewilder and mislead them from the true issue to be determined. *Fowler v. Smith*, 2 Cal. 45.

5. The court should give or refuse instructions to the jury as asked for, and though the phraseology may be modified to make it more intelligible, yet the sense must not be altered. *Conrad v. Lindley*, 2 Cal. 175.

6. The court must give or refuse the instructions asked for, and no modification which alters the meaning or might mislead the jury, can be substituted. *Russell v. Amador*, 3 Cal. 403.

7. The naked instruction of a court, unaccompanied with any statement of facts, cannot satisfy a substantial error, although some may not be consonant with the rules of law. *White v. Abernethy*, 3 Cal. 426.

8. An erroneous instruction will be disregarded if the jury came to the proper understanding and rendered a correct judgment. *Haskell v. McHenry*, 4 Cal. 411.

9. A rule of court required counsel to file and submit to the court any instructions they may offer before the argument is closed to the jury: held, this does not operate where a cause is submitted without argument. *Turney v. Endicott*, 5 Cal. 103.

10. After a jury have once retired, it is error to allow them to come into court and receive instructions, in the absence of the parties or their counsel. *Redman v. Gulnac*, 5 Cal. 148.

11. Where the plaintiff's case does not depend alone on the evidence mentioned in the instruction requested by the defendant, it was properly refused. *Pearson v. Snodgrass*, 5 Cal. 479.

12. A court must give or refuse instructions asked for. It may modify the phraseology so as to render it more intelligible to the jury, but cannot alter its sense. *Jamson v. Quivey*, 5 Cal. 491.

13. If counsel desired a large number of instructions should be given, it was at

least his duty to have presented them to the court before or during the argument of the cause, in order that the judge might have arrived at a knowledge of their contents, and be able advisedly to give or refuse them. *Anderson v. Parker*, 6 Cal. 201.

14. Instructions in civil and criminal cases should be drawn with some slight reference to the case as made by the evidence. *People v. Roberts*, 6 Cal. 217.

15. Where no question of jurisdiction is raised by the pleadings, it is error to instruct the jury "that if they believe a certain fact they must find for the defendant, as the existence of that fact will establish a want of jurisdiction over the case," because, as the pleadings stand, such a verdict is a complete bar to another action to which the plaintiff is entitled in another court, if the verdict against him was rendered in pursuance of such instruction. *Fairbank v. Woodhouse*, 6 Cal. 435.

16. The constitutional right of the court "to state the testimony" to the jury, would hardly authorize a judge to express his opinion as to its effect. *Seligman v. Kalkman*, 8 Cal. 216.

17. Instructions to the jury are properly refused when not warranted by the pleadings. *Thompson v. Lee*, 8 Cal. 280.

18. An instruction asked for is properly refused when there is no evidence on the question of fact embraced in it. *People v. Hurley*, 8 Cal. 390.

19. Where equivalent instructions are given and refused, the court should place its refusal on the ground that equivalent instructions were given. Unless this is done, the jury may be misled. *Id* 392.

20. It is not error in a court to refuse to give to the jury an instruction which embraces a question which came properly before the court, and not before the jury. *Branger v. Chevalier*, 9 Cal. 360.

21. It is error for the court to charge the jury as to a question of fact, or as to the weight of evidence. *Battersby v. Abbott*, 9 Cal. 568.

22. An instruction of the court to the jury must be adapted to the facts of the case. *People v. Honshell*, 10 Cal. 87.

23. The fact that instructions given by the court are lost or mislaid before a motion for new trial is heard, is no ground to suspend the hearing of the motion or for new trial. *Visher v. Webster*, 13 Cal. 60.

24. A court is not bound to give an in-

In general.—In Civil Cases.

struction upon its face erroneous, though the error might not be sufficient to reverse the judgment if the charge were given. *Id.* 61.

25. If an instruction be refused for the reason that it has already been given, the reason of the refusal should be stated so as not to mislead the jury. *People v. Ramirez*, 13 Cal. 172.

26. The court may refuse an instruction asked, stating an abstract or general proposition of law, when it has already so charged the jury as to embrace such proposition, or so much of it as is applicable to the case. *Fairchild v. California Stage Co.*, 13 Cal. 602.

27. An instruction does not prejudice defendant, where the verdict was the only one that could have been rendered under the evidence. *Terry v. Sickles*, 13 Cal. 429.

28. Whether an instruction giving the general rule—without the qualification—be proper or not, depends on the facts in proof, and the charge would be right or wrong according to the circumstances of the given case. *People v. Arnold*, 15 Cal. 482.

29. Where a party asks an abstract proposition of law, by way of instruction to a jury, he takes the risk of its being correct in all its parts. *Thompson v. Paige*, 16 Cal. 79.

II. IN CIVIL CASES.

30. It was error for the court to instruct the jury, that when a person injuriously slanders the title of another, malice is presumed. *McDaniel v. Baca*, 2 Cal. 338.

31. In an action against an administrator the court should, if asked, charge the jury as to the statute time within which the action could be brought when the claim is rejected. *Benedict v. Haggin*, 2 Cal. 386.

32. The action was against surgeons "for malpractice, by which amputation became necessary." The court charged erroneously, "that if they believe from the evidence that the defendants were guilty of negligence, carelessness or inattention, in their treatment of plaintiff's wounds, by which he was caused great bodily pain and suffering, the plaintiff is entitled to a verdict." The action was not

brought for bodily pain or suffering. *Moore v. Teed*, 3 Cal. 190.

33. In an action for use and occupation, the court was asked to instruct the jury, "that it was necessary, to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff; and if the jury believed the defendant used and occupied the same against the will of the plaintiff, that they must find a verdict for the defendant;" which the court refused: it was held, that in this the court erred. *Sampson v. Shaeffer*, 3 Cal. 201.

34. Where defendants were sued as factors, although no claim for commissions, etc., were set out as a counter claim, it was error for the court to charge the jury that it was for them exclusively to say what amount the plaintiff was entitled to recover, and that the defendants were liable for the value of the goods at the time of demand. *Lubert v. Chauviteau*, 3 Cal. 463.

35. It is not error to instruct a jury, that if sufficient time had elapsed between the dealings of the plaintiffs with the old firm and their subsequent transactions with the new firm to put a reasonable man on inquiry, they might be treated as new dealers. *Treadwell v. Wells*, 4 Cal. 262.

36. Where the complaint does not charge the mortgagee in possession with negligence or improper conduct in the leasing the mortgaged premises, but it requires him to account for the rents he actually received, it is proper to refuse to instruct the jury that he might have leased the property differently, and to charge him with what he might have received if so leased. *Benham v. Rowe*, 2 Cal. 407.

37. In an action on a guaranty, though it is error in terms to charge the jury, if they find for the plaintiff to assess as damages the amount of the penalty fixed in the guaranty, yet if the plaintiff's damages, if any, must exceed the penalty, the direction must be regarded as limiting the verdict, and defendant is not injured by the instruction. *Jones v. Post*, 6 Cal. 105.

38. In an action for directing water from the plaintiff's ditch, and where both parties claimed in part the waters of the same stream: held, that the following instruction was properly given by the court to the jury: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbit creek

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more water than he was entitled to at the precise time that such deficiency existed." *Brown v. Smith*, 10 Cal. 511.

39. Also, where the court instructed the jury, that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury, that it was incapable of directing the waters of the creek, then plaintiff cannot recover. *Ib.*

40. Where in a suit of conversion by an administrator, the complaint averred the facts necessary under the statute to maintain the action, and the answer denied the facts; but it is agreed by counsel that the proof is conflicting: and the court below instructed the jury, that if they believed from the evidence that defendant did receive the property mentioned in the complaint belonging to the estate of G., deceased, and converted and appropriated to his own use, and refused to deliver the same when demanded, etc., they will find for plaintiff; and it is objected to upon appeal that this instruction was wrong, because it ignores all reference to the time of the alienation by defendant, whether before or after the issuing of letters of administration upon the estate of deceased: held, that there being no statement of facts, the appellate court cannot tell whether there was any discrepancy in the proof as to the time of the alienation, assuming that there was such alienation; and that in favor of the judgment, it must be presumed, unless there be direct evidence to the contrary, that the court did not err in giving the instruction in this form, for there may have been no controversy as to the time of alienation, if any was made, though there might have been conflict in the proof as to the fact of alienation, and this the court left to the jury. *Beckman v. McKay*, 14 Cal. 252.

41. In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and eleventh section of the statute to regulate the settlement of estates, the proof as to the right, title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Ib.*

42. In ejectment, where the title is of record and wholly documentary, the court

may declare the effect of the papers offered by plaintiff, and instruct the jury that plaintiff has made out his title, if they believe the land to be within the boundaries of a grant under which plaintiff claims. *McGarvey v. Little*, 15 Cal. 31.

43. In an action for diverting water from plaintiff's ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount, defendants asked the court to instruct the jury, that if defendants had brought water from foreign sources, and emptied it into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, "less such amount as might be lost by evaporation, and other like causes." The instruction was given, with the explanation, that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator: held, that the explanation was proper, the concluding words of the instruction being too general and indefinite. *Burnett v. Whitesides*, 15 Cal. 36.

44. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough of the other stack to make sixty tons, at eighteen dollars per ton. Plaintiff had sixty-two tons and four hundred pounds of hay baled, the surplus over sixty tons being by mistake. Plaintiff told defendant that there were two tons and some hundreds of pounds piled up together, and asked defendant whether he would take the surplus. Defendant said he would see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff sues for nine hundred and nineteen dollars, balance due on the hay. The court instructed the jury, that if they believed from the evidence it was the understanding of the parties that upon the payment of the two hundred dollars by defendant the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with

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other hay belonging to plaintiff made no difference, if defendant agreed to accept it in that condition and consider it as delivered—the contract for delivery would be fully executed. *Smith v. Friend*, 15 Cal. 126.

45. On the above facts defendant asked the court to instruct the jury, that “if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights and containing different quantities, and all being in the same pile, there was no delivery without division had” The instruction was refused; held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. *Ib.*

46. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream above and adjoining the claims of plaintiffs, defendants’ claim being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs’ claims, and through this flume a large quantity of the tailings was deposited on plaintiffs’ claims, to their great damage. The flume was constructed for the purpose of working defendants’ claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The court instructed the jury that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to claims subsequently located: held, that the instruction was wrong; that the defendants were not entitled, as matter of strict legal right, to an easement upon plaintiffs’ claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person may have a right of way by necessity over the land of another, does not apply to this case; and further, that this court does not

recognize the doctrine that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by any local custom or regulation, its existence should have been averred and proved. *Esmond v. Chew*, 15 Cal. 143.

47. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.’s order on the wharf at Stockton, claiming that the trees were not paid for and not subject to W.’s debts, for want of delivery, and asked on the trial this instruction: “That a man who is insolvent for the means to pay his debts in this State is in law insolvent, without reference to any property in another State:” held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson v. Paige*, 16 Cal. 79.

48. Plaintiff also asked this instruction: “That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:” held, that this proposition is not strictly correct; that if the trees bargained for were put out on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Ib.*

49. In ejectment, the court having admitted in evidence, as sufficiently proven, the mesne conveyances through which plaintiff traced title—the defendants being mere trespassers—charged the jury “that the written evidence of trial, together with the admissions of the parties, authorized them to find for the plaintiff, since the execution of the papers had been passed upon by the court:” held, to be no objection to this instruction that it does not leave the execution and delivery of the conveyances to the jury; that the sufficiency of their execution was a matter addressed solely to the court, and that—no question being raised during the trial

In Civil Cases.—In Criminal Cases.

as to their delivery, and no evidence being offered to rebut the presumption of delivery arising from their possession by plaintiff—the instruction amounted only to an announcement of the law as to the effect of the conveyances, and of the admission of the defendants. *Stark v. Barrett*, 15 Cal. 372.

50. Held, further, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no such objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Ib.*

51. It is error for the court to instruct the jury that before the plaintiff can recover, the evidence must specifically fix and establish the eastern boundary line of the grant under which plaintiff claimed, when it appears from the evidence that the land in controversy is within that boundary line. The precise location of the line is of no moment. *Seaward v. Malotte*, 15 Cal. 307.

III. IN CRIMINAL CASES.

52. In every criminal case the instructions given and refused should be marked and signed by the judge, or they will not be considered on error. *People v. Lockwood*, 6 Cal. 205.

53. In a criminal trial, it is error for the court to charge a jury orally without the consent of the parties. *People v. Beeler*, 6 Cal. 247; *People v. Ah Fong*, 12 Cal. 347.

54. The instruction “that the killing being proved, the law implies malice, and it devolves upon the defendant to repel the presumption,” is correct in principle, and if the defendant feared that the jury might construe it into an exclusion of all testimony for the prosecution, which might be favorable to the prisoner, he should have asked for an explanatory instruction. *People v. March*, 6 Cal. 547.

55. The instructions of a court in a capital case must be in writing, and a verbal modification of a written instruction asked is erroneous. *People v. Payne*, 8 Cal. 344; *People v. Demint*, 8 Cal. 424; *People v. Woppner*, 14 Cal. 438.

56. An instruction which would in its terms require the jury to acquit the defendant, upon the ground that the deceased fired first, without any regard to the circumstances under which the shot was fired, is erroneous. *People v. Honshell*, 10 Cal. 87.

57. Defendant was indicted for stealing a steer. The court charged the jury in effect that though defendant killed the steer, believing it to be his own, yet when he appropriated it to his own use and benefit it was evidence of a felonious intent, and the jury will so find: held, that the charge was erroneous, because it assumes as a fact that a defendant did appropriate the steer, which was for the jury, and then makes the mere fact of appropriation conclusive proof of guilt. *People v. Carabin*, 14 Cal. 440.

58. It is not error in the court, in a criminal case, to charge the jury to give such weight to the defendant's confession as they deem it entitled to, “judging from the circumstances under which it was given, and the motives which would naturally actuate the party in giving it;” and that they might, in their discretion, believe a part and disbelieve another part of such confession. *People v. Wyman*, 15 Cal. 74.

59. McB., the accomplice, swore to the larceny by the defendant. The court instructed the jury, “that, though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony:” held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *People v. Eckert*, 16 Cal. 112.

60. On the trial upon indictment for murder, the only witness for the prosecution who saw the transaction itself testified in substance, that he and Tung Hoy met a large number of their countrymen—Chinese—six of whom took them out into the chapparal, tied him, and then one of the Chinese struck Tung Hoy on the head with a sword, another pierced him in the back, when he fell, and witness then escaped, and has never since seen him. The court instructed the jury that if the evidence of this witness were true, defendants were guilty of murder in the first degree: held, that the court erred; that such instruction assumes the homicide,

In Criminal Cases.—When an erroneous Instruction may be Reviewed.

which was not proven by the witness. *People v. Ah Fung*, 16 Cal. 138.

61. On trial under an indictment for receiving stolen goods, the court instructed the jury "that a guilty knowledge, on the part of the defendant, is essential to the constitution of the offense. This may be shown either directly by the evidence of the principal offender, or circumstantially by proving that the defendant bought them very much under their value, or denied their being in his possession, or the like:" held, that the charge is erroneous in this, that it asserts as a conclusion of law that if the defendant purchased the goods at a price much below their value, or if he denied that he had them, or if the thief swore defendant received them, then, in either case, the guilty knowledge was proved; that this is not law; that either one of these facts is a circumstance of guilt, but does not alone constitute conclusive proof of guilt. *People v. Levison*, 16 Cal. 99.

62. In criminal cases, the court should, as a general rule, instruct the jury hypothetically, and not assign a conclusive effect to circumstances, or assume that such circumstances were proven. In the absence of opposing proof, they are sometimes conclusive, but not generally, and it should always be left to the jury to determine whether those circumstances are established. *Ib.*

63. In criminal cases, if the instructions to the jury are erroneous under any and every state of facts, the supreme court will review them, even though there be no statement of facts—because it necessarily appears that the court erred to the prejudice of defendant. *Ib.*

64. But where the instruction may be correct under any state of facts, then the supreme court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *Ib.*

65. On trial for burglary, the court instructed the jury that if they found from the evidence that defendant entered a certain warehouse in the night time, and took therefrom sundry goods and chattels, he was guilty as charged: held, that the instruction was wrong, because it ignores the felonious intent of the entry and its character. *People v. Jenkins*, 16 Cal. 431.

IV. WHEN AN ERRONEOUS INSTRUCTION MAY BE REVIEWED.

66. Although the supreme court may be satisfied that the verdict of a jury is reasonable in amount, a new trial will be granted where an erroneous instruction has been given by the district judge which may have influenced the verdict. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

67. The charge of a judge to a jury should be given with reference to the testimony adduced on the trial, and where the charge is returned on appeal, but no portion of the testimony, the appellate court will not undertake to determine as to the correctness or incorrectness of the charge. *People v. McCauley*, 1 Cal. 385; *People v. Baker*, 1 Cal. 405.

68. An erroneous instruction may be assigned for error if there be any evidence rendering it pertinent to the issue. *Buzzell v. Bennett*, 2 Cal. 102.

69. Though instructions may not be technically correct, yet if the questions upon which the case turns seem to have been fairly put to the jury and the verdict sustained by the testimony, the supreme court will not interfere. *Smith v. Harper*, 5 Cal. 331.

70. Where instructions, though incorrect in law, are all in favor of the defendant, he cannot complain of the error. *Gaven v. Dopman*, 5 Cal. 342.

71. Where the evidence is not set out in a bill of exceptions, or other authentic form, the appellate court will not enquire into the correctness of instructions given by the court below, considered as abstract questions of law. *People v. Lafuente*, 6 Cal. 202.

72. An error in an instruction which does not militate against the appellant, or a mere want of perspicuity on the part of the court below in framing instructions, is not a ground of reversal. *People v. More*, 8 Cal. 94.

73. In a chancery case, it is doubtful whether the refusal to give instructions to the jury, even conceding them to be correct, can be assigned as error. *Branger v. Chevalier*, 9 Cal. 360.

74. The naked directions of a court to the jury, unaccompanied with a statement of facts, will not satisfy this court of substantial error, although some of the direc-

When an erroneous Instruction may be Reviewed.—Instrument.

tions may not be in consonance with rules of law. *Nelson v. Lemmon*, 10 Cal. 50.

75. Errors assigned upon instructions given by the court below will not be considered by this court, unless there is an authenticated statement of the evidence to show the pertinency or relevancy of such instructions. *Nelson v. Mitchell*, 10 Cal. 93.

76. The supreme court will not disturb the instructions of the district court to the jury on the ground that there was no evidence upon which to base them, when there was some evidence, although it may have been slight. *Perlberg v. Gorham*, 10 Cal. 125.

77. Where the record does not show all the instructions it is very questionable whether the appellate court could in such a case consider the particular ones brought up for review, as they may depend in a very great degree upon the rest. *Mc Garrity v. Byington*, 12 Cal. 431.

78. Instructions which are not embodied in the statement on appeal or bill of exceptions, and are neither certified to by the judge trying the cause or signed by him, cannot be the subject of consideration on appeal. *Paige v. O'Neal*, 12 Cal. 492.

79. For error in refusing to give an instruction to the jury, the supreme court will not undertake to determine how far the party excepting was prejudiced, but will reverse the judgment. *Busenius v. Coffee*, 14 Cal. 93.

80. Where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving or refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

81. In criminal cases, if the instructions to the jury are erroneous under any and every state of facts, the supreme court will review them, even though there be no statement of facts—because it necessarily appears that the court erred, to the prejudice of defendant. *People v. Lerison*, 16 Cal. 100.

82. But where the instruction may be correct under any state of facts, then the supreme court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *Ib.*

83. A refusal to give an instruction

cannot be urged as error for the first time on a petition for a rehearing on appeal. *Payne v. Treadwell*, 16 Cal. 247.

INSTRUMENT.

1. The signature to a bond set out in the complaint should be proved, and not be deemed admitted by the answer which fails to deny it under oath, when the defendants are other parties than those alleged to have signed the instrument. *Heath v. Lent*, 1 Cal. 411.

2. Where the plaintiff was assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor, before the assignment; it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith v. Truebody*, 2 Cal. 347.

3. An affidavit to the effect that an instrument has been materially altered, without showing in any manner in what the alteration consists, furnishes but feeble ground upon which to base a motion to set aside a judgment. *Taylor v. Randall*, 5 Cal. 80.

4. A party pledging negotiable instruments, transferable by delivery, loses all right to the securities, when transferred by the pledgee in good faith to a third party. *Coit v. Humbert*, 5 Cal. 261.

5. Upon the loss of a power of attorney, there is no reason why its existence should not be shown and the power continued so as to carry out the object both of the principal and agent. *Posten v. Rasette*, 5 Cal. 469.

6. An action cannot be maintained upon a lost negotiable instrument, without first indemnifying the defendant. *Grover v. Hawley*, 5 Cal. 484.

7. Where an original instrument, proved to be lost has been recorded, it is error to admit parol evidence of its contents, unless the failure to produce the record is accounted for. *Brotherton v. Mart*, 6 Cal. 488.

8. Section twenty-one of the act of March, 1851, giving to copies of papers from the county recorder's office the like

Instrument.

effect as evidence as originals, does not dispense with the production of the originals if they can be obtained; it merely fixes the value of the copy as evidence, when it is necessary to be introduced from the loss of the original. *Macy v. Goodwin*, 6 Cal. 582.

9. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system. *Hopkins v. Beard*, 6 Cal. 665.

10. Where a guaranty is endorsed upon an instrument after it is made, and therefore constituted no part of the original instrument, the guaranty will fail, for the reason that there is either no consideration, or the new consideration is not expressed in the instrument to which reference is made. *Hazeltine v. Larco*, 7 Cal. 35.

11. Courts of this State are not bound to take official notice of the rules adopted for the regulations of the various departments of the federal government, or those established by the board of land commissioners or surveyor general of the United States for California. If these officers have adopted a rule, refusing to allow original papers to be taken from the files, that fact should be shown by affidavit, before evidence of their contents could be admitted. *Hensley v. Tarpey*, 7 Cal. 289; *Bagley v. Eaton*, 10 Cal. 147.

12. Where two instruments are executed at the same time between the same parties and about the same subject matter, they may be considered as constituting parts of the same transaction. *Low v. Henry*, 9 Cal. 548.

13. Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provost v. Piper*, 9 Cal. 553.

14. The law imports a consideration to a sealed instrument from its seal; but our statute allows it to be rebutted in the answer. *McCarty v. Beach*, 10 Cal. 463.

15. Courts of equity possess jurisdiction

to decree the reëxecution of an instrument accidentally destroyed. *Cummings v. Coe*, 10 Cal. 530.

16. Where an ambiguity in an instrument of writing consists in the use of a word which has a settled meaning, but at the same time consistently admits of two interpretations, according to the subject matter in the contemplation of the contracting parties, it is not such a patent ambiguity as falls within the rule forbidding its explanation by parol testimony. *Jenny Lind Co. v. Bower*, 11 Cal. 198.

17. Equity will relieve against mistake in an instrument, where it appears upon its face. *Wagenblast v. Washburn*, 12 Cal. 212.

18. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor, in the same manner as a promissory note by a maker. *Comstock v. Breed*, 12 Cal. 288; *Ortman v. Dixon*, 13 Cal. 36.

19. A subscribing witness to a written instrument, if within the jurisdiction of the court, that is, within the State, must be produced, or some sufficient reason for his absence given. *Stevens v. Irwin*, 12 Cal. 308; *Smith v. Brannan*, 13 Cal. 115.

20. Where several papers concerning the same subject matter are executed by or between the same parties at the same time, all are to be construed together as one instrument. *Ingoldsby v. Juan*, 12 Cal. 577.

21. Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument, it will not be such even though the characters [L. s] are added to the signature. *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 231.

22. A sworn copy or exemplification of instruments in the archives of the government is evidence, and the originals ought not to be removed from the government offices. *Gregory v. McPherson*, 13 Cal. 574.

23. An affidavit by a party to the suit, that the original deed "is not in his possession, or under his control," is sufficient to admit in evidence a certified copy from the recorder's office, the deed having been properly acknowledged and recorded, and the grantee being a third person. *Skinker v. Flohr*, 13 Cal. 638.

24. Where a paper purporting to be an admission by an agent is attached to the complaint as an exhibit, and the answer denies the agency, the paper is not evidence until the agency is proven. *Garfield v. Knight's Ferry W. Co.*, 14 Cal. 37.

See EVIDENCE OF LOST INSTRUMENTS, EVIDENCE XXVIII.

INSURANCE.

1. Where an agent, authorized to effect insurance, retains the policy, his agency continues, and in case of a loss it extends to the collection or enforcement of the policy. *DeRo v. Cordes*, 4 Cal. 119.

2. Where by the terms of the charter party made in England, the charterer agreed to insure the advanced freight at the ship's expense, it being deducted from the freight money paid, but failed to do so until long after the risk had commenced, by reason whereof the owner was compelled to insure for his own protection, the owner can recover of the charterer the amount paid by him for insurance. *Lawson v. Worms*, 6 Cal. 371.

3. In such a case the owner is the party for whose benefit the advance freight is insured, as he is liable to refund it on loss of the ship; and having been compelled to pay the insurance premium twice, by default of the charterer, he is entitled to recover back one of the payments. *Ib.*

4. The fact that a vessel lost while being towed out to sea is insured, does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance; for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. *White v. Steam Tug Mary Ann*, 6 Cal. 470.

INTEMPERANCE.

1. It is not alone the influence of liquor

which avoids a contract, but it must be shown to exist to such extent as to seriously impair the reasoning faculties at the time of the contract. *Pickett v. Sutter*, 5 Cal. 412.

2. Intoxication of the plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street. *Robinson v. Pioche*, 5 Cal. 461.

INTENTION.

1. Residence depends upon intention as well as fact, and a mere inhabitancy for a short period will not make a resident. *People v. Peralta*, 4 Cal. 175.

2. The drawing of a weapon is generally evidence of an intention to use it; yet it may be rebutted when the act is accompanied with a declaration or circumstances showing no intention to use it. *People v. McMakin*, 8 Cal. 549.

3. The question of intention of the parties should not be submitted to the jury where the question is what constitutes a delivery. *Vance v. Boynton*, 8 Cal. 561.

INTEREST.

1. Interest is, as a general rule, not recoverable except by virtue of statutory regulations, yet a small rate may be allowed in some cases by way of damages. *Davis v. Greely*, 1 Cal. 422.

2. Interest is not recoverable on a judgment of another State without proof that the law of that State allows interest on judgments. *Thompson v. Monrow*, 2 Cal. 100; *Cavender v. Guild*, 4 Cal. 253.

3. The Spanish law allows legal interest where none is agreed upon, and conventional interest, which is the rate usual at a given time and given place, and which may be greater or less than legal interest. *Fowler v. Smith*, 2 Cal. 570.

Interest.

4. Interest runs at the rate agreed upon in the written contract after maturity, although not expressly stated, and if no rate is agreed upon then it bears legal interest. *Kohler v. Smith*, 2 Cal. 597.

5. Where the assignee of a mortgage upon premises, the buildings upon which were burnt, agreed to waive his lien in favor of one advancing money to rebuild, but no agreement was made at the time for interest: held, that the guarantee of the assignee extended no further than the contract, and that a subsequent agreement to pay an extra rate of interest could not be enforced. *Godfrey v. Rogers*, 3 Cal. 102.

6. Upon a money demand bearing interest, on which payments have been made after maturity, the proper method of computing interest is stated in *Connecticut v. Jackson*, 1 John Ch. R. 13; *Backus v. Minor*, 3 Cal. 233.

7. But for several years accounts had been stated by the plaintiff, charging interest both on the debts and the payments, and rendered to the defendant and no objection made thereto within a reasonable time, it is the same as an agreement that interest should be computed accordingly, and was held to be binding upon them. *Ib.*

8. Interest due on notes up to the time of judgment should be added to the principal to constitute the judgment, and then interest at the agreed rate should run on the whole judgment until paid. *Guy v. Franklin*, 5 Cal. 417; *Emeric v. Tams*, 6 Cal. 156; *McCann v. Lewis*, 9 Cal. 247; *Mount v. Chapman*, 9 Cal. 297.

9. If there is an improper allowance of interest, the question should be raised in the court below and not in the supreme court for the first time. *Morgan v. Hugg*, 5 Cal. 410; *Guy v. Franklin*, 5 Cal. 417.

10. Our statute provides that parties may stipulate in writing for any rate of interest for the use of money, but where there is no written contract fixes the rate at ten per cent. per annum. *Adams v. Hastings*, 6 Cal. 129.

11. A written contract to pay greater interest than was due on an indebtedness incurred prior to the contract is void for want of consideration as to the excess of interest up to the date of the contract. *Ib.* 130.

12. A contract to pay in future greater interest than previously on an existing indebtedness is binding, the forbearance of

the creditor being a sufficient consideration. *Ib.*

13. Where the note of a party bore interest at ten per cent. per annum at a time when the current rate of interest was ten per cent. a month, in consideration of which he received a covenant from the payees to convey them certain lands, on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity. *Brown v. Covillaud*, 6 Cal. 572.

14. Where a note bore monthly interest but the rate was blank, and was filled in by the holder, he cannot without some evidence of agreement recover more than legal interest, though it would have been good in the hands of an innocent person for the rate filled in. *Fisher v. Dennis*, 6 Cal. 579; *Visher v. Webster*, 8 Cal. 112.

15. Where a cognovit was given in an action for an amount due, and defendant was let in to answer, and the cognovit is used as evidence of an account stated, interest from the date of the cognovit may be given by way of damages. *Hirschfield v. Franklin*, 6 Cal. 609.

16. The law does not tolerate the payment of more than legal interest, except by express agreement in writing. *Crosby v. McDermitt*, 7 Cal. 148.

17. A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 8 Cal. 33.

18. Where a note is given with the rate of interest in blank, and the holder inserts therein a sum of interest without the knowledge or consent of the maker, it does not become thereby void. *Visher v. Webster*, 8 Cal. 112.

19. Where a promissory note is payable three months after date, with interest at the rate of — per month, the interest runs from the date of the note. *Dewey v. Bowman*, 8 Cal. 149.

20. Where the terms of a probate sale were, one-half of the purchase money cash, and the remainder in ninety days, with interest from date of sale, at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down: held, that the purchaser is entitled to a reduction for the interest on one-half of the purchase money. *Halleck v. Guy*, 9 Cal. 197.

Interest.—Interpleading.

21. The rule is that when property converted has a fixed value, the measure of damages is that value, with legal interest from the time of its conversion. *Douglass v. Kraft*, 9 Cal. 563.

22. If a party, by antedating a promissory note, and making it draw interest from date, secures to himself a certain sum of money not justly due to him for any past or present consideration, he takes that much from the other directors, and they are just as much injured as if that amount had been included as a part of the principal sum itself. *McKenty v. Gladwin*, 10 Cal. 229; *Scales v. Scott*, 13 Cal. 79.

23. Where a note is antedated for the purpose of making it draw interest, for which there is no consideration, it is void as to creditors. *McKenty v. Gladwin*, 10 Cal. 230.

24. The provision of the statute which authorizes judgments to bear the same interest as the contracts on which they are recovered, was intended to be confined to contracts fixing the rate of interest. *Raun v. Reynolds*, 11 Cal. 19.

25. The act to regulate interest on money is in derogation of the common law and must be strictly construed. *Ib.*

26. When a bailee disclaims his relation to the bailor he cannot claim the right to require a demand for the money before interest is charged against him. *Dickinson v. Owen*, 11 Cal. 76.

27. Interest upon interest already due cannot be allowed except in pursuance of a written engagement of the parties. *Montgomery v. Tutt*, 11 Cal. 316.

28. The only damages which the law allows for the detention of money under its process, is the legal interest. *Heyman v. Landers*, 12 Cal. 111; *Van Pelt v. Littler*, 14 Cal. 201.

29. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales v. Scott*, 13 Cal. 69.

30. Errors in the computation of interest should be corrected by motion in the court below. *Whitney v. Buckman*, 13 Cal. 539.

31. It is error to charge six per cent. interest, the Mexican rate, on a contract made before the passage of our statute as to interest, up to the date of the statute, and ten per cent. afterward. *Aguirre v. Packard*, 14 Cal. 172.

32. Interest follows a contract, according to the law in existence at the time and place of the contract or of the performance of it. A subsequent change in the legal rate of interest does not affect the contract. *Ib.*

33. Where an account presented to an administrator for allowance contains no item for interest, and the face of the paper does not show that interest results necessarily from the fact stated as constituting the claim, interest is not recoverable. *Ib.* 173.

34. The legal rate of interest in California, under the Mexican law, was six per cent. per annum. *Ib.* 179.

35. A redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent., or to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *McMillan v. Visher*, 14 Cal. 241.

36. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment; but such interest cannot be charged on the premises as against plaintiff. *Gamble v. Voll*, 15 Cal. 510.

37. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest to be held by him for plaintiff until called for, there is a continuous trust, and if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. *Baker v. Joseph*, 16 Cal. 177.

38. As to whether proof of the conventional rate of interest in San Francisco during the time defendant held plaintiff's money was admissible, stated. *Ib.*

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INTERPLEADING.

1. A having an award in his favor



against the city of San Francisco, and a suit pending to enforce the same, the common council made an appropriation for the payment of the award: held, that A cannot be compelled to litigate his rights with B, who stood by without notice of his claim. *Wilson v. Heslep*, 4 Cal. 302.

### INTERPRETER.

1. When one who had acted as interpreter and attorney, in relation to the execution of a deed by the grantor and defendant in the action, on being called by the plaintiff as a witness, testified that he had read the deed to the grantor, and what passed at the time of the execution, and who subsequently received a conveyance of a part of the land from the plaintiff: held, that the defendant might prove that this witness had made to other persons a different statement of the facts in relation to the transaction from that which he had given under oath; and that it was error in the court below to reject such evidence when offered by the defendant. *McDaniel v. Baca*, 2 Cal. 326.

2. Where the jury and court are satisfied that the wife understood English, at the time of executing and acknowledging a note and mortgage upon the homestead, there was no necessity for an interpreter to explain the contents of the mortgage. *Pfeiffer v. Riehn*, 13 Cal. 649.

### INTERVENTION.

1. Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to a full adjustment of the controversy, and should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 507; *Dillon v. Byrne*, 5 Cal. 456.

2. The provisions of the civil code give a party the right to intervene in an action in a case of a transfer of any interest

in the pendency thereof, or where he is directly interested in the subject matter of the litigation, and this can be done either before or after issued joined. *Brooks v. Hager*, 5 Cal. 282.

3. A. & Co. having on general deposit with B. & Co., of Marysville, \$75,000, a tax for county purposes was levied thereon and payment demanded, both of B. & Co. and A. & Co.: held, that the tax was legal, and that the county might intervene in an action concerning the money to recover said tax. *Yuba County v. Adams*, 7 Cal. 37.

4. It is too late to raise an objection in this court for the first time that certain parties could not intervene in a suit pending in the district court, when such objection was not made in the court below. *McKenty v. Gladwin*, 10 Cal. 228.

5. The wife is a proper party defendant in a suit to foreclose a mortgage upon the premises claimed as a homestead, and if not made a party, she may intervene. *Moss v. Warner*, 10 Cal. 297.

6. In a suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. *Horn v. Volcano Water Co.*, 13 Cal. 69.

7. The interest which entitles a person to intervene in a suit between other parties must be in the matter in litigation, and of such a direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. *Ib.* 70.

8. A suit to enforce a particular lien under the act is a proceeding to enforce all the liens against the property, and an intervention in a suit already pending, if filed within the six months, is as much a compliance with the act as an original suit. *Mars v. McKay*, 14 Cal. 129.

9. In a suit to enforce a lien, a mortgagor of the ditch subsequent to the lien has no absolute right to intervention; and where the suit has been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. *Hocker v. Kelly*, 14 Cal. 165.

## INTOXICATION.

See INTEMPERANCE.

## IN TRANSITU.

1. A party being about to fail, can assign a bill of lading of goods to arrive, not yet paid for, to another in trust, to devote the proceeds to the payment of the vendor, and such assignment is good against attaching creditors and renders a stoppage in transitu unnecessary, for there is a rescission before there could be a stoppage. *Le Cacheux v. Cutter*, 6 Cal. 519.

2. The right of a vendor of goods to a stoppage in transitu exists until they arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitu. *Markwald v. His Creditors*, 7 Cal. 214.

## INVENTORY.

1. Where a full inventory of all the effects of the deceased is embodied in a will, it seems to be unnecessary for the executors to make out a new inventory; at all events, their neglect to do so will not invalidate the will. *Panaud v. Jones*, 1 Cal. 510.

2. In this case, the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and therefore undisposed of. The statement is of a fact existing at the time

of the filing of the petition—and that fact is, that the property of the estate is shown by the inventory, and is insufficient to pay the debts, etc.; and if it be the property of the estate, it has not been disposed of. *Stuart v. Allen*, 16 Cal. 502.

## ISSUE.

1. The legislature has not provided the supreme court with a jury in any case, nor authorized it to cause an issue of fact to be made up in this court and referred to another court for trial. All issues of fact are to be tried in the inferior courts of the State. *Ex parte the Attorney General*, 1 Cal. 87.

2. The court may direct special issues to be framed in equity cases and submitted to the jury with directions to find a special verdict. *Smith v. Rowe*, 4 Cal. 8.

3. The issues of fact joined in the probate court, and which are sent to the district court for trial, are of that class upon which the probate judge is unwilling to pass his judgment, or where from great conflict of evidence, a reasonable doubt must exist in his mind as to which side has the right. *Keller v. Franklin*, 5 Cal. 433.

4. A party may intervene either before or after issue joined in a case. *Brooks v. Hager*, 5 Cal. 282.

5. A default admits every fact put in issue by the complaint. *Harlan v. Smith*, 6 Cal. 174; *Rowe v. Table Mountain W. Co.*, 10 Cal. 144; *Hentsch v. Porter*, 10 Cal. 558; *McGregor v. Shaw*, 11 Cal. 48; *Hunt v. City of San Francisco*, 11 Cal. 259; *Curtis v. Herrick*, 14 Cal. 119; *Smith v. Billett*, 15 Cal. 26.

6. Special issues, framed by the court according to the rules of chancery practice, may be tried by a jury in equity cases, but if plaintiff fails to present those issues, he cannot be allowed to take advantage of it. *Brewster v. Bours*, 8 Cal. 505.

7. In an application for a mandamus to compel a district judge to sign a bill of exceptions which the relator alleges he refuses to do, and where the district judge in his answer avers that he has signed a

true bill of exceptions, and that the one presented by the relator is not a true bill: held, that the relator is not entitled to a jury trial to try this issue. *People v. Judge of the Tenth Judicial District*, 9 Cal. 20.

8. Issues of fact are sent from the probate court to the district court not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of a jury trial and its incidents. *Pond v. Pond*, 10 Cal. 500.

9. If fraud be alleged in answer to a motion to discharge a judgment, on the ground of a discharge in insolvency, the court can frame issues, and try and determine the same with or without a jury. *Inlay v. Carpentier*, 14 Cal. 177.

10. After judgment by default in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billett*, 15 Cal. 26.

11. In theory, issue is joined in the supreme court, upon the assignment of errors made upon the record. The case may be regarded as a new and distinct action. Upon the issue thus made the judgment of the court must rest, and that judgment affirms the law on the matter presented for adjudication, and affixes the rights of the parties under the law. *Davidson v. Dallas*, 15 Cal. 83.

12. A verdict found on any fact or title distinctly put in issue, is conclusive in another action between the same parties or their privies in respect of the same fact or title. *Kidd v. Laird*, 15 Cal. 182.

13. The court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be found upon the pleadings and submitted to the jury. *Curtis v. Sutter*, 15 Cal. 263.

14. The language of the constitution as to the right of trial by jury was used with reference to the right as it exists at common law. This right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. *Koppikus v. State Capital Commissioners*, 16 Cal. 254.

## ITEMS, BILL OF.

1. If a bill of items is not satisfactory, because defective in form or substance, or not being verified, it should be returned immediately or the court should be moved for a further or amended bill. It is too late to object to it at the trial. *Dennison v. Smith*, 1 Cal. 437.

2. Where the complaint in *hæc verba* sets forth the bill of sale, it was held, to remedy a defect in the description of the quantity of the goods sold, a party must be presumed to know what was intended by his own account. *Cochran v. Goodman*, 3 Cal. 245.

## JOINDER.

See ACTIONS, JOINDER OF, MISJOINDER, NONJOINDER.

## JOINT DEBTOR.

1. Where it is clear that two or more defendants are not jointly liable, a joint judgment against both cannot be sustained, although each may be severally liable; so held in an action by a lessor against two sub-tenants of his lessee, when it appeared that the sub-tenants did not occupy any portion of the premises jointly. *Pierce v. Minturn*, 1 Cal. 471.

2. A declaration is insufficient which treats the maker and guarantor of a note as joint makers, and contains no allegation of demand and notice. *Riggs v. Waldo*, 2 Cal. 487; *Lightstone v. Laurence*, 4 Cal. 277.

3. A covenant not to sue, made to a portion only of joint debtors, does not release any of them. *Matthey v. Galley*, 4 Cal. 64.

4. In an action for contribution between joint obligors, the statute of limitations

does not begin to run until after the payment of the debt by the plaintiff. *Sherwood v. Dunbar*, 6 Cal. 54.

5. In an action brought jointly against two defendants on a joint and several obligation, the entry of final judgment on default against one of the defendants is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 182.

6. In all cases of joint and several contracts, the plaintiff may elect whether he will sue the defendants severally or jointly; having elected to treat his demands as joint for the purposes of the action, he must be governed by the same rules which would have applied if his contract originally had been joint and not joint and several, and it is clearly error to enter several judgments against the defendants. *Ib.*

7. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Hirschfield v. Franklin*, 6 Cal. 609.

8. Where two defendants are jointly sued, and service had on both, the clerk of the court has no authority to enter judgment by default against one, and his act in so doing is without color of law and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 449.

### JOINT LIABILITY.

See CONTRACT, JOINT DEBTOR.

### JOINT STOCK ASSOCIATION.

See CORPORATIONS.

### JOINT TENANCY.

See TENANCY.

### JUDGE.

See COUNTY JUDGE, DISTRICT JUDGE.

### JUDGMENT.

- I. In general.
- II. Amendment to a Judgment.
- III. Assignment of a Judgment.
- IV. Evidence of a Judgment.
- V. Miscellaneous Judgments.
  1. On Arrest.
  2. On Demurrer.
  3. Against an Administrator.
  4. In Ejectment.
  5. Against an absent Defendant.
    - a. By Publication.
    - b. By Appointment of an Attorney.
  6. On Foreclosure of a Mortgage.
  7. In Replevin.
- VI. Judgment on Appeal.
- VII. Jurisdiction over Judgments.
- VIII. Costs in a Judgment.
- IX. Lien of a Judgment.

### I. IN GENERAL.

1. A judgment is the determination of the court upon the issues presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject matter in litigation, and puts an end to the suit. *Loring v. Illsley*, 1 Cal. 28.

2. The defect that there was no right of action in the plaintiff would be fatal on motion in arrest of judgment. *Sublette v. Melhado*, 1 Cal. 106.

3. Every definitive sentence or decision of a court, by which the merits of a cause are determined, although it be not technically a judgment, or the proceedings are not capable of being enrolled so as to constitute what is technically called a record, is a judgment within the meaning of the law, and as such subject to the revisory jurisdiction of an appellate court. *Bell v. Davis*, 1 Cal. 137.

4. A judgment was obtained in the court of first instance which was transfer-



## In general.

red to the district court; the defendant in that action filed his complaint against the plaintiff, the judgment creditor, in the district court, alleging fraud in the recovery of the judgment and praying to have the judgment set aside, and a new trial had. The defendant answered the complaint and denied the allegations and the court set aside that judgment and awarded a new trial: held, that this was a final judgment in this cause, and that the new trial awarded was to be had in the first action and not in the second. It is such a final judgment from which an appeal would lie. *Ib.* 139.

5. It seems that in law as in equity the court may add to and strike out parties and render a judgment against some defendants and in favor of others. *Rowe v. Chandler*, 1 Cal. 172.

6. If the verdict of the jury fails to find the lien, the court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. Hauss Hijo*, 1 Cal. 186.

7. Where the complaint alleges the making and endorsing of a promissory note and the endorser denies neither signature, the answer should be stricken out and the plaintiff be entitled to judgment. *Grogan v. Ruckle*, 1 Cal. 196; *Whitwell v. Thomas*, 9 Cal. 499; *Kinney v. Osborn*, 14 Cal. 113.

8. The summons cited the defendant to appear and answer at ten A. M. the complaint and the judgment was rendered at nine A. M. against him: held, that the judgment was irregular and a new trial should be ordered, although the court subsequently offered to allow the defendant to come in and make his defense. *Parker v. Shephard*, 1 Cal. 232.

9. The attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 11 Cal. 103.

10. A judgment was obtained against one John P. Manrow, in the city of New York, and an action was brought upon a judgment against one John P. Manrow, in the city of San Francisco; the identity of the person was held to be presumed. *Thompson v. Manrow*, 1 Cal. 428.

11. Where it is clear that two or more

defendants are not justly liable, a joint judgment against both cannot be sustained although each may be severally liable. *Pierce v. Minturn*, 1 Cal. 471.

12. The plaintiff must recover on the allegations of his complaint if at all, and if the complaint fails to aver that property was partnership property, the judgment of the court should not find that fact. *Sterling v. Hanson*, 1 Cal. 480.

13. In an action against partners judgment can only be taken against those served with process. *Ingraham v. Gilde-meester*, 2 Cal. 89.

14. The appellate court will presume in favor of the judgment of the court below unless the record clearly show error. *Thompson v. Monrow*, 2 Cal. 100; *Kilburn v. Ritchie*, 2 Cal. 148; *White v. Abernathy*, 3 Cal. 426; *Johnson v. Sepulveda*, 5 Cal. 151; *Grewell v. Henderson*, 7 Cal. 292; *Nelson v. Lemmon*, 10 Cal. 50.

15. Interest is not recoverable on a judgment in another State without proof that the law of such State allows interest on judgments; at common law, judgments do not carry interest. *Thompson v. Monrow*, 2 Cal. 100; *Cavender v. Guild*, 4 Cal. 253.

16. A judgment will not be reversed on appeal for an error by which the rights of the parties were not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148.

17. After a judgment had been entered, it is too late for defendant to file a bill for a discovery in aid of his defense on the ground that it was meritorious and lies entirely within the knowledge of the judgment creditor, if he was cognizant of the facts before the judgment was rendered. *Norris v. Denton*, 2 Cal. 380.

18. A judgment will be set aside in equity which was improperly obtained, there being no cause of action and no notice to the parties. *People v. Lafarge*, 3 Cal. 133.

19. It was a wrongful exercise of authority in the district court, to strike out ex parte a marginal entry of satisfaction on a judgment entered two years before. *Henly v. Hastings*, 3 Cal. 342.

20. A court may at any time render or amend a judgment nunc pro tunc, where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. *Morrison v. Dopman*, 3 Cal. 357.

## In general.

21. Nor will a court after the lapse of a term open a judgment upon motion and render a new judgment. *Ib.*

22. But if there is no evidence to show that the judgment was different from the one entered, the latter must stand until reversed. *Ib.*

23. A judgment rendered for more than plaintiff's claim will be reversed. *Palmer v. Reynolds*, 3 Cal. 396.

24. Judgment is entered upon a report of referees as matter of course, and the only mode to take advantage of it is by moving to set it aside, as on motion for a new trial. *Sloan v. Smith*, 3 Cal. 407.

25. Where an action in the district court was founded upon a judgment in the court of first instance, and an appeal was taken from the judgment of the district court, the record of the court of first instance was brought up by certiorari to this court and the judgment was found invalid; the judgment of the district court was reversed and the cause remanded. *Parsons v. Davis*, 3 Cal. 424.

26. A judgment which is right will not be reversed because it is rendered upon a wrong reason. *Helm v. Dumars*, 3 Cal. 450; *Bleven v. Freer*, 10 Cal. 178; *Hafley v. Maier*, 13 Cal. 15.

27. Process issued against several defendants, but one of whom appeared; no default was taken as to the others, and a joint judgment was rendered against all, and there being no sufficient finding of the facts and conclusion of law to sustain the judgment, the verdict being general, the judgment was reversed. *Estell v. Chenery*, 3 Cal. 468.

28. Where the answer contains no good ground of defense the court should render judgment on the pleadings for the plaintiff. *Corwin v. Patch*, 4 Cal. 204.

29. The judge who tried the cause without a jury may file his finding of facts after the judgment is entered. *Vermuele v. Shaw*, 4 Cal. 217.

30. A foreign judgment is not a contract, obligation or liability founded on an instrument of writing executed out of the State within the statute of limitation. *Patton v. Ray*, 4 Cal. 287.

31. If a judgment entered be irregular, as embracing more parties than the testimony justifies, the proper practice is to move the court to correct the judgment in court below. *Mulliken v. Hull*, 5 Cal. 247.

32. A party is not confined to his remedy by statute but may resort to a court of equity for relief against a judgment obtained by fraud or surprise. *Johnson v. Pacific Mail S. S. Co.*, 5 Cal. 407.

33. Where costs are imposed as a condition for reopening a judgment after the adjournment of the term, the acceptance of the costs by the opposite party will not be construed into a consent to have the cause reinstated. *Carpentier v. Hart*, 5 Cal. 407.

34. In entering a judgment the correct rule is to add the interest due on the note up to the time of the judgment to the principal, and enter the judgment for the gross amount, and such judgment is then to bear the same interest as the notes until paid. *Guy v. Franklin*, 5 Cal. 417; *Emeric v. Tams*, 6 Cal. 156; *Mount v. Chapman*, 9 Cal. 297.

35. A judgment upon demurrer is not always a bar to a subsequent action. It is so only where it determines the whole merits of the case. *Robinson v. Howard*, 5 Cal. 429.

36. Where an amended decree rendered at the same time as the first decree is simply what the original decree should have been and does no injustice to a party, this court will not disturb it on account of any alleged irregularity not affecting the merits. *Gronfier v. Minturn*, 5 Cal. 492.

37. An application by a defendant to set aside his confession of judgment should show that his claim was not just, and that the judgment ought not to have been confessed. *Arrington v. Sherry*, 5 Cal. 514.

38. In cases of fraud in obtaining a judgment a party aggrieved must proceed by a bill to impeach the original decree for fraud. *Robb v. Robb*, 6 Cal. 22.

39. In an action brought firstly against two defendants on a joint and several obligation, the entry of final judgment on default against one is a discharge of the other. *Stearns v. Aguirre*, 6 Cal. 180.

40. An injunction will not lie to restrain the collection of a judgment against the plaintiff on the ground that the judgment was for a balance of purchase money of land under covenant for a good title, while in fact the grantor had no title as long as the purchaser against whom the judgment was taken, and who seeks to enjoin it, remains in possession. *Jackson v. Norton*, 6 Cal. 189.

## In general.

41. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not a ground for reversal. *Anderson v. Parker*, 6 Cal. 201.

42. A judgment of insolvency where the court had jurisdiction, if not reversed on appeal, is conclusive between the parties. *Kohlman v. Wright*, 6 Cal. 231.

43. Where judgment is taken jointly against two defendants, it makes no difference so far as they are concerned, whether the Sheriff first levied on joint property or not. *Low v. Adams*, 6 Cal. 281.

44. An insolvent's discharge must be by the judgment of the court, and in the same county in which the proceedings were instituted. *Turner v. McIlhany*, 6 Cal. 288.

45. Where a defendant was sued as John, service was returned upon James, and judgment was entered against J.: held, that it was error, unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

46. A judgment of the court below will not be disturbed on account of an erroneous instruction which was not applicable to the facts of the case. *People v. March*, 6 Cal. 547.

47. If the parties are tenants in common, and defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover; or by an action for money had and received, and an action for goods, wares and merchandise, sold and delivered, will not entitle him to a judgment. *Williams v. Chadbourne*, 6 Cal. 561.

48. When a judgment is entered upon the cognovit, and by its authority, then the amount acknowledged would have been the sum of the judgment; but where upon complaint and answer denying the allegations thereof, the acknowledgment is used as evidence, interest may be given in the judgment by way of damages. *Hirschfield v. Franklin*, 6 Cal. 609.

49. In an action against defendants jointly indebted, where one only is served, a several judgment may be entered against him. *Ib.*

50. In pleading the judgment of the probate court, it being a court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. *Smith v. Andrews*, 6 Cal. 654.

51. An appeal does not lie in favor of the plaintiff in an action from a judgment of nonsuit, entered on his own motion. *Imley v. Beard*, 6 Cal. 666.

52. Equity will only interfere to enjoin a judgment at law, rendered against a party by reason of fraud or accident, unmixed with any fault or negligence of himself or his agents. *Phelps v. Peabody*, 7 Cal. 52.

53. A personal judgment of a court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the court had acquired no jurisdiction over the person of the defendant. *Whitwell v. Barbier*, 7 Cal. 63.

54. A judgment can be attacked in any form directly and collaterally for want of jurisdiction, but only by a direct proceeding against the judgment in the court which rendered it, or in an appellate court upon appeal from the judgment, where there is an irregularity in procuring jurisdiction. *Ib.* 64.

55. Where the facts stated in the complaint are proved on the trial and found to constitute a good cause of action, the plaintiff is entitled to judgment thereupon. *Crosby v. McDermitt*, 7 Cal. 148.

56. A judgment is a debt of record, and the parties are judgment debtor and creditor, and it is property subject to a levy under execution. *Adams v. Hackett*, 7 Cal. 203.

57. A judgment is of no force except between the parties and privies. *Beckett v. Selover*, 7 Cal. 228.

58. The judgment of a court sitting as a jury may refer to the pleadings for the facts found, provided the reference is sufficiently distinct and the facts are sufficiently stated in the pleadings. *McEwen v. Johnson*, 7 Cal. 260.

59. If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal; but when entered by a mere ministerial officer without authority of law, it is void. *Stearns v. Aguirre*, 7 Cal. 448.

60. Where two defendants are jointly sued and service had on both, the clerk of the court has no authority to enter judgment by default against one, and his act in so doing is illegal and void, and may be disregarded or set aside. *Ib.* 449.

## In general.

61. But where the plaintiff established his right to recover against both defendants, judgment should be entered against them after setting aside the void entry of the clerk. *Ib.*

62. A levy under execution on sufficient property to satisfy it, is a satisfaction of the judgment. *People v. Chisholm*, 8 Cal. 30.

63. A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 8 Cal. 32.

64. Where a judgment is rendered and an appeal taken to this court, the court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 135.

65. The finding of a court like a special verdict of a jury must be taken in connection with the pleadings to support the judgment. *Smith v. Muygridge*, 8 Cal. 445.

66. In contemplation of the statute, there is no judgment five years after its entry in a justice's court; it is extinguished. *White v. Clark*, 8 Cal. 513.

67. A sale under a void judgment passes no title. If the judgment is merely voidable the sale is good. *Gray v. Hawes*, 8 Cal. 568.

68. A judgment void for want of personal jurisdiction is not cured by the appearance of the party for the purpose of vacating it. *Ib.*

69. The presumption in favor of a judgment of a court of general jurisdiction is overthrown, when the record of the entire case discloses a want of jurisdiction. *Ib.* 569.

70. To plead a former judgment in bar it must appear not only that it was upon the same action but between the same parties. *Chase v. Swain*, 9 Cal. 136.

71. Upon facts found, whether by report of a referee or special verdict of the jury, the direct action of the court must be invoked before the judgment can be entered, and the time within which notice of motion to set aside the report or verdict must be given should date from the filing of the report or rendition of the verdict. *Peabody v. Phelps*, 9 Cal. 224.

72. Where an action is tried without a jury, or the whole case is referred to a referee, judgment follows immediately, as a conclusion of law upon the facts found,

and the time within which the notice of the motion should be made dates from the entry of the judgment. *Ib.*

73. Where the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. *People v. Edwards*, 9 Cal. 293.

74. A judgment cannot be impeached collaterally because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson v. Bell*, 9 Cal. 321.

75. The supreme court does not deem it necessary to decide whether in all cases, where the judgment is based upon the complaint which does not state facts sufficient to constitute a cause of action, the judgment itself may be treated as a nullity. *Reynolds v. Harris*, 9 Cal. 341.

76. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Wells v. Stout*, 9 Cal. 497.

77. The judgment in an attachment suit need not direct the sale of the property attached, as the law makes it the duty of the sheriff to sell it. *Low v. Henry*, 9 Cal. 551.

78. Where the record shows that a demurrer was interposed to the complaint, and was sustained by the court, and afterwards during the same term, a judgment was rendered in favor of the plaintiff, this court will not presume that the order sustaining the demurrer was set aside before judgment was rendered. *Seaver v. Cay*, 9 Cal. 565.

79. The failure of a justice of the peace to state on his docket that the summons was returned served, will not vitiate the judgment on appeal. *Denmark v. Liening*, 10 Cal. 94.

80. A judgment rendered in one State and upon which suit is instituted in another, is a contract in the sense of the constitution. *Scarborough v. Dugan*, 10 Cal. 308.

81. Where an execution on a judgment for the recovery of money is not stayed by the undertaking on appeal required by statute for that purpose, a sale may be made on the execution, and the rights of purchasers are in no respect affected by the subsequent reversal of the judgment. *Farmer v. Rogers*, 10 Cal. 335.



## In general.

82. Where a decree rendered in a suit against a corporation contained a direction for the sale of the interests of individuals not parties to the suit, and from such decree the corporation alone appealed: held, that the corporation could not take advantage of the error in the decree in embracing individuals. *Dennis v. Table Mountain Water Co.*, 10 Cal. 370.

83. It is not error to render final judgment on plaintiff's complaint without leave to amend. *Gallagher v. Delaney*, 10 Cal. 410.

84. An execution must be warranted by the judgment. If it exceeds the judgment, it has no validity. *Davis v. Robinson*, 10 Cal. 412.

85. A personal judgment cannot be given against a party not served with process in an action on a joint obligation of several defendants. *Treat v. McCall*, 10 Cal. 512.

86. The provision of the statute on interest which authorizes judgments to bear the same interest as the contracts on which they are recorded was intended to be confined to contracts fixing the rate of interest. *Raun v. Reynolds*, 10 Cal. 19.

87. Where judgment obtained in different courts are to be set off, the moving party must go into the court in which the judgment against him stands. *Russell v. Conway*, 11 Cal. 103.

88. Where there are several counts, the fact that by reason of one of them having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. *Hunt v. City of San Francisco*, 12 Cal. 259.

89. An action will lie on a judgment or decree obtained in one of the district courts of this State. *Ames v. Hoy*, 12 Cal. 19.

90. A judgment entered on the forfeiture of a cognizance is the property of the State, and the legislature may release the same in such form and on such conditions as it thinks proper to prescribe. *People v. Bircham*, 12 Cal. 54.

91. Where judgment was rendered by confession in open court, upon an allegation of indebtedness and appearance of the parties, whatever errors intervened, they cannot at the instance of one not a party to the judgment be invoked to set

aside or show the judgment a nullity. *Cloud v. El Dorado County*, 12 Cal. 133.

92. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction. *Low v. Burrows*, 12 Cal. 188.

93. The reasons given by a judge in his findings are no part of the judgment. The point decided is the thing fixed by the judgment. *Burke v. Table Mountain Water Co.*, 12 Cal. 409.

94. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership, or the authority of the party making the note to bind all, and one of the parties, is nonsuited and judgment taken against the other two: held, that there is no error in such judgment. *Stoddart v. Van Dyke*, 12 Cal. 438.

95. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of party or counsel, where if the neglect were excusable, full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 445.

96. The act of the clerk in entering the judgment is a mere ministerial act. *McMillan v. Richards*, 12 Cal. 468.

97. A judgment will not be set aside, on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel v. Dukes*, 12 Cal. 482.

98. The board of supervisors of a county is a special tribunal with mixed powers, administrative, judicial and legislative, and jurisdiction over roads, ferries and bridges, is given to it by statute. Its judgments and orders cannot be attacked collaterally, any more than the judgments of courts of record. *Waugh v. Chancey*, 13 Cal. 12.

99. A decision of the court is its judgment, the opinion is the reasons given for that judgment. *Houston v. Williams*, 13 Cal. 27.

100. A judgment against one on a joint contract of several bars the action against the others, even though the latter were dormant partners unknown to the plaintiff

## In general.

when the original action was brought. *Brady v. Reynolds*, 13 Cal. 33.

101. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for new trial. *Hutchinson v. Bours*, 13 Cal. 51.

102. A suspension of all proceedings under the judgment fully protects the losing party from all loss or injury, if from any cause the verdict be set aside or the judgment vacated. *Ib.*

103. A judgment in pursuance of the verdict is the act of the law upon record facts, and follows, as a matter of course, unless the court intervene to prevent it. *Ib.*

104. A decree fairly entered by consent of an attorney is as binding upon his client as a decree entered after resistance. *Holmes v. Rogers*, 13 Cal. 200.

105. If an attorney assent to the decree, the assent need not be made in open court by words spoken by the attorney. It might have been made by stipulation out of court; for it is the fact that is effectual, not the mere mode of authentication to the court. *Ib.* 201.

106. When a decree is made by consent of the attorney, it is no ground of error that the decree embraces land not in the complaint, and even if error, the remedy is appeal. *Ib.* 203.

107. An appeal lies from an order setting aside a final decree in equity, and granting a rehearing. *Riddle v. Baker*, 13 Cal. 301.

108. To obtain the aid of chancery to vacate a judgment, a party must show that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Ib.* 304.

109. If a party enters judgment for too much, or before the whole amount is due, it is not conclusive, but only prima facie evidence of fraud to avoid the judgment. *Patrick v. Montader*, 13 Cal. 442; overruling *Taaffe v. Josephson*, 7 Cal. 356.

110. A purchaser of land, subsequent to a suit brought against his vendors to quiet title, and to a notice of lis pendens filed in the county recorder's office, is a mere volunteer who takes subject to any decree in the suit. *Gregory v. Haynes*, 13 Cal. 494.

111. Equity has jurisdiction to vacate a judgment fraudulently altered, so as to

include a defendant not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 560.

112. An alteration of a judgment by the court, without notice, so as to include a party not served with process, if not void, is voidable at the election of the party. *Ib.* 561.

113. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on defendant, by his proper name, as John Doe, alias Westfall, a default being entered, judgment may be rendered against the defendant in his true name Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 120.

114. A decree of the probate court, ordering a claim to be paid, rendered on petition of the administrator and without objection by him, is final and conclusive and cannot be assailed collaterally, nor directly, on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

115. A defendant having no defense to an action, cannot go into equity and enjoin a judgment by default, on the ground that the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141.

116. The court in which a void judgment is rendered can, on motion, at any time arrest all process issued by its clerk thereon. *Chipman v. Bowman*, 14 Cal. 158.

117. A discharge in insolvency of a debt is equally a discharge of a judgment on that debt and the costs, rendered between the time of filing the petition and schedule and the time of final discharge. *Imlay v. Carpentier*, 14 Cal. 175.

118. Where on "a verdict for the full sum claimed with interest and costs" judgment is rendered for a sum equal to the principal with interest at ten per cent. per annum from the time the money was due, the judgment itself to draw like interest until paid, it is error. *Macoleta v. Packard*, 14 Cal. 179.

119. Where a party moves for a new trial and fails, he can not on the same facts go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 228.

120. Where two persons sue, as partners in possession, for a trespass on firm

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property, the judgment in their favor is firm assets. The fact of joint title as partners to the damages is in issue and adjudicated. *Ib.* 229.

121. A redemptioner is not required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *McMillan v. Vischer*, 14 Cal. 241.

122. In a chancery case, where all the proofs are in, and the case fully before the lower, and the appellate court, the judgment of the latter is conclusive where it passes upon the merits of the controversy; and on the reversal of the decree below, that court can take no further proceedings unless authorized by the appellate court, except such as are necessary to give effect to its judgment; the whole matter is res adjudicata. *Soule v. Dawes*, 14 Cal. 249.

123. Where a submission to arbitration is made an order of court, under the code the clerk may enter judgment on the award, in due time, without any further order of court. *Carsley v. Lindsay*, 14 Cal. 395; overruling *Heslep v. City of San Francisco*, 4 Cal. 4.

124. Where on a suit against defendants as members of a company one pleads he was not a member and the court finds he was, the finding supports a judgment for plaintiff. *Parke v. Hinds*, 14 Cal. 417.

125. After a judgment has been rendered by the supreme court, a material modification of such judgment should not be made upon a petition for rehearing; the rehearing should be first granted. *Clark v. Boyreau*, 14 Cal. 637.

126. Plaintiff in execution, after assigning his judgment, pretended falsely and fraudulently to be the owner of it, and so pretending made a contract to discharge the judgment by taking the note of third persons not negotiable in the mercantile sense in payment; the makers of the note agreed to this under the supposition induced by him that he was the owner: held, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note even to assignees before maturity thereof. *Mitchell v. Hackett*, 14 Cal. 665.

127. On motion for new trial it is irregular for the court to reverse its first judg-

ment and render a contrary one without hearing or notice. *Ib.* 667.

128. Where the court has jurisdiction of the question and the parties, its judgment, whether legal or illegal, proper or improper, is valid and binding until reversed or set aside. *Reynolds v. Harris*, 14 Cal. 678.

129. Where a party to a judgment has obtained any advantage through the judgment he must restore that advantage to the other party, if the judgment be afterward reversed. *Ib.* 679.

130. If on sale under judgment the plaintiff and his assignee buys in the property he must restore it to the defendant on reversal of the judgment; otherwise as to a stranger, a bona fide purchaser without notice. *Ib.*

131. The jury having found plaintiff entitled to the use of so much of the water flowing in the stream as would run in a ditch of a certain capacity, a judgment was entered, following the verdict: held, that the judgment is not erroneous as not distinguishing between the water ordinarily flowing in the stream and the water from foreign sources emptied in by defendants. The law regulates the rights of the parties in this respect, and the judgment must be construed with reference to such law. *Burnett v. Whitesides*, 15 Cal. 37.

132. In suit against several defendants known as "Table Mountain Water Co.," for possession of a ditch, the verdict was "We find for the plaintiff and against L.," one of the defendants. Judgment was: entered that defendant surrender possession of the ditch to plaintiff, and that plaintiff recover of L., "one of said defendants, the sum of — his costs," etc.: held, that there is no error in the judgment, that it must be construed by the verdict, which is confined to plaintiff and L. *Treat v. Lafarge*, 15 Cal. 41.

133. Injury is presumed from evidence erroneously admitted, and the adverse party must show clearly that no injury accrued, or the judgment cannot stand. *Grimes v. Fall*, 15 Cal. 65.

134. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claim

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ed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved all of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, were enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker v. Woods*, 15 Cal. 68.

135. But even if any proof aliunde of C.'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was prima facie sufficient to admit the attachment papers in proof. *Ib.* 69.

136. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff, still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by the plaintiff. *Ib.* 70.

137. The recital in the docket of a justice, who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself, and if the return fail to show sufficient service, the recital, being based on the return alone, amounts to nothing

more than the opinion of the justice, and cannot be relied on to give validity to the judgment. *Lowe v. Alexander*, 15 Cal. 300.

138. Such a recital embraces no question of fact, and does not, therefore, raise the question whether the decision of an inferior court, establishing the existence of a fact essential to its jurisdiction, can be attacked in a collateral proceeding, upon which point this court expresses no opinion. *Ib.*

139. The record of the proceedings in a justice's court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice and void; and the failure of defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Ib.* 300.

140. Where the record shows that suit was brought in township No. 4, Sierra county, that the summons was served, by the constable of that township, in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, the judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder. A constable has no power to execute process out of his township.\* *Lowe v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 16 Cal. 392.

141. In suit against husband and wife for services rendered by plaintiff to the wife before her marriage, judgment may be entered against both defendants, with a direction that it be enforced only against the separate property of the wife, and the common property of both. *Van Maren v. Johnson*, 15 Cal. 311.

142. The separate property of the wife and the common property of both husband and wife are equally liable for the debts of the wife contracted previous to her marriage, and judgments recovered for such debts may be enforced against either class or both classes of property indiscriminately. *Ib.* 313.

\* The act of February, 1861, empowers constables to serve process in any township in the county in which they are elected.



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143. Dismissal of an appeal in the supreme court for want of prosecution, in accordance with the rules of the court, operates as an affirmance of the judgment below, within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term. *Karth v. Light*, 15 Cal. 326; *Chamberlain v. Reed*, 16 Cal. 207.

144. The cases in which dismissal of an appeal will not operate as a bar to a second appeal, and hence not as an affirmance of the judgment below, are those where the dismissal has been made upon some technical defect in the notice of appeal, or the undertaking, or the like. The bar operates where the dismissal is for want of prosecution, and the order is not vacated during the term, or the dismissal is on its merits. *Karth v. Light*, 15 Cal. 326; *Chamberlain v. Reed*, 16 Cal. 207.

145. Plaintiff has judgment against defendant for six hundred dollars. Defendant has judgment in the same court, but in a different action, against plaintiff for one hundred and ten dollars, costs. Plaintiff moves to set off defendant's judgment, and apply the same as a credit upon plaintiff's judgment. Motion denied. Plaintiff appeals from the order denying the motion: held, that the supreme court has no jurisdiction—the judgment sought to be set off being for less than two hundred dollars. *Crandall v. Blen*, 15 Cal. 408.

146. R. & Co., defendants, had two mechanics' liens upon certain property, one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the Act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a Sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having

been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble v. Voll*, 15 Cal. 510.

147. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.*

148. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment on the liens, by paying the money justly due, interest, costs, etc.—he not having been party to the suit by the lien-holder. *Ib.*

149. Plaintiffs here cannot object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment. *Ib.*

150. In this case, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from this decree. *Ib.*

151. Mrs. L., defendant, when a femme sole, contracted a debt upon which judgment by default was recovered against her, and an appeal taken in her name to the supreme court, where the judgment was affirmed. Subsequently, judgment was obtained against plaintiff here, as surety on her appeal bond. This judgment he paid, by giving his note in full satisfaction. He now sues Mrs. L. for the sum so paid: held, that she cannot defend on the ground that the paper on which the first suit against her was brought expressed no consideration, and that the complaint therein averred none, and that hence no demand is shown against her—the judgment of the supreme court, being conclusive so long as it stands, cannot be attacked collaterally on the ground that parties to it did not prosecute the appeal,

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but must be set aside, if at all, by a direct proceeding impeaching it for fraud. *Bostic v. Love*, 16 Cal. 72.

152. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation, until the further order of the court; collect money due or to become due it; sell certain stock, and pay certain proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hill*, 16 Cal. 148.

153. Where the court makes an order requiring plaintiff to appear at a certain time, and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard, it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 161.

154. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for nonappearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

155. An action will lie on a judgment obtained in a justice's court in this State, even when the time within which an execution could be issued on such judgment has expired; and the court may refuse to permit the defendant from setting up the statute of limitations after he answers to the merits. *Stuart v. Lander*, 16 Cal. 375.

156. A judgment is a contract within the sixty-seventh section of the act concerning courts of justice and judicial officers. *Ib.*

157. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the

note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non judice and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 382.

158. Doubtful whether the clerk could enter judgment, in an action of this nature, without application to the court. This point reserved. *Ib.*

159. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ewer*, 16 Cal. 470.

160. The nature and extent of the relief in such cases, are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such, courts of equity seldom relieve. *Ib.*

161. In this case relief cannot be granted, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure

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4 suit. And further, this action is not brought directly for relief from the sale, but for a sale of the property, an account as incident to a partition and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Ib.* 471.

162. The rights of plaintiffs to the proceeds arising from the sale must be limited by the extent of the interest they acquired in the premises under their conveyance—that is, to one-third; and from this one-third their proportionate share of the costs and expenses of the action, and subsequent proceedings, must be deducted. *Ib.*

163. What is meant by sheriffs' deeds, made on sales under decrees in foreclosure suits, taking effect by relation from the date of the mortgage, explained. *Ib.* 472.

164. The doctrine of caveat emptor applies only to sales made upon valid judgments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy or the lien of the judgment; and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 564.

165. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A is essential; and when present the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes that risk. To that extent the doctrine of caveat emptor applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to

receive; it is for that interest he makes his bid and pays his money. *Ib.* 565.

See ARREST OF JUDGMENT, DEFAULT.

## II. AMENDMENT TO A JUDGMENT.

166. The defendant was sued and served by the name of George Mott, and judgment entered against him in that name, without notice to him, the plaintiff, on his own motion, obtained an order from the court to amend the judgment by altering the name from George to *Gordon*: held, that this was error. *McNally v. Mott*, 3 Cal. 235.

167. A court may amend or render a judgment nunc pro tunc, where the record discloses that the entry on the minutes does not correctly give what was the judgment of the court. *Morrison v. Dapman*, 3 Cal. 257.

168. Where an amended decree, rendered at the same term as the first decree, is simply what the original decree should have been, and does no injustice to a party, this court will not disturb it on account of any alleged irregularity not affecting the merits. *Gronfier v. Minturn*, 5 Cal. 492.

169. When a judgment is rendered and an appeal taken, the court below loses control over the judgment, and an order amending the judgment is erroneous. *Bryan v. Berry*, 8 Cal. 134.

170. While the term lasts, the court has power to amend the record. After the term has passed, the record cannot be amended, unless there is something in the record to amend by. *Branger v. Chevalier*, 9 Cal. 173.

171. It is not admissible, in a collateral manner, to amend the record of a previous action. If it can be amended at all, or a patent defect be cured, it must be by direct proceeding. *McMillan v. Reynolds*, 11 Cal. 379.

172. The appellate court cannot amend the record for error shown by the affidavit of the judge who tried the cause. *Smith v. Brannan*, 13 Cal. 115.

## III. ASSIGNMENT OF A JUDGMENT.

173. Where A received an assignment

## Assignment of a Judgment.—Evidence of a Judgment.

of stock in a corporation, and the stock was subsequently attached under a judgment against the vendor, and afterwards the stock was regularly transferred to A, who then obtained an assignment of the judgment under which the stock was attached: held, that the assignment of the judgment at once merged the lien of the higher right, and that A, as regarded third parties, became the absolute owner of the stock. *Strout v. Natoma W. and M. Co.*, 8 Cal. 80.

174. The objection that the judgment was assigned before filing the bill, is answered by the fact that upon the record the assignment is admitted to have been fraudulent, and certainly the defendants can claim nothing in a court of equity by reason of such an assignment. *Russell v. Conway*, 11 Cal. 103.

175. An administrator for a foreign estate has the right to assign for a valuable consideration a judgment obtained there by the intestate in his lifetime, and against a person who has since removed to this State. *Low v. Burrows*, 12 Cal. 189.

176. The assignee of a judgment is only the holder of an equity, with the right to use the judgment and the name of the plaintiff to enforce it, and stands in the shoes of the assignor as to all the defenses which existed against the judgment between the parties to it. *Wright v. Levy*, 12 Cal. 262.

177. Plaintiff in execution, after assigning his judgment, pretended, falsely and fraudulently, to be the owner of it, and so pretending, made a contract to discharge the judgment by taking the note of third persons not negotiable, in the mercantile sense, in payment. The makers of the note agreed to this under the supposition, induced by him, that he was the owner: held, that the makers of the note, on discovering that the plaintiff was not the owner of the judgment, properly refused to pay the note, even to assignees, before maturity. *Mitchell v. Hackett*, 14 Cal. 665.

178. An assignee of a judgment, and of the sheriff's certificate of a sale thereunder, stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant, where no loss or injury will be done to the assignee. *Reynolds v. Harris*, 14 Cal. 681.

## IV. EVIDENCE OF A JUDGMENT.

179. A certificate of exemplification of a judgment rendered in another State, when attested by the clerk under the seal of the court, and when the presiding judge of the court certifies that the attestation is in due form of law, is sufficient evidence, under the act of congress of May 26th, 1790, to sustain the action upon the judgment in this State. *Thompson v. Manrow*, 1 Cal. 425.

180. A claim of title by virtue of a sheriff's deed is not sufficient without proving the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

181. A judgment at common law is not evidence in an action against an heir. *Beckett v. Selover*, 7 Cal. 228.

182. The record of a judgment of another State, if certified in conformity with the act of congress, is admissible in evidence in this State. *Parke v. Williams*, 7 Cal. 249.

183. The judgment of a court of competent jurisdiction directly upon the points is, as a plea, a bar, and as evidence, conclusive between the same parties upon the same matter directly in another court. *Love v. Waltz*, 7 Cal. 252.

184. Where a plaintiff had obtained judgment in another court for a quarter's rent under a lease: held, that in an action of forcibly entry for nonpayment of another quarter's rent, under the same lease, between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Ib.*

185. When a judgment record is used in evidence, it can only be considered as conclusive evidence, where its operation is mutual and concludes both parties. *Davidson v. Dallas*, 8 Cal. 246.

186. In an action for damages for the diversion of the water from the plaintiffs' ditch, the defendants denied the diversion, and alleged that the water used by them was used by agreement between the Volcano Water Company and themselves, and came from their reservoir. On the trial the plaintiffs could introduce in evidence the judgment wherein the right to the use of the water had been adjudged between the plaintiffs and the Volcano Water Company, and parol evidence that the water



used was the same in controversy in that suit. *Walsh v. Harris*, 10 Cal. 392.

187. A judgment between the holder and maker of a note cannot be evidence between the holder and endorser, or in a subsequent suit between the endorser and maker. *Bryant v. Watriss*, 13 Cal. 87.

188. A record may be admitted in evidence in favor of a stranger, against one of these parties, as containing a solemn admission or judicial declaration by such party in regard to a certain fact. *Shafter v. Richards*, 14 Cal. 126.

189. Where the surety undertakes that the principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive evidence against the surety. *Pico v. Webster*, 14 Cal. 204.

190. But in case of official bonds, the sureties undertake in general terms that the principal will perform his official duties, and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Ib.*

191. A judgment is always admissible as evidence of its rendition when that fact is relevant, but not as proof to charge a stranger directly by its operation. *Ib.* 207.

192. Under our system, the judgment in ejectment is only conclusive of two points; the right of possession in the plaintiff, and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 468.

193. A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title. *Kidd v. Laird*, 15 Cal. 182.

194. Where the record shows that suit was brought in township No. 4, Sierra county; that the summons was served by the constable of that township in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, the judgment rendered is void and not admissible as evidence of title upon a sale made thereunder. A constable has no power to issue process out of his township.\* *Low v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 16 Cal. 392.

\*The statute of 1861, p. 28, authorizes constables to serve process in their own counties.

## V. MISCELLANEOUS JUDGMENTS.

### 1. On Arrest.

195. The judgment should state the fraud affirmatively, for fraud being the gravamen of the arrest, it should be conclusively found before the debtor can be imprisoned or the bail charged. *Mattoon v. Eder*, 6 Cal. 60; *Davis v. Robinson*, 10 Cal. 412.

196. The writ of arrest is only an intermediate remedy or process to secure the presence of the party until final judgment, and that the facts on which it is based must be affirmatively found, and the fraud stated in the judgment, in order to authorize an arrest on final process. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

197. A party cannot be imprisoned under a judgment in a civil action for assault and battery. *Ex parte Prader*, 6 Cal. 240.

198. A complaint alleging that the defendant collected moneys as the agent or attorney in fact of the plaintiff in the alternative form is insufficient to sustain a judgment convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 625.

199. To authorize a judgment convicting the defendant of fraud, the facts upon which the charge is based must be specifically alleged in the complaint. *Davis v. Robinson*, 10 Cal. 412.

### 2. On Demurrer.

200. A judgment upon demurrer is not always a bar to a subsequent action. It is only so when it determines the merits of the case. *Robinson v. Howard*, 5 Cal. 429.

201. Where the answer shows that the demurrer was to the validity of the contract which gave rise to the claim, and this averment is found to be true the judgment upon demurrer is a bar to the suit. *Ib.*

202. When a final judgment on demurrer to the complaint sustaining the demurrer is reversed, the plaintiff has a right to amend on application to the court below. *Phelan v. Supervisors of San Francisco County*, 9 Cal. 16.

203. Where a record shows that a de-

## On Demurrer.—Against an Administrator.—In Ejectment.

murrer was interposed to the complaint, and was sustained by the court, and afterwards, during the same term, a judgment was rendered in favor of the plaintiff, the court will not presume that the order sustaining the demurrer was set aside by the court before judgment was rendered. *Seaver v. Cay*, 9 Cal. 565.

204. It is error to render final judgment on demurrer to plaintiff's complaint. Where the complaint is defective the court should sustain the demurrer, with leave to the plaintiff to amend his complaint; and if the plaintiff then declines, judgment final should be given. *Gallagher v. Delaney*, 10 Cal. 410.

205. Where a demurrer to a complaint is overruled, and an application subsequently made for leave to file an answer, the allowance of the application rests in the discretion of the court, subject to review in case of its arbitrary or unreasonable exercise. *Thornton v. Borland*, 12 Cal. 439.

206. If, after the demurrer to a complaint sustained, defendant does not offer to amend, final judgment against him will not be disturbed. *Smith v. Yreka Water Co.*, 14 Cal. 201.

### 3. Against an Administrator.

207. The only effect of a judgment against an administrator, upon any claim for money, shall be to establish the claim in the same manner as if it had been allowed by the administrator and the probate court. *Belloc v. Rogers*, 9 Cal. 127.

208. A judgment by default may be taken against an administrator as well as any other party. *Chase v. Swain*, 9 Cal. 137; *Hentsch v. Porter*, 10 Cal. 562.

209. Under our system, a judgment against an administrator is little—if any—better than an allowance by him, and approval by the probate judge. *Wells v. Robinson*, 13 Cal. 143.

210. A decree of the probate court, ordering a claim to be paid, rendered on the petition of the administrator, and without objection to him, is final and conclusive; and cannot be assailed collaterally nor directly on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

### 4. In Ejectment.

211. The plaintiff in ejectment may sue one or more defendants, and they may answer separately or demand separate verdicts; unless they do so, however, they will be concluded by the general verdict. *Winans v. Christy*, 4 Cal. 80.

212. A party is not bound by a judgment rendered in an action of ejectment, where he has not received legal notice of the action. Such judgment is not evidence against him of paramount title in the plaintiff in ejectment. *Peabody v. Phelps*, 9 Cal. 226.

213. It is error to refuse in an action of ejectment a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 270.

214. In an action of ejectment to recover possession of a large tract of land, where the defendant failed to appear, and the case was submitted to the court, who found that plaintiff had title to the whole tract, and that the defendant was in possession of a part, sixty or seventy acres of the tract, without right: held, that it was proper for the court to enter judgment for the plaintiff for the possession of the whole tract. *Vallejo v. Fay*, 10 Cal. 278.

215. The decrees of the board of land commissioners and of the district court are admissible in evidence in ejectment, and conclusive against the government, and against those holding by its license or permission. *Gregory v. McPherson*, 13 Cal. 574.

216. Where in ejectment against several defendants, the judgment for damages is several instead of joint, the damages may be remitted, and the judgments for the land stand. *Curtis v. Herrick*, 14 Cal. 120.

217. Under our system, the judgment is only conclusive of two points: the right of possession in the plaintiff and the occupation of the defendant at the commencement of the suit. *Yount v. Howell*, 14 Cal. 468.

218. In ejectment upon a disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noë v. Card*, 14 Cal. 609.

## In Ejectment.—Against an absent Defendant.

219. After judgment by default in ejectment, a jury trial cannot be awarded, there being no issue. *Smith v. Billett*, 15 Cal. 26.

220. Where an amended complaint in ejectment sets up title acquired after the commencement of the suit, and a judgment by default is regularly entered, the judgment is valid. *Ib.*

221. If the defendant interposes no obstacle to trying the case on such subsequently acquired title, he cannot object after judgment. *Ib.*

222. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damage being claimed, and defendants being in possession. *McGarvey v. Little*, 15 Cal. 31.

223. Where the complaint in ejectment avers the ownership and right of plaintiff and the possession and withholding by defendant in general terms, without stating any time when plaintiff's title accrued or existed, and without making any allegation as to damages for rents and profits, but simply praying judgment therefor in a given sum, and the complaint is demurred to as not stating facts sufficient, and a general judgment for possession, and \$2250 damages is given: held, that damages cannot be recovered for any period preceding the commencement of the action; but that this point, to wit: that the complaint does not support the judgment for damages, cannot be raised for the first time on petition for rehearing in the supreme court—the defendant on the first hearing in this court having put his objection to the general judgment for damages on the ground of error in the charge of the court below to the jury, and of error in the admission of evidence as to the rents and profits; the point of his objection being, that a recovery for rents and profits beyond three years was barred by the statute, and this court having decided against him as the point was not properly presented by the record. *Payne v. Treadwell*, 16 Cal. 247.

224. Failure of defendant in ejectment to appear when the cause is called for trial—an answer being in—authorizes the court to try it without a jury. *Doll v. Feller*, 16 Cal. 433.

225. Where in ejectment the facts found by the court authorized a judgment for possession, but not for damages, the judgment being for possession and damages was affirmed in the supreme court, upon respondent remitting the damages and paying the costs of appeal. *Ib.* 434.

5. *Against an absent Defendant.*a. *By publication.*

226. A judgment obtained by publication of summons against a defendant out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

227. Under the code, after the expiration of six months, if the absent defendant fails to deny the allegations of the complaint, he is held to admit them as true, and cannot afterwards show their falsity. *Ware v. Robinson*, 9 Cal. 111.

228. An affidavit which avers a cause of action against the defendant; that defendant cannot after due diligence be found in the State; that he was beyond the limits of the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons was issued, and that defendant still has a family residing in said county; is insufficient to authorize the publication of the summons for only thirty days; it must be for three months. *Jordan v. Giblin*, 12 Cal. 102.

229. An affidavit for an order of publication of the summons upon the ground of the absence of the defendant from the State is insufficient, if it does not show that the defendant had left the State, or that any diligence had been used to ascertain his whereabouts beyond inquiring of a single individual; where there is no pretense that he concealed himself to avoid service. *Swain v. Chase*, 12 Cal. 285.

b. *By appointment of an Attorney.*

230. The provision of the code author-

Against an absent Defendant.—On Foreclosure.

izing a judgment personal and final against an absent defendant, for whom the court has appointed an attorney with privilege to the defendant to come in and deny in six months, is not in violation of the constitution of the United States. *Ware v. Robinson*, 9 Cal. 111.

231. The affidavit to authorize the appointment of an attorney for an absent or absconding debtor must show that summons has been issued and placed in the hands of the proper officer, and an effort had been made to serve the defendant personally. *Jordan v. Giblin*, 12 Cal. 102.

#### 6. On Foreclosure of a Mortgage.

232. Where a mortgage was given to secure an indebtedness for which promissory notes were held, with an understanding that the notes were to be given up and the personal liability canceled, on the foreclosure of the mortgage, the mortgagee was held not to be entitled to a personal judgment for any balance remaining unpaid after a sale of the property. *Moore v. Reynolds*, 1 Cal. 352.

233. The voluntary release of the property levied on, by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment. *People v. Chisholm*, 8 Cal. 30.

234. In a foreclosure suit judgment may be rendered for the amount found due upon the personal obligation to secure which the mortgage is executed. *Rollins v. Forbes*, 10 Cal. 300; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

235. A decree for the sale of premises in a suit to enforce a mechanic's lien has the same and no greater effect upon the rights of purchasers and incumbrancers prior to the commencement of the suit than a similar decree would have upon the foreclosure of a mortgage. If such purchasers are not made parties, they are not bound by the proceedings. *Whitney v. Higgins*, 10 Cal. 553.

236. In a suit on a note and mortgage, where creditors of the defendants intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiffs against defendants. They can only claim protection against the enforce-

ment of the judgment to their prejudice. *Horn v. Volcano Water Co.*, 13 Cal. 69.

237. Where plaintiffs sued at law and took a judgment—a bill in equity still pending to enforce a specific lien for the same amount—and a distinct claim set up to a fund, and afterwards prosecuted to judgment, evidences no such distinct and deliberate choice to risk the first judgment, as to bar the plaintiffs from prosecuting their equitable claim. *Wells v. Robinson*, 13 Cal. 142.

238. In this State parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises and the application of the proceeds to its payment, and apply after sale for the ascertainment of any deficiency and execution for the same; or they may take a formal judgment for the amount due in the first instance. *Rowland v. Lieby*, 14 Cal. 157.

239. In a foreclosure suit the decree will not apportion the debt among the several cotenants of the land, who acquired undivided interests therein at the same time, and subsequent to the execution of the mortgage. *Perre v. Castro*, 14 Cal. 531.

240. A decree binds the specific premises mortgaged, and the property passed into the hands of the executrix of the husband's estate subject to its lien. *Cowell v. Buckelew*, 14 Cal. 641.

241. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock, and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

242. Under a decree of foreclosure and sale, H. had come into possession of the mortgaged premises. Subsequently, on appeal to the supreme court, the decree



## On Foreclosure.

was reversed, with direction that the sale under it be set aside, that defendants in the suit be restored to the property sold, and that the court below should proceed to dispose of the case in pursuance of the principles of the opinion. The court below, on filing the *remittitur*, entered a decree setting aside said sale, restoring defendants to possession, directing plaintiff to deliver up possession; awarding a writ of restitution in case of refusal, vacating the credit given on the decree of foreclosure—the plaintiff having bought in the property—and ordering an account of the rents and profits of the premises while in the hands of H., with an injunction pending the account: held, that the order by the court below for an account of the rents and profits was right; that the general direction by this court to the court below, to proceed in pursuance of the principles of the opinion of this court, was mere formality, neither giving authority, nor limiting the power of the court below; that without such directions that court could act only in subordination to the principles declared by this court; that the question of rents and profits being left open by this court, indicated that it was to be passed on by the court below; that there is no distinction as to the right to have the *corpus* of the property restored on reversal of the decree under which it was sold, and the restoring of the rents and profits received from its use; and that the restitution of both is essential to making the party whole. *Raun v. Reynolds*, 15 Cal. 470.

243. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account, before a referee, for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Ib.* 471.

244. Where, in a foreclosure suit, the judgment is in the usual form—ascertaining the amount due, directing a sale of the mortgaged premises, application of the proceeds to the payment of the debts,

providing for the recovery of any deficiency, and authorizing execution for the same—such judgment does not become a lien on the real estate of the debtor from the time it is docketed. *Chapin v. Broder*, 16 Cal. 422.

245. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted; and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien, until the amount of the deficiency to be recovered has been ascertained and fixed. *Ib.*

246. The decree in a foreclosure suit, under the old equity system, usually directed the mortgagor to assert his right by payment of the principal sum due, interest and costs, within a designated period, or be barred of his equity. The decree operated directly upon the property, and its effect was to restore the same, upon payment to the mortgagor; or to vest, upon failure of payment, an absolute title in the mortgagee. To give any efficacy to the decree, it was essential that the owner of the equity should be brought before the court; and he was an indispensable party to a valid foreclosure. *Goodenow v. Ewer*, 16 Cal. 467.

247. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. *Ib.* 467.

248. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under our law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree acquires no title. *Ib.*

## On Foreclosure.—In Replevin.

249. It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale. Under such decree, the purchaser takes the title which the mortgagor possessed, whatever it may have been, at the execution of the mortgage. *Ib.*

250. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently, D. and M. conveyed to defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided one-third—one-half of E.'s interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose—making D. alone party—get judgment for the amount due, and a decree directing a sale of all the interest D. had at date of mortgage. At the sale, plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree, and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property—a partition being impossible without prejudice—and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the date of his mortgage to them; and that the sheriff stated such interest was offered for sale: held, that the bid of plaintiffs, being for the full amount of their judgment, satisfied it; and that the effect of this satisfaction was to discharge the undivided one-sixth held by E. from the lien of the mortgage. *Ib.* 470.

251. Held, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being

not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Ib.*

252. Held, also, that upon proper application in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing in E. and others interested, as parties. *Ib.*

253. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Biggs v. Hargrave*, 16 Cal. 563.

254. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Ib.*

255. A purchaser under a decree of this character may petition to be released from his purchase, or that the sale be set aside, where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject matter, or of persons having interests in the property; or for other reasons, that the estate directed to be sold would not pass. *Ib.*

256. Where a purchaser at a sale under a decree, in a foreclosure suit, directing the sale of the premises—which decree was void, because the grantee of the the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: held, that the action does not lie—the purchaser being aware, at the time of his bid, that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud. *Ib.* 565.

### 7. In Replevin.

257. Where the defendant in a replevin

## In Replevin.—On an Appeal.

suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiff for costs, which was paid: held, that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Cal. 571.

258. The liability of the sureties on a replevin bond cannot be more than the value of the property fixed by the judgment in the original suit. *Nickerson v. Chatterton*, 7 Cal. 572.

259. The judgment in an action of replevin is conclusive evidence between the parties of the plaintiff's title to the chattel in question, and it only remained for the court, in an action for trover brought for the chattel, to determine its value. *Nickerson v. California Stage Co.*, 10 Cal. 521.

260. In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross judgment, and must be based upon proper averments. *Gould v. Scannell*, 13 Cal. 431.

261. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

## VI. JUDGMENT ON APPEAL.

262. Where, from the record, it appears highly probable that the judgment of the court below is founded neither upon law or equity, the supreme court should reverse the judgment. *Reed v. Jourdain*, 1 Cal. 102.

263. Where the verdict is clearly contrary to evidence, the appellate court may reverse the judgment on that account. *Acquital v. Crowell*, 1 Cal. 193.

264. The supreme court may, after a judgment, direct a rehearing in a cause

before the remittitur is sent down and filed in the court below; but if the remittitur is sent down after the order of rehearing is made, the court still has jurisdiction. *Grogan v. Ruckle*, 1 Cal. 194; *Mateer v. Brown*, 1 Cal. 231.

265. The supreme court will modify a judgment so as finally to settle the controversy when the rights of the parties appear to be fully ascertained. *Persse v. Cole*, 1 Cal. 371.

266. The supreme court, on reversing the judgment, may render such judgment as the court below should have done. *Gahan v. Neville*, 2 Cal. 81; *Bidleman v. Kewen*, 2 Cal. 250.

267. Where a jury rendered a verdict which did not carry costs "and costs of suit," the appellate court reversed that part of the judgment which gave costs, and directed the lower court so to modify the judgment. *Shay v. Tuolumne Water Co.*, 6 Cal. 286.

268. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

269. At common law, the appellate court either affirms or reverses the judgment upon the record before it, and the opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court have the same rights that they originally had. *Stearns v. Aguirre*, 7 Cal. 448; *Phelan v. Supervisors of San Francisco County*, 9 Cal. 16.

270. After the plaintiff had appealed upon a statement agreed upon as containing the facts and evidence of his case, and a judgment has been pronounced against him, going to the whole merits of the controversy, it would be exceedingly improper to allow him an opportunity to alter or change the facts on a second trial. *Gunter v. Laffan*, 7 Cal. 592.

271. It would only be where there was undoubted error that the appellate court could review and correct a former decis-

In general.

ion. *Osborne v. Hendrickson*, 8 Cal. 32.

272. Where a final judgment on demurrer to the complaint sustaining the demurrer is reversed on appeal, the plaintiff has the right to amend on application to the court below. *Ib.*

273. The provision of law that "when a judgment or order is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment or order," does not cover the case of a judgment for the recovery of money. It only applies where the judgment operates upon specific property in such a manner that its title is not changed, as by directing the possession of real estate, or the delivery of documents, or of particular personal property in the hands of defendant, and the like. *Farmer v. Rogers*, 10 Cal. 335.

274. The supreme court will reverse the judgment of the court below where the facts found by the court are not sufficient to support the judgment. *Davis v. Caldwell*, 12 Cal. 126.

275. Where a case is appealed from the district court and the supreme court reverses the judgment of the district court, and directs the entry of a final judgment, such judgment can be entered by the clerk of the district court in vacation. *McMillan v. Richards*, 12 Cal. 468.

276. The court below cannot refuse to give effect to the judgment of the appellate court, and a judgment entered by the clerk in such case is just as binding as if entered in the supreme court itself. *Ib.*

277. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

278. Where a suit is pending in the supreme court on appeal, the judgment below is suspended for all purposes, and it is not evidence upon the questions at issue, even between the parties. *Woodbury v. Bowman*, 13 Cal. 634.

279. Where a judgment is against two, one of them only appeals, and the appeal is dismissed with twenty per cent. damages, the damages, with the costs, do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under a judgment. *McMillan v. Vischer*, 14 Cal. 241.

280. After a judgment has been rendered on appeal, a material modification of such judgment should not be made upon a petition for rehearing; the rehearing should first be granted. *Clark v. Boyreau*, 14 Cal. 638.

281. The provisions of the code authorizing the supreme court on the reversal or modification of the judgment or order below to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court from exercising the same power. *Reynolds v. Harris*, 14 Cal. 677.

282. Where judgment is entered against "the defendants," some of whom were not sued, though their names appeared as defendants by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court or the court below, on motion. *Browner v. Davis*, 15 Cal. 11.

283. Complaint filed against M. and D. and H. and L., sureties. Complaint amended, and H. and L. only named defendants, and on this complaint the issue was found and the cause tried: held, that this operated as a discontinuance, as to M. and D., and that, although the judgment runs as against "said defendants"—the verdict and judgment being entitled "*B. (plaintiff) v. M. et. al.*"—still the judgment must be referred to the issue, is of no effect against M. and D., and may be modified, as a clerical misprision, in the supreme court. *Ib.*

284. In theory, issue is joined in the supreme court upon the assignment of errors made upon the record. The case may be regarded as a new and distinct action. Upon the issue thus made the judgment of the court must rest, and that judgment affirms the law on the matter presented for adjudication, and fixes the rights of the parties under the law. *Davidson v. Dallas*, 15 Cal. 83.

285. Where the judgment below is reversed and the cause remanded for a new trial, it must be retried in pursuance of the principles of law declared in the opinion of the appellate court. The directions of the opinion become a portion of the judgment. *Ib.*

286. The supreme court will not reverse the judgment of the court below to afford the plaintiff an opportunity to amend his complaint, he not having offered to amend



## Jurisdiction over Judgments.—Costs in a Judgment.

below—there being no error in the record. *Gibbons v. Scott*, 15 Cal. 286.

## VII. JURISDICTION OVER JUDGMENTS.

287. A judgment rendered by a district court after the time appointed for the adjournment of the term is invalid, and will be set aside. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

288. After the adjournment of the term, no power remains in the district court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kramer*, 2 Cal. 583; *Morrison v. Dopman*, 3 Cal. 257; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

289. The district court is a superior court of general jurisdiction, and its judgment upon any subject matter within its power is conclusive between the parties in every collateral issue, as long as such judgment is unreversed. *Webb v. Hanson*, 3 Cal. 105.

290. The district court is not limited by the present act, as to the time within which it may grant relief upon a judgment unjustly or improperly obtained. *People v. Lafarge*, 3 Cal. 133.

291. It is a wrongful exercise of authority, in the district court, to strike out, on an ex parte motion, a marginal entry of satisfaction, on a judgment rendered two years before. *Henly v. Hastings*, 3 Cal. 342.

292. A judgment rendered by a district court after the time appointed for the adjournment of the term may be set aside, if there has been no service of summons upon the defendants. *Carpentier v. Hart*, 5 Cal. 407; *Pico v. Carrillo*, 7 Cal. 32; *Shaw v. McGregor*, 8 Cal. 521.

293. The fact that the court was adjourned, though not for the term, at the time set for the hearing of objections of creditors to an insolvent's discharge, and that the hearing took place before the judge at chambers, is no valid objection to the discharge. *Clarke v. Ray*, 6 Cal. 604.

294. Courts have no power to interfere

with the judgments and decrees of other courts of concurrent jurisdiction. *Anthony v. Dunlap*, 8 Cal. 27; *Rickett v. Johnson*, 8 Cal. 35; *Revalk v. Kraemer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; *Phelan v. Smith*, 8 Cal. 521; *Gorham v. Toomey*, 9 Cal. 77; *Uhlfelder v. Levy*, 9 Cal. 614.

295. A State court cannot enjoin a judgment of a Federal court. *Phelan v. Smith*, 8 Cal. 521.

296. An exception to the general rule that one court cannot enjoin the proceedings of another court of coördinate jurisdiction, arises when the court in which the action or proceeding should be had is unable, by reason of its jurisdiction, to afford the relief sought; as when several fraudulent judgments are confessed in several courts, a creditor may bring one action in any one of these courts to enjoin them all. *Uhlfelder v. Levy*, 9 Cal. 614.

## VIII. COSTS IN A JUDGMENT.

297. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment; the redeemer is not bound to pay them when he redeems from a sale under the judgment. *McMillan v. Vischer*, 14 Cal. 241.

298. Under the practice act, as it stood in 1854, a party who failed to file with the clerk a memorandum of costs within the time limited, waived his right to costs, whether they were clerk's and sheriff's fees or other costs; and in the absence of such memorandum, the clerk had no power to include costs in the judgment. *Chapin v. Broder*, 16 Cal. 418.

299. If the clerk's and sheriff's fees were inserted in the judgment, when not so claimed, the judgment is so far a nullity, and may be attacked collaterally. *Ib.*

300. The New York cases do not apply, because there, costs are taxed by the clerk on notice to the adverse party; but no time is fixed within which the notice must be given, and the costs are not waived by failure to give it. *Ib.* 419.

301. After a judgment is entered, and the record completed, the clerk has no power to fill up the blank left for costs. His authority terminates with the entry of

## Lien of a Judgment.—Jurisdiction in general.

the judgment, and the court alone, on motion to amend, is competent to relieve where costs are omitted. *Ib.* 420.

302. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Ib.*

See Costs.

## IX. LIEN OF A JUDGMENT.

303. A conveyance made without authority will not affect the lien of a judgment. *Smith v. Morse*, 2 Cal. 556.

304. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of the lien commences to run only from the date of the remittitur from the appellate court. *Dewey v. Latson*, 6 Cal. 134.

305. The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 281.

306. The judgment debtor cannot set up errors in docketing the judgment as destroying the lien, when the property has been sold on execution under the judgment; if the property sold is his, the levy operates as a lien; if not, he has no right to complain. *Ib.*

307. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes the transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarty v. Christie*, 13 Cal. 81.

308. The statutory lien of a judgment upon the real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 438.

309. A judgment recovered against the husband does not become a lien on the homestead, and a sale of the homestead upon an execution issued on such judgment is void. *Ackley v. Chamberlain*, 15 Cal. 182.

310. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judg-

ment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ib.* 183.

311. In this State, a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor. *Bowman v. Norton*, 16 Cal. 220.

312. If an undertaking on appeal to the supreme court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin v. Broder*, 16 Cal. 420.

## JURISDICTION.

- I. In general.
- II. Admitted by the answer.
- III. Of Administration.
- IV. Of Arbitrators.
- V. Demurrer to Jurisdiction.
- VI. Of Courts.
  1. In general.
  2. Of Federal Courts.
  3. Of the Court of a United States Commissioner.
  4. Of the Supreme Court.
  5. Of the District Court.
    - a. Not appellate.
    - b. In probate matters.
    - c. Over Proceedings in other District Courts.
    - d. Over Judgments.
  6. County Court.
    - a. Appellate.
  7. Court of Sessions.
  8. Probate Court.
  9. Superior Court.
  10. Justices' Courts.
  11. Recorders' Courts.

## I. IN GENERAL.

1. The constitution of the State confers the authority of peace officers upon the justices of the supreme court and the dis-

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Admitted by Answer.—Of Administration.—Of Arbitrators.—Of Courts.

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strict judges. *People v. Smith*, 1 Cal. 13.

2. The State has an absolute right to control, regulate and improve the navigable waters within its jurisdiction as an attribute of sovereignty. *Geary v. Gunter*, 1 Cal. 467.

3. The legislature cannot confer upon a county judge the power of designating the place and manner of holding an election, as it is a ministerial and not a judicial act, and an election thus held will be void. *Dickey v. Hurlbut*, 5 Cal. 344.

See ALCALDE, COUNTY JUDGE, DISTRICT JUDGE, OFFICE and OFFICER.

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## II. ADMITTED BY ANSWER.

4. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, answers that he has a tax title to the land, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 616.

5. Citation to heirs, to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila v. Padilla*, 14 Cal. 106.

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## III. OF ADMINISTRATION.

6. Two jurisdictional facts must exist to support administration in every case: first, the death of the party; second, his residence within the county at the time of his death. They must be alleged in the petition and be true in point of fact. *Beckett v. Selover*, 7 Cal. 233; *Haynes v. Meeks*, 10 Cal. 118.

7. To vest the incoming administrator with title to an estate, there must be a grant of letters of administration to him; the mere handing over of the papers by the old administrator to the new is insufficient. *Rogers v. Hoberlein*, 11 Cal. 129.

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## IV. OF ARBITRATORS.

8. Our statute concerning referees is in aid of the common law remedy by arbi-

tration, and does not alter its principles. *Tyson v. Wells*, 2 Cal. 130.

9. Where the parties entered into a submission to arbitration, in which it was stipulated that the award be entered as the judgment of the county court: held, that it was void in toto, that court having no jurisdiction over the subject matter of the award. *Williams v. Walton*, 9 Cal. 145.

10. The court having no jurisdiction the arbitrators could have none, nor could they have common law powers when appointed in the mode provided by statute. *Ib.* 146.

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## V. DEMURRER TO JURISDICTION.

11. Demurrer to the jurisdiction of a court of general jurisdiction lies only where the want of jurisdiction appears affirmatively on the face of the complaint. Otherwise, of courts of limited and special jurisdiction; there, every fact essential to confer jurisdiction must be alleged. *Doll v. Feller*, 16 Cal. 433.

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## VI. OF COURTS.

### 1. In general.

12. Courts will take judicial notice of the territorial extent of the jurisdiction and sovereignty exercised de facto by their own government; of the local divisions of their country so far as political government is concerned. *People v. Smith*, 1 Cal. 13.

13. After the process of the court is finally and completely executed, from that moment the power of the sheriff under it and the authority of the court to enforce it, ceases. *Loring v. Illsley*, 1 Cal. 28.

14. When a bond is given to release a vessel, the action should proceed in the same manner against the vessel after the release; and if the vessel was not liable, the giving of the bond cannot vest a jurisdiction over the subject matter. *McQueen v. Ship Russell*, 1 Cal. 166.

15. A British seaman on board a British vessel of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue and

recover his wages in a State court. *Pugh v. Gillam*, 1 Cal. 485.

16. The agreement of parties cannot divest courts of their proper jurisdiction. *Muldrow v. Norris*, 2 Cal. 78.

17. The rule that requires seizure of the thing to give jurisdiction in actions in rem is altered by our statute; service on a person standing in particular relation to the thing, confers jurisdiction in the court from which the process issues. *Averill v. Steamer Hartford*, 2 Cal. 309.

18. The code confers admiralty jurisdiction pro tanto upon the district courts, and the proceedings in such actions must be governed by the principles and forms of admiralty courts, except when otherwise controlled or directed by the act. *Ib.*

19. Jurisdiction in rem may exist in several courts at the same time, on the same subject. *Ib.*

20. Courts have a discretion in granting a ferry license within two miles of an established ferry, to be exercised for the promotion of public convenience. *Ex parte Hanson*, 2 Cal. 263.

21. The court may, on its own motion, strike out improper evidence and instruct the jury to disregard it, to preserve the rights of litigants. *Parker v. Smith*, 4 Cal. 105.

22. The legislature has no judicial functions and therefore cannot except one case or one party from the operation of a general rule of law, either as to the right or remedy. *Guy v. Hermance*, 5 Cal. 74.

23. Courts have no jurisdiction to prescribe by rule what shall be deemed a waiver of a trial by jury; the power is legislative and cannot be conferred on the judiciary. *Exline v. Smith*, 5 Cal. 113.

24. Whenever a new right is created by statute, and the enforcement of such right is committed to a court of general original jurisdiction, such court quoad hoc is an inferior court, and must pursue the statute strictly. *Cohen v. Barrett*, 5 Cal. 210.

25. The legislature cannot confer on one court the jurisdiction which the constitution has given to another. *Zander v. Coe*, 5 Cal. 232.

26. The judicial power of the courts of the United States in admiralty and maritime cases is not exclusive, and the States have the power to confer that jurisdiction to its fullest extent upon their own court. *Taylor v. Steamer Columbia*, 5 Cal. 274 ;

*Warner v. Steamer Uncle Sam*, 9 Cal. 710 ; *Ord v. Steamer Uncle Sam*, 13 Cal. 372.

27. In this State the jurisdiction of courts of equity over questions of title to real estate, acquiesced in to avoid the consequences of the fictitious actions of ejectment at common law, has no existence. *Ritchie v. Dorland*, 6 Cal. 38.

28. Objections which go to the jurisdiction of the court in an insolvent case, may be properly taken on trial. *Turner v. McIlhany*, 6 Cal. 288.

29. In order to give a court jurisdiction of the subject matter so as to enable it to issue orders or process, there must be a suit instituted in the court. *Ex parte Cohen*, 6 Cal. 320.

30. The first point decided by any court is that the court has jurisdiction, although it may not be in terms. *Clary v. Hoagland*, 6 Cal. 688.

31. A personal judgment of a court of general jurisdiction is invalid for the purpose of acquiring any rights under it, when it appears affirmatively upon the face of the record that the court had acquired no jurisdiction over the person of the defendant. *Whitwell v. Barbier*, 7 Cal. 62.

32. That which in a court of general jurisdiction would be a mere irregularity, absolutely deprives the former of all jurisdiction. *Ib.* 64.

33. The true test of a want of jurisdiction in a court is, whether the omission be of the form or of the substance of the act required to be performed. *Ib.*

34. A writ of certiorari is not the proper remedy where there has been no excess of authority. *Coulter v. Stark*, 7 Cal. 245.

35. If a judgment is pronounced by a court having jurisdiction, no matter how irregular it may be, it must stand until set aside or reversed on appeal, but when entered by a mere ministerial officer without authority of law, is void. *Stearns v. Aguirre*, 7 Cal. 448.

36. One court cannot enjoin the proceedings of another court of coördinate jurisdiction. *Anthony v. Dunlap*, 8 Cal. 26 ; *Rickett v. Johnson*, 8 Cal. 35 ; *Recalk v. Kraemer*, 8 Cal. 71 ; *Chipman v. Hibbard*, 8 Cal. 271 ; *Phelan v. Smith*, 8 Cal. 521 ; *Gorham v. Toomey*, 9 Cal. 77 ; *Uhlfelder v. Levy*, 9 Cal. 614.

37. Consent of parties cannot give ju-



## Of Courts.—Of Federal Courts.

jurisdiction of a subject matter to a court which the constitution denies. *Feillett v. Engler*, 8 Cal. 77; *Gray v. Hawes*, 8 Cal. 568.

38. Where the constitution limits the jurisdiction to persons, they may if competent waive their privilege, and this will give the court jurisdiction. *Gray v. Hawes*, 8 Cal. 568.

39. A judgment void for want of personal jurisdiction, is not cured by the appearance of the party for the purpose of vacating it. *Ib.*

40. The presumption in favor of the judgment of a court of general jurisdiction is overthrown when the record of the entire case discloses a want of jurisdiction. *Ib.* 569.

41. In the absence of all evidence on the point of regular service of the defendant, the presumption would be in favor of the jurisdiction of the court, and of the regularity of its proceedings, and for want of such evidence the decree cannot be impeached in a collateral action. *Alderson v. Bell*, 9 Cal. 321.

42. Jurisdiction is the power to hear and determine; but after the determination of a matter over which the court has this cognizance, it cannot be contended that a law fixing the mode by which effect is to be given to a lawful judgment is not a mere subject of municipal regulation, which has nothing to do with a question of jurisdiction. *Hickman v. O'Neal*, 10 Cal. 295.

43. Courts of equity possess jurisdiction to decree the reëxecution of instruments accidentally destroyed. *Cummings v. Coe*, 10 Cal. 530.

44. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. *Jordan v. Giblin*, 12 Cal. 102.

45. Where a court has jurisdiction both of the parties and the subject matter, the manner of exercising that jurisdiction cannot make void the action of the court. *Cloud v. El Dorado County*, 12 Cal. 133.

46. In an action on a judgment obtained in another State, where the transcript of the judgment shows the jurisdiction of the court on its face, it is not necessary to aver jurisdiction. *Low v. Burrows*, 12 Cal. 188.

47. A subscribing witness to a written

instrument, if within the jurisdiction of the court, that is within the State, must be produced, or a sufficient reason given for his absence. *Stevens v. Irwin*, 12 Cal. 308.

48. The pendency of a suit between parties at the time of issuing the restraining order is sufficient to give the court jurisdiction to issue the order, and the regularity of its exercise cannot be collaterally impeached. *Prader v. Purkitt*, 13 Cal. 591.

49. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, set up as a full defense a tax title, he cannot object afterwards that equity has no jurisdiction over tax titles. *Kelsey v. Abbott*, 13 Cal. 616.

50. A court cannot properly, even upon consent of parties, pass upon questions not raised by the written allegations of the pleadings. *Boggs v. Merced Mining Co.*, 14 Cal. 356.

51. Where the court has jurisdiction of the question and the parties, whether its judgment was legal or illegal, proper or improper, it is valid and binding until reversed or set aside. *Reynolds v. Harris*, 14 Cal. 678.

## 2. Of Federal Courts.

52. The constitution of the United States gives no authority to the supreme court of the United States to exercise appellate jurisdiction over the State courts, nor can such authority be derived by implication or construction.\* *Johnson v. Gordon*, 4 Cal. 368.

53. Neither a writ of error or appeal lies to take a case from a State court to the supreme court of the United States. *Ib.* 274.

54. In holding the judiciary act of 1789 to be constitutional, we by no means recognize an unlimited right of appeal from the decisions of this court to the supreme court of the United States. *Ferris v. Coover*, 11 Cal. 179.

\*Since the rendition of this opinion the act of April 9th, 1855, provided for writs of error in certain cases from the supreme court of the State to the supreme court of the United States.

### 3 Of the Court of the United States Commissioner.

55. The American consular court of China is not the highest judicial tribunal of the jurisdiction. An appeal lies from the consul to the United States commissioner. *Forbes v. Scannell*, 13 Cal. 286.

### 4. Of the Supreme Court.

56. The supreme court has no jurisdiction in cases where the matter in dispute is less than two hundred dollars, nor has the constitution which defined this jurisdiction excepted those cases pending before its adoption. *Luther v. Ship Apollo*, 1 Cal. 16; *Simmons v. Brainard*, 14 Cal. 278.

57. The judiciary act of February 28th, 1850, provides that an appeal may be taken from any final judgment of a court of first instance, rendered since the first day of January, 1847, and if the decision of the court below be a final judgment, an appeal lies; otherwise, not.\* *Loring v. Illsley*, 1 Cal. 27.

58. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

59. The supreme court is strictly a court of appellate jurisdiction, but it may exercise its appellate jurisdiction by means of the process of mandamus; so also it seems by means of the writs of habeas corpus, certiorari, supersedeas, prohibition. *People v. Turner*, 1 Cal. 144; *White v. Lighthall*, 1 Cal. 348; *Adams v. Town*, 3 Cal. 248.

60. The supreme court is strictly an appellate court, having no original jurisdiction, and its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals.

No power was conferred upon the supreme court to review judgments of the county courts\* on appeal. *White v. Lighthall*, 1 Cal. 347; *Adams v. Town*, 3 Cal. 248.

61. *Though the plaintiff recover less than \$200, the defendant is entitled to an appeal, if the costs added to the judgment, exceed \$200.* *Gordon v. Ross*, 2 Cal. 157; overruled in *Dumphy v. Guindon*, 13 Cal. 30.

62. Where the constitution gave the supreme court appellate jurisdiction, but the statute failed to provide the manner of appeal, a writ of error would lie to take the case up. *Adams v. Town*, 3 Cal. 248; *Middleton v. Gould*, 5 Cal. 190.

63. In equity, the supreme court, on an appeal, has full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape or by whatever party the appeal is taken up. *Grayson v. Guild*, 4 Cal. 125.

64. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and that no jurisdiction can be conferred by the statute in these cases. *People v. Aplegate*, 5 Cal. 296; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

65. The supreme court is an appellate tribunal, and can take no original jurisdiction however conferred. *Ex parte Knowles*, 5 Cal. 301.

66. Where a case has once been decided on appeal, the judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed, and this applies not only to questions of law but to questions of jurisdiction. *Clary v. Hoagland*, 6 Cal. 688.

67. Where the right to determine the extent and effect of restriction is either expressly, or by necessary implication, confided to the legislature, then the judiciary has no right to interfere with the legislative construction. But in all other cases of restriction it is the right and duty of the supreme court to decide the effect and extent of the restriction in the last resort, and the question whether that right is vested in the legislature or in the judiciary must be equally decided by the supreme court. *Nouques v. Douglass*, 7 Cal. 69.

\* The act of February 28th, 1850, repealed by the act of May 19th, 1853.

\* The amendment to the code of May 15th, 1854, conferred jurisdiction on the supreme court in appeals from the county courts.

68. It is the right and duty of the supreme court on habeas corpus to review the decisions of inferior courts in cases of contempts. *Ex parte Rowe*, 7 Cal. 182; *Ware v. Robinson*, 9 Cal. 111; overruling *Ex parte Cohen*, 5 Cal. 495.

69. The supreme court has the power under its rules to reinstate causes which had been dismissed at a previous term. *Haight v. Gay*, 8 Cal. 300.

70. The constitution of this State confers upon the supreme court appellate power in all cases where the amount in controversy exceeds two hundred dollars, and this appellate power, having been conferred by the constitution, cannot be taken away or impaired by act of the legislature. *Adams v. Woods*, 8 Cal. 314.

71. There are but two appellate tribunals under the constitution—the county and supreme courts—and neither of these courts has the right to take original jurisdiction of any case they can hear upon appeal. *People v. Fowler*, 9 Cal. 89.

72. The supreme court possesses appellate power in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost or municipal fine is drawn in question. *Conant v. Conant*, 10 Cal. 253.

73. The supreme court possesses appellate jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Ib.*

74. Unless it affirmatively appear in the record that a copy of the notice of appeal has been served on the adverse party or his attorney, the supreme court cannot take jurisdiction of the case. *Hildreth v. Guindon*, 10 Cal. 490.

75. The supreme court will not entertain jurisdiction in cases where the record fails to show that judgment and costs amount to over two hundred dollars. *Doyle v. Seawall*, 12 Cal. 280.

76. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court, on questions of fraud, made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

77. The supreme court has no jurisdiction of an action where the amount involved is less than two hundred dollars,

though the costs added thereto would increase it beyond two hundred dollars. *Dumpley v. Guindon*, 13 Cal. 30; overruling *Gordon v. Ross*, 2 Cal. 256.

78. The supreme court has no jurisdiction where the amount in dispute is less than two hundred dollars, though an offset be pleaded. *Simmons v. Brainard*, 14 Cal. 278.

79. Plaintiff obtained a preliminary injunction, restraining defendants from obstructing a road leading to plaintiff's mine. Upon the answer being filed, the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge thereupon made an order that upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived, and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction, pending the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: held, that the application must be denied, if this court had the power to grant it; that the remedy of plaintiffs under the reviving order is ample to protect them until the appeal can be heard, or the injunction be dissolved by some competent authority. *Eldridge v. Wright*, 15 Cal. 89.

80. The supreme court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 114.

81. The supreme court has no jurisdiction on appeal of a motion to offset in part a judgment for less than two hundred dollars, against another judgment of six hundred dollars. *Crandall v. Blen*, 15 Cal. 408.

82. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 16 Cal. 188.

83. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four

## Of the District Court.

dollars, treble damages, besides costs—the title not being involved—query, whether the supreme court has jurisdiction of an appeal from the county court? *Paul v. Silver*, 16 Cal. 76.

See SUPREME COURT.

### 5. Of the District Court.

84. The district courts have no jurisdiction beyond what has been conferred upon them by the statutes of the States. *Selby v. Bark Alice Tarlton*, 1 Cal. 104.

85. In adopting the common law, by the act organizing the district courts and by the act prescribing the practice therein, the legislature have defined the limits of the powers and jurisdiction of the district courts, and have nowhere conferred upon them the powers of a court of admiralty. *Ib.\**

86. The district courts have no power to examine into the propriety or validity of judgments of courts of the first instance transferred to the district courts, unless perhaps where a clear case of fraud should be made out. *Belt v. Davis*, 1 Cal. 141.

87. The supreme court may issue a writ of certiorari to a district court for the purpose of reviewing summary proceedings in a case where no appeal would lie. *People v. Turner*, 1 Cal. 156.

88. An attorney licensed to practice in the supreme court is, by the rules of the court, authorized by virtue thereof to practice in all the courts of the State; and a district court cannot expel him from that bar. *Ib.* 190.

89. The act of the legislature, by which a district judge is empowered to hold a district court in another district, is constitutional and valid; and a court held in pursuance of that act by a district judge in a district other than the one for which he has been elected, is not for that reason improperly organized. *People v. McCauley*, 1 Cal. 380.

90. The code confers admiralty jurisdiction upon the district courts pro tanto, and the proceedings in such actions must be governed by the principles and forms of admiralty courts, except when other-

wise controlled or directed by the act. *Averill v. Steamer Hartford*, 2 Cal. 309.

91. The jurisdiction of the district court is confirmed and defined by the constitution; and no statute can deprive it of its powers to take cognizance of any action wherein the amount in controversy exceeds the value of two hundred dollars. *Hicks v. Bell*, 3 Cal. 224.

92. Where the principal sum sued for is less than two hundred dollars, the district court has no jurisdiction. *Arnold v. Van Brunt*, 4 Cal. 89.

93. District courts cannot entertain jurisdiction of cases in a justice's court by certiorari, where the error complained of might be corrected on appeal to the county court. *Gray v. Schupp*, 4 Cal. 185.

94. In a suit brought by one of the partners in a mining company against the company, to recover his share which had been sold for an alleged nonpayment of an assessment, and also to recover the sum of \$2,027, his proportionate share of the gold taken out by said company, the district court had jurisdiction. *Schuepler v. Evans*, 4 Cal. 212.

95. The district courts have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the county court cannot take away the constitutional jurisdiction of the district court. *Fitzgerald v. Urton*, 4 Cal. 238.

96. District courts of this State have the same control over the persons of miners as well as their estates, that the courts of chancery in England have. This is conferred by the constitution and cannot be divested by any legislative enactment. *Wilson v. Roach*, 4 Cal. 366.

97. In the event of the disqualification of the sheriff and owner, a district court has the right to appoint an elizor, and even if such authority were not conferred by statute, by virtue of its original jurisdiction has the power to appoint a special officer to execute its process. *Wilson v. Roach*, 4 Cal. 367.

98. The legislature possessed an undoubted right to transfer the criminal business of the court of sessions to the district court. *People v. Gilmore*, 4 Cal. 380.

99. In an action for freight money, brought in the courts of this State, it is not a sufficient answer to set up that the vessel has been libeled for the nondelivery

\* This admiralty jurisdiction was conferred by the practice act of April 29th, 1851, title VI.



## Of the District Court.

of freight in the district court of the United States; both actions may proceed at the same time without the fear or danger of collision or clashing of jurisdiction. *Russell v. Alvarez*, 5 Cal. 48.

100. Actions in forcible entry and detainer are summary proceedings provided by statute, and do not belong to district courts by virtue of original, nor can they have appellate jurisdiction. *Townsend v. Brooks*, 5 Cal. 53.

101. Where an action has been commenced in a district court in good faith for a sum exceeding two hundred dollars, exclusive of interest, a judgment may be rendered for an amount less than that sum. *Jackson v. Whartenby*, 5 Cal. 95.

102. The district court is a court of general original jurisdiction; its process is co-extensive with the States. Causes may be removed from one district court to another, in the manner provided by statute, before answer. *Reyes v. Sanford*, 5 Cal. 117.

103. Proceedings in insolvency are not stricti juris either proceedings in law or equity, but a new remedy or proceeding created by statute, the administration of which is vested in the district court, independent of their common law or chancery powers as courts of general jurisdiction. *Cohen v. Barrett*, 5 Cal. 210.

104. District courts cannot take cognizance of any case where the sum involved does not exceed two hundred dollars. *Zander v. Coe*, 5 Cal. 232.

105. District courts by the constitution are clothed with original jurisdiction in law and equity, where the amount in controversy exceeds two hundred dollars, exclusive of interest. *Zander v. Coe*, 5 Cal. 232; *Sandford v. Head*, 5 Cal. 298.

106. District courts of this State are courts of original and common law jurisdiction and are courts of record, and have power to naturalize aliens according to the laws of congress, and are the only State courts which have that power. *Ex parte Knowles*, 5 Cal. 306.

107. In an action for service and a division of the property acquired during coverture, the jurisdiction of the district court is not limited as to the amount. *Deuprez v. Deuprez*, 5 Cal. 388.

108. District courts have jurisdiction to punish for contempts of their process, and to issue such writs as are necessary to the

exercise of their jurisdiction. *Ex parte Cohen*, 5 Cal. 495.

109. The legislature, in conferring jurisdiction in insolvency on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

110. The grant of authority to the county judge to award injunctions in cases brought in the district courts, is a mere power to issue mesne process, auxiliary to the proper jurisdiction of the district court, and is not trenching upon it. *Thompson v. Williams*, 6 Cal. 89; *Crandall v. Woods*, 6 Cal. 451.

111. A district court may issue a writ of certiorari to a county judge to review the proceedings of his court. *Chard v. Harrison*, 7 Cal. 116.

112. As soon as proceedings supplementary to execution were instituted before the district court, that court obtained jurisdiction over the case, and had authority to proceed and apply the property of the judgment debtors to the satisfaction of the judgment upon which proceedings were had. *Adams v. Hackett*, 7 Cal. 202.

113. In an application for a mandamus to compel a district judge to sign a bill of exceptions which the relator alleges he refuses to do, and the judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: held, that the vendor is not entitled to a jury to try the issue of the verity of the bill. *People v. Judge of the Tenth District Court*, 9 Cal. 20.

114. A writ of certiorari will lie in the district court to review the action of the board of supervisors, otherwise their action would be beyond control. *People v. El Dorado County*, 8 Cal. 61; overruling *People v. Hester*, 6 Cal. 680.

115. Where suit was brought in the district court on an undertaking on appeal to the supreme court, given in the sum of three hundred dollars conditioned to pay all damages and costs, not exceeding the three hundred dollars which may be awarded by the supreme court, and the damages and costs so awarded were only thirty dollars and fifteen cents: held, that the district court had no jurisdiction. *Page v. Ellis*, 9 Cal. 250.

116. The jurisdiction of the fourth and twelfth judicial district courts within the

Of the District Court.—Not Appellate.—In Probate matters.

limits of the city of San Francisco is equally extensive, and proceedings may be commenced in either court, at the option of the suitor. *Slade v. His Creditors*, 10 Cal. 485.

117. District courts are courts of general jurisdiction in all matters given them by law, wherever those matters may be locally situated or wherever the parties may reside; but for convenience, parties have a right to a trial of particular cases in particular counties. *Watts v. White*, 13 Cal. 324.

118. The jurisdiction of a district court to enjoin a sale of real estate is coextensive with its jurisdiction to set aside and order to be canceled a deed of such property. *Pixley v. Huggins*, 15 Cal. 132.

#### a. Not Appellate.

119. The act of March 18th, 1850, grants an appeal to the district court from the court of sessions in the matter of license to establish a ferry, but does not provide for an appeal from the judgment of the district court; no appeal can then be taken, and unless the party can bring himself within the constitutional provisions of appeals, the judgment of the district court is final and conclusive.\* *Webb v. Hanson*, 3 Cal. 68; 105.

120. The district court has no appellate jurisdiction under our constitution. *People v. Peralta*, 3 Cal. 379; *Caulfield v. Hudson*, 3 Cal. 389; *Hernandez v. Simon*, 3 Cal. 464; *Gray v. Schupp*, 4 Cal. 185; *Reed v. McCormick*, 4 Cal. 342; *Townsend v. Brooks*, 5 Cal. 52; *Zander v. Coe*, 5 Cal. 230; *People v. Fowler*, 9 Cal. 86.

121. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court, is unconstitutional and void. As the power to try de novo issues which have been tried and decided necessarily includes the power to reverse or modify such decisions, the effect of the act would be to confer appellate jurisdiction, which the district court cannot exercise. *Deck's Estate v. Gherke*, 6 Cal. 669.

\* The appellate jurisdiction of the district court was afterwards passed upon, and held to be unconstitutional.

#### b. In Probate matters.

122. District courts of this State have the same control over the persons of minors as well as their estates that the courts of chancery in England possess. *Wilson v. Roach*, 4 Cal. 366; *Belloc v. Rogers*, 9 Cal. 129.

123. The issues of fact joined in the probate court, and which are sent to the district court for trial, are of that class upon which the probate judge is unwilling to pass his judgment, or where from great conflict of evidence a reasonable doubt must exist in his mind as to which side has the right. *Keller v. Franklin*, 5 Cal. 433.

124. District courts have unlimited jurisdiction over issues of fact sent to be tried out of the probate court. *Ib.* 434.

125. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court is unconstitutional and void. *Deck's Estate v. Gherke*, 6 Cal. 669.

126. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding, and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim is presented to the administrator and probate court, it is otherwise. *Belloc v. Rogers*, 9 Cal. 129.

127. An action to foreclose a mortgage, given for the purchase money of a homestead by a deceased person, is not a claim in the sense of the statute against the estate of the deceased. Suit can be brought thereupon in the district court, and the administrator is a proper party for the purpose of liquidating the amount of the indebtedness. *Carr v. Caldwell*, 10 Cal. 385.

128. There is no relation of inferiority in the constitution or powers of the probate court, as respects the district court. They are unlike, but within their respective spheres not unequal. They are both constitutional courts. No appeal lies from one to the other. *Pond v. Pond*, 10 Cal. 500.

129. Issues of fact are sent from the probate court to the district court, not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. *Ib.*

## Over Proceedings in other District Courts.—Over Judgments.—County Court.

130. The district court, by virtue of its common law powers alone, derives its powers to try issues of fact, and that court, as a court of law, has no jurisdiction over probate matters. *Ib.* 501.

131. The nonpresentation of a claim against the estate of a deceased person to the administrator will not deprive the district court of jurisdiction over the estate. *Hentsch v. Porter*, 10 Cal. 560.

132. Under former decisions of this court, district courts, as courts of chancery, have assumed jurisdiction over probate matters, and as probably rights have vested under their decrees, and the principle asserted is more convenient in practice, it is not permissible now to question the jurisdiction. *Deck's Estate v. Gerke*, 12 Cal. 436.

133. The district court may take jurisdiction of the settlement of an estate, when there are peculiar circumstances of embarrassment to its administration, and when the assuming jurisdiction would prevent waste, delay and expense, and thus conclude by one action and decree a protracted and vexatious legislation. *Ib.* 437.

## c. Over Proceedings in other District Courts.

134. The several district courts of the State have all the same jurisdiction and stand on the same level, and one cannot attempt by the writ of mandamus to supervise, direct or restrain the action of another, and this power must exist in the supreme court, for without it the judiciary system would be irremediably imperfect. *People v. Turner*, 1 Cal. 149.

135. One district court has no authority to enjoin the proceedings of another district court. *Anthony v. Dunlap*, 8 Cal. 27; *Rickett v. Johnson*, 8 Cal. 35; *Revalk v. Kraemer*, 8 Cal. 71; *Chipman v. Hibbard*, 8 Cal. 271; *Gorham v. Toomy*, 9 Cal. 77.

136. A district court cannot enjoin the proceedings of a federal court. *Phelan v. Smith*, 8 Cal. 521.

137. The exception to the general rule, that one district court cannot restrain the proceedings of another district court, is where the court in which the action or proceeding should be had is unable, by

reason of its jurisdiction, to afford the relief sought; as where several fraudulent judgments are confessed in several courts, it would not be necessary for the creditor to bring a different suit in each different court. *Uhlfelder v. Levy*, 9 Cal. 614.

## b. Over Judgments.

138. A judgment rendered by a district court after the time appointed for the adjournment of the term is invalid, and will be set aside. *Smith v. Chichester*, 1 Cal. 409; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

139. After the adjournment of the term, no power remains in the district court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kraemer*, 2 Cal. 583; *Morrison v. Dopman*, 3 Cal. 357; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

See JUDGMENT.

## 6. County Court.

140. The district courts have constitutional jurisdiction in cases of nuisance. The grant of such to the county court by statute cannot take away the constitutional jurisdiction of the district court. *Fitzgerald v. Urton*, 4 Cal. 238.

141. An act conferring jurisdiction on the county courts in actions for which courts of general jurisdiction have always supplied a remedy as "special cases," is unconstitutional and void. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

142. Causes may be transferred from one county court to another, according to statute. *Reyes v. Sanford*, 5 Cal. 117.

143. The cognizance of cases in which the amount does not exceed \$200, is the only one which is not fixed and determined by the constitution, but is left to the legislature to be vested in the county court as special cases, or in the justices' courts. *Zander v. Coe*, 5 Cal. 232.

144. A county court has no jurisdiction

## County Court.—Appellate.

to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars. *Brock v. Bruce*, 5 Cal. 280.

145. The power of the county court to treble damages by way of penalty in actions of forcible entry results, by necessary implication, from its power to try de novo. *O'Callaghan v. Booth*, 6 Cal. 66.

146. The ninth section of article six of the constitution cannot be construed to confer exclusive original jurisdiction in all special cases upon the county courts. *Ib.* 67.

147. The legislature, in conferring jurisdiction in insolvency cases on both the district and the county courts, acted in the exercise of a legitimate power, and these courts have concurrent jurisdiction. *Harper v. Freelon*, 6 Cal. 76.

148. The act of March 27th, 1850, conferring upon the county court the power of incorporating towns, is unconstitutional. *People v. Town of Nevada*, 6 Cal. 144.

149. Where parties stipulate to arbitrate, and that the award be entered as a judgment of the county court: held, that it was void in toto, if it exceeded two hundred dollars, as the court had no jurisdiction. *Williams v. Walton*, 9 Cal. 145.

150. The act giving jurisdiction over the subject of contested elections to the county court is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 150.

151. County courts, under the statute, have jurisdiction in proceeding by mandamus, and the statute is constitutional. *People v. Day*, 15 Cal. 92.

152. Aside from previous decisions of this court, the true construction of our constitution is, that the legislature has power to confer on county courts jurisdiction in such specially enumerated and defined cases as in its discretion should be confided to those tribunals. *Ib.*

153. Where a special term of the county court was held on the first day of May, upon notice to that effect given on the twenty-fourth of April preceding, the proceedings of the court were irregular, if not void; the statute (Wood's Dig. 381) requiring a notice of not less than ten nor more than twenty days. *People v. Riley*, 16 Cal. 187.

## a. Appellate.

154. The county court tries causes on appeal de novo, as prescribed by the statute; still such a trial is an exercise of appellate, and not of original jurisdiction. *Townsend v. Brooks*, 5 Cal. 53.

155. An appeal to the county court is to be tried de novo, and the court should hear the merits of the case, and not dismiss the action because the parties defendants had not notice of trial in the justice's court. *Coyle v. Baldwin*, 5 Cal. 75.

156. The question of jurisdiction of the county court of a case on appeal by reason of there being no appeal bond, cannot be raised in the supreme court for the first time. *Howard v. Harman*, 5 Cal. 78.

157. If the county court has no jurisdiction in cases on appeal, where an appeal bond is not given, as required by the statute, the objection should be made in the court below, and not on appeal from the county court. *Taylor v. Randall*, 5 Cal. 79.

158. On appeal from a justice's court to the county court, on questions of law alone, if a new trial be ordered, it should take place in the county court. *People v. Freelon*, 8 Cal. 517.

159. The county court has the sole appellate jurisdiction in all cases, civil and criminal, arising in justices' courts, subject to such restriction as the legislature may impose, by making the decisions of the justices final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 86.

160. A defendant, who has been properly served with process issued out of a justice's court, who allows judgment to be taken against him, by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts—there being no issue of fact. *People v. County Court of El Dorado County*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328.

161. Where the defendant appeals, on questions of law and fact, to the county court, and has admitted all the facts by the default, he is not entitled to a trial de novo upon the facts, nor upon the law, unless there is a statement filed in conformity with the statute. *People v. County Court of El Dorado County*, 10 Cal. 20.

162. In all cases of appeal, the issue of fact must be made in the court of original



## Appellate of the County Court.—Court of Sessions.—Probate Court.

jurisdiction. The county court can only retry the issue tried in the court below. This is what is meant by a trial anew in the county court, under the code. *Ib.*

163. The failure of a justice of the peace to state in his docket that the summons was returned "served," will not vitiate the judgment on appeal. *Denmark v. Liening*, 10 Cal. 94.

164. A refusal by the county court, on appeal from a justice's, to permit an amendment of a complaint, is a matter of discretion with which the supreme court will not interfere, there being no affidavit of the materiality or importance of the amendment. *Canfield v. Bates*, 13 Cal. 608.

165. On appeal from a justice's court, in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 92.

See COUNTY COURT.

### 7. Court of Sessions.

166. The constitution limits the jurisdiction of the court of sessions to criminal business, and negatives any other jurisdiction. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 22; *Phelan v. Supervisors of San Francisco County*, 6 Cal. 540.

167. The court of sessions has no appellate jurisdiction in either civil or criminal cases. Their jurisdiction is original, not appellate. In all cases where an appeal lies from a justice's court, it must be taken to the county court. *People v. Fowler*, 9 Cal. 87.

168. Courts of sessions have jurisdiction of fighting a duel with fatal result. *People v. Bartlett*, 14 Cal. 653.

See COURT OF SESSIONS.

### 8. Probate Court.

169. The claim of exclusive jurisdiction in courts of probate over the subject matter of persons of minors as well as their estates, is unfounded. *Wilson v. Roach*, 4 Cal. 366.

170. The probate court has jurisdiction to try and determine issues of fact arising in proceedings before it, and those issues

which are sent to the district court for trial are of that class upon which the probate judge is unwilling to pass his judgment, or where from great conflict of evidence a reasonable doubt must exist in his mind as to which side has the right. *Keller v. Franklin*, 5 Cal. 433.

171. Over issues of fact joined in the probate court, the jurisdiction of the district court shall be unlimited; but this cannot be said to deprive the probate court of its jurisdiction. *Ib.* 434.

172. A probate judge has no jurisdiction to order an administrator who resigned to pay the money in his hands into court. *Wilson v. Hernandez*, 5 Cal. 443.

173. In pleading a judgment of a probate court, it being a court of limited and inferior jurisdiction, it is necessary to set forth the facts which gave jurisdiction. *Smith v. Andrews*, 6 Cal. 654.

174. The jurisdiction of the probate court over testamentary and probate matters is not exclusive. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction. *Deck's Estate v. Gerke*, 12 Cal. 436.

175. Citation to heirs, to show cause against probate of will not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila v. Padilla*, 14 Cal. 106.

176. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate, and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: held, that on these facts, the court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that manda-

## Superior Court.—Justices' Court.—Recorder's Court.

mus will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 Cal. 221.

See PROBATE COURT.

### 9. Superior Court.

177. The act of the legislature, giving the power to the late superior court of the city of San Francisco to send its process beyond its territorial limits, was constitutional. *Hickman v. O'Neal*, 10 Cal. 295; overruling *Meyer v. Kalkman*, 6 Cal. 589.

178. The superior court had no jurisdiction of a suit affecting real estate situated outside the city limits. *Watts v. White*, 13 Cal. 323.

See SUPERIOR COURT.

### 10. Justices' Courts.

179. If a justice issues an attachment and takes bond in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action lies on the bond. *Ben-edict v. Bray*, 2 Cal. 255.

180. Although the jurisdiction of mining claims is given to justices' courts, yet if the amount in controversy is above two hundred dollars, the district court has jurisdiction; no statute can deprive the latter court of the jurisdiction confirmed and defined by the constitution. *Hicks v. Bell*, 3 Cal. 224.

181. A party who sues out a writ of replevin from a justice's court having no jurisdiction, and obtains the property, cannot, in an action on the bond, set up as a defense the want of jurisdiction of the justice. *McDermott v. Isbell*, 4 Cal. 114.

182. A party who avails himself of the process of an inferior court cannot escape the responsibility of his own act, upon the ground that such tribunal has no jurisdiction over the subject matter in controversy. *Ib.*

183. A cause having been transferred from the recorder's court to a justice's, the latter of which had jurisdiction, and the defendant having appeared before a justice and consented to the time fixed for trial, is a waiver of his right to be brought in by the summons and complaint. *Cronise v. Carghill*, 4 Cal. 122.

184. The law vesting magistrates with jurisdiction where the sum in controversy amounts to more than two hundred dollars, is unconstitutional and void. *Zander v. Coe*, 5 Cal. 234; *Small v. Gwinn*, 6 Cal. 449.

185. Where a justice renders a judgment exceeding his jurisdiction, the county court, on appeal, should dismiss the whole case. *Ford v. Smith*, 5 Cal. 331.

186. Justices of the peace have jurisdiction of an action to determine the right to mining claims, but not where there is a conflict as to the right to the use of water. *Hill v. Newman*, 5 Cal. 446.

187. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention. *Van Etten v. Jilson*, 6 Cal. 19; *Small v. Gwinn*, 6 Cal. 449; *Freeman v. Powers*, 7 Cal. 105.

188. Justices' courts have jurisdiction in cases of forcible entry. *O'Callahan v. Booth*, 6 Cal. 67; *Hart v. Moon*, 6 Cal. 162.

189. A justice of the peace has jurisdiction to grant appeals, and to stay proceedings thereupon. *Coulter v. Stark*, 7 Cal. 245.

190. The act conferring criminal jurisdiction in justices' courts is constitutional. *People v. Fowler*, 9 Cal. 88.

191. The law presumes nothing in favor of the jurisdiction of justices' courts; and a party who asserts a right under the judgment of a justice, must affirmatively show every fact necessary to show such jurisdiction. *Swain v. Chase*, 12 Cal. 285.

192. The record of the proceedings in a justice's court in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice and void; and the failure of defendant after summons served to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Lowe v. Alexander*, 15 Cal. 301; *Fagg v. Clements*, 16 Cal. 392.

See JUSTICE'S COURT.

### 11. Recorder's Court.

193. The recorder of the city of San Francisco has the right to award the pun-

## Juror.

ishment for the crime of assault and battery affixed by the statute of crimes and punishments of April 18th, 1850. *People v. Ah King*, 4 Cal. 307.

## JUROR.

1. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was made until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was biased in favor of the plaintiff. *Lawrence v. Collier*, 1 Cal. 38.

2. A juror is competent, though he may have formed and expressed an opinion from reports, yet who thought he could sit on a jury without bias if evidence would change his opinion, and that he would be governed by the evidence adduced. *People v. McCauley*, 1 Cal. 384.

3. A new trial should not be granted on the affidavit of a jurymen, made after the verdict and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial. *People v. Baker*, 1 Cal. 405.

4. It is a well settled rule, founded upon considerations of necessary policy, that the testimony of a jurymen cannot be received to defeat his own verdict. *Ib.*

5. On the trial of an indictment for grand larceny, punishable with imprisonment or death, at the discretion of the jury, a juror was asked by the prosecuting attorney, whether he had any conscientious scruples against the infliction of capital punishment, to which he answered that he would hang a man for murder, but would not for stealing: held, that the juror was not competent. *People v. Tanner*, 2 Cal. 258.

6. To render a person competent to act as a juror, he must be an elector for the county in which he is returned, and have resided in the county thirty days. *Sampson v. Shaeffer*, 3 Cal. 107.

7. A juror cannot be allowed to impeach his own verdict, or account for his

own or his fellow juror's misconduct. *Amsby v. Dickhouse*, 4 Cal. 103.

8. Residence depends upon intention as well as fact, and inhabitancy for a short period only, against the intention of acquiring a domicile, would not make a resident competent to be a juror. *People v. Peralta*, 4 Cal. 175.

9. The prisoner who has not exhausted his peremptory challenges has the right to challenge peremptorily one of his jurors, after the twelve are accepted, but before they are sworn. *People v. Kohle*, 4 Cal. 199.

10. For the purpose of asserting the innocence or maintaining the defense of the prisoner, there is no system under which it is absolutely necessary that the right of challenge should be exercised at any precise point of time before the jurors are sworn. *Ib.*

11. No regular panel having been drawn and summoned, the court ordered thirty-six jurors to be summoned, which was done, and twenty-seven of them appearing, the court caused their names to be placed in a box, from which twelve were drawn to constitute a trial panel: held, not to be ground for challenge to the whole panel. *People v. Stuart*, 4 Cal. 225.

12. Under any circumstances, the withdrawal of a juror, and the continuance of a case thereby, is no ground for reversing a judgment subsequently obtained. *Benedict v. Cozzens*, 4 Cal. 382.

13. The affidavit of jurors will not be taken to contradict a verdict as shown in the record. *Castro v. Gill*, 5 Cal. 42; *Wilson v. Berryman*, 5 Cal. 46; *People v. Backus*, 5 Cal. 276.

14. Where jurors agree each one to mark down the sum he thinks proper to find as damages, and then to divide the total amount of those sums by the number of persons composing the jury, which result should be their verdict, such conduct is irregular. *Wilson v. Berryman*, 5 Cal. 45.

15. Jurors will be permitted to substantiate their own verdicts by affidavit, and check any collusion or corruption on the part of the officer having them in charge.\* *Wilson v. Berryman*, 5 Cal. 46; contra, *People v. Backus*, 5 Cal. 276.

\*The above conflicting decisions are both by C. J. Murray; but the former case is an obiter dictum, while in the latter case it received the attention of counsel and the bench, and the later opinion may be relied on as the law.

## Juror.

16. A prisoner has the right to examine jurors by propounding any interrogatory to the jurors, without first challenging them for cause. *People v. Backus*, 5 Cal. 277.

17. The law contemplates that every juror who sits in a cause shall have a mind free from all bias or prejudice of any kind, and if a juror is prejudiced in any manner, he is not a proper person to sit in the jury box; and the prisoner may ask if he belongs to any association or order which would create a prejudice against the prisoner. *People v. Reyes*, 5 Cal. 346.

18. Where a juror is challenged for actual bias, the triers are to determine the fact from the testimony, and any testimony which would lead to the conclusion that a bias existed in the juror's mind, is competent testimony. *Ib.* 349.

19. In criminal cases, it is a good ground of challenge of a juror, that he has expressed an opinion as to the guilt or innocence of the prisoner upon what he had heard at the time he expressed the opinion, and that at the time he so expressed it, he expressed no qualification. *People v. Cottle*, 6 Cal. 228.

20. The remark of a juror during a recess of the trial that there was no use of taking up time in trying to humbug the jury, and that the lawyer who made the shortest speech would win the case, was not such misconduct as will vitiate the verdict. *Taylor v. California Stage Co.*, 6 Cal. 230.

21. In a capital case, where a juror on his examination on voir dire by defendant stated that he had formed and expressed an unqualified opinion, the defendant should have challenged him for cause; and when he did not, and the juror stated on examination by the prosecution that he had formed his opinion from reading newspapers: held, that the defendant could not question him further, but must challenge peremptorily. *People v. Stoncifer*, 6 Cal. 409.

22. A citizen of the State who has resided in the county fourteen days, and then been absent some months from the State, with the intention of returning to reside in the county, and has returned and resided some fourteen days in the county, is a competent juror, his residence dating from the first residence, and not from his return. *Ib.* 410.

23. A party who accepts a juror, knowing him to be disqualified, is estopped from afterwards availing himself of such disqualification. *Ib.* 411.

24. Affidavits to the incompetency of a juror must be embodied in a bill of exceptions or they will not be examined by the appellate court. *Ib.*

25. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that opinion when expressed was without qualification: held, that he was properly challenged by the prisoner, and should have been rejected. *People v. Williams*, 6 Cal. 207.

26. It is no argument in favor of the ruling of the court overruling the challenge, that the juror did not state whether his opinion was for or against the prisoner. The courts would not permit a juror to be questioned on that fact. *Ib.*

27. Where a juror in a capital case was asked if he entertained such conscientious opinions as would preclude him from finding the defendant guilty, when the offense charged was punishable with death, to which he answered that he was opposed to capital punishment on principle: held, that it was error to challenge for cause by the prosecution on such answer. *People v. Stewart*, 7 Cal. 143.

28. A challenge for cause is warranted where the juror on his voir dire states that it would require proof to change the opinion then existing in his mind. *People v. Gehr*, 8 Cal. 361.

29. The fact that a juror says that he could try a cause impartially, will not make him competent. The life or liberty of a citizen is not to be committed to the decision of those whose prejudices and pride of opinion are enlisted against him. *Ib.*

30. The declaration of a juror before trial, that "the people ought to take the prisoner out of jail and hang him," renders him incompetent to try the case; and where the verdict of guilty has been found by such juror, the court should grant a new trial. *People v. Plummer*, 9 Cal. 313.

31. The objection to the qualification of a juror, that his name was not on the venire returned by the sheriff, comes too late after verdict. It should have been urged on the trial. *Thrall v. Smiley*, 9 Cal. 537.



## Juror.

32. On a trial for murder, eleven jurors were examined, passed upon by both the State and the defense, and sworn. These jurors were sworn to try the case without objection of counsel for defendant. The twelfth juror was accepted by the parties. The counsel for the defendant, before the last juror was sworn, offered to interpose a peremptory challenge to one of the eleven sworn, without naming him or stating any fact which had come to their knowledge since he was sworn: held, that the offer to challenge was properly refused, as no good cause was shown. *People v. Rodriguez*, 10 Cal. 59.

33. In an action of ejectment, a juror who has formed an opinion adverse to the validity of the title under which defendants claimed, is an incompetent juror. *White v. Moses*, 11 Cal. 69.

34. A general challenge of a juror for cause, without specification of the particular grounds, is insufficient. *Paige v. O'Neal*, 12 Cal. 492.

35. That a juror has just tried a case involving the liability of defendant for a similar cause of action, depending on the same general considerations, does not render him incompetent to sit in the subsequent cause. *Algier v. Steamer Maria*, 14 Cal. 169.

36. A verdict in a criminal case cannot be impeached by an affidavit of one of the jurors, tending to show that it was not a fair expression of the opinion of the jury. *People v. Wyman*, 15 Cal. 75.

37. Challenges to the panel of the grand jury or to individual jurors must be made at the impaneling of the jury; and on indictment for murder transferred to the district court, the challenge cannot there be made. *People v. Moice*, 15 Cal. 331.

38. A challenge for implied bias, in criminal cases, must specify the particular cause of bias. It is not enough to say, "I challenge the juror for implied bias." *People v. Reynolds*, 130.

39. It is proper to examine a juror on his voir dire, generally, as to his qualifications, with the view to obtain information upon which to rest a specific challenge. Immediately after such preliminary examination is closed, the challenge should be made, distinctly stating the causes. The district attorney can then except to the challenge, or deny the facts it alleges; that is, he can demur to its sufficiency, or join

issue on the truth of its averment. If the latter course be adopted, the jurors can be further examined, other witnesses be called, and the matter then submitted to the court. *Ib.* 131.

40. The allowance of a peremptory challenge, in criminal cases, after the juror has been accepted and sworn, is not a matter of right, but may be permitted for good cause. *Ib.*

41. That a juror was formerly connected with the police department of San Francisco, and had, generally, an unfavorable opinion of persons accused of crime, is no disqualification. *Ib.*

42. In criminal cases, jurors may be sworn in chief, as they are accepted, or the administration of the oath may be delayed until the panel is completed. In either case, the defendant must exercise his right of peremptory challenge before the juror is sworn. *Ib.*

43. In criminal cases, the test, under our statute, of the exclusion of a juror for implied bias, is, that he has formed or expressed an unqualified opinion or belief in the guilt or innocence of the accused. To exclude the juror, he must have a settled conviction of the guilt or innocence of the accused, or must have expressed such conviction. *Ib.* 132.

44. The terms "unqualified opinion or belief" were used to define the nature of the opinion or belief formed or expressed; to distinguish between a mere hypothetical opinion, or a mere casual impression, and a decided or fixed opinion. *Ib.*

45. That a juror has read or heard a statement of the facts of a case, does not, of itself, disqualify him, under the statute; for he may not have formed or expressed an "unqualified opinion." A mere impression or suspicion derived from such reading or hearing does not disqualify. The juror must have reached a conclusion like that upon which he would be willing to act in ordinary matters. *Ib.*

46. The "unqualified opinion" intended by the statute, usually involves a belief in the facts, as well as a conclusion from them; and although a juror may, from reading or hearing a statement of the facts, draw an inference from it which amounts to an opinion, still, if this inference or opinion be conditional or qualified—for example, if it depend upon the facts turning out as stated in the account read

## Juror.—Jury.

or heard—the juror is not, as a matter of law, disqualified on an exception for implied bias. *Ib.* 133.

47. In such case, the juror might, under some circumstances, be excluded for actual bias; for instance, where a case depended upon circumstances not in themselves conclusive, if a juror had an opinion which gave conclusive force to one or more of such circumstances, it might show that actual bias which would preclude him from fairly trying the issue. *Ib.*

48. On exception for actual bias, the triers have the right to reject a juror on a certain state of facts, if they think he will not act with entire impartiality, even though he be not disqualified, as a conclusion of law, from such facts. They have an enlarged, though not an arbitrary discretion in the matter. They should examine the juror fully, and are governed by no inflexible rules. They must judge by what they can discover of the qualities, state of mind, motives and relations of the particular juror, and from their judgment there is no appeal. *Ib.* 134.

49. The statute makes the expression of an unqualified opinion, in law, bias, which cause, of itself, excludes the juror; but the expression of a less decided opinion, though it does not, as a matter of law, exclude him, may be sufficient in itself, or in connection with other proof, to exclude him, if, in the judgment of the triers, from what they can discover of the character of the juror, this expression or these other circumstances would render him not entirely impartial. *Ib.*

See CHALLENGE, GRAND JURY, INSTRUCTIONS, JURY, VERDICT.

## JURY.

1. From the exercise of the remedies which the writ of quo warranto affords, a jury is to be impaneled to try the various issues of facts, which, from the nature of the investigation, would be of a wide range and of the most exciting character. *Ex parte the Attorney General*, 1 Cal. 87.

2. The legislature has not provided the supreme court with a jury in any case, nor

authorized it to cause an issue of facts to be made up in this court and referred to another court for trial. All issues of facts are to be tried in an inferior court of this State. *Ib.*

3. Where the boundaries of a lot of land granted by an alcalde are uncertain, the jury should determine the true location of the lot in question. *Reynolds v. West*, 1 Cal. 328.

4. Where an action is brought for the balance of an account, and the answer avers payment by a promissory note, and the plaintiff replies that he was induced to receive the note by fraud, the court held that it was one of the cases where the party was entitled to a trial by jury, and it could only be referred by consent of the parties. *Seaman v. Mariani*, 1 Cal. 336.

5. Evidence showing that the plaintiff was a good bookkeeper was proper to be submitted to the jury, to enable them to form an estimate of the damages which the plaintiff had probably sustained; and they should consider the probabilities of his procuring a situation and retaining it. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

6. Whether driving piles into a street extended into the bay in the city of San Francisco is an obstruction to the free use of the street by the public, is a question of fact for the jury to pass upon, and if not so submitted, a new trial will be granted. *City of San Francisco v. Clark*, 1 Cal. 386.

7. Damages caused by the depreciation of real estate under an attachment, and the injury caused to the credit and the reputation of the defendant by reason of the attachment, are too remote to submit to the consideration of a jury in an action on the undertaking. *Heath v. Lent*, 1 Cal. 412.

8. The fact whether a structure was a public nuisance, is a question not for the court but for the jury to decide. *Gunter v. Geary*, 1 Cal. 467.

9. The whole charge to the jury should be taken together, and when considered in this way, if it appear that the jury could not have been misled by it, a new trial will not be granted. *Carrington v. Pacific Mail S. S. Co.*, 1 Cal. 478.

10. Whether such a custom existed or not, when a custom is about being proven, is a question for the jury to decide. *Panaud v. Jones*, 1 Cal. 500.

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11. The court should refuse to instruct the jury on abstract questions of law, not applicable to the evidence. *Fowler v. Smith*, 2 Cal. 45.

12. The right of trial by jury cannot be waived by implication. *Smith v. Pollock*, 2 Cal. 94.

13. It is the duty of the court to decide upon the admissibility of a witness objected to for interest, and it is error to refer the question to a jury upon the evidence, with instructions to disregard the testimony if they believe the witness interested. *Tabor v. Staniels*, 2 Cal. 240.

14. The right of trial by jury may be waived in the mode prescribed by law. *Russell v. Elliott*, 2 Cal. 246.

15. An order of reference to ascertain the amount of damages for the wrongful suing out of an injunction is no violation of the right to a trial by jury. *Ib.*

16. The question of notice of the dissolution of a partnership is a fact for the jury, under the charge of the court. *Rabe v. Wells*, 3 Cal. 151; *Treadwell v. Wells*, 4 Cal. 263.

17. The trial by jury does not necessarily attach to equity cases. *Smith v. Rowe*, 4 Cal. 7.

18. In an action of trespass, the question of damages is a question particularly for the jury. *Drake v. Palmer*, 4 Cal. 11.

19. The fact of the dedication of the premises by possession as a homestead was properly submitted to the jury. *Cook v. McChristian*, 4 Cal. 26.

20. The question of the possession and identity of the land should be left to the jury. *Hicks v. Davis*, 4 Cal. 69.

21. The mere act of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of a jury trial under the code. *Zane v. Crowe*, 4 Cal. 112.

22. Where the evidence and the reasonable presumption tend to establish the fact in controversy, a nonsuit is improper, and the case should be given to the jury. *De Ro v. Cordes*, 4 Cal. 119.

23. It is not the province of the court, where a jury tries the case, to pronounce upon the facts in its finding. *Bessie v. Earle*, 4 Cal. 200.

24. Where the contract declared on is joint, and there is no evidence showing that one of the parties sued was party to the contract, his receipt of money on ac-

count of the work done is not enough to fix his liability. This is a mere circumstance to be left to the jury on the question of his being a party to a contract. *Kritzner v. Warner*, 4 Cal. 232.

25. The time provided by statute in which a jury shall be returned by the sheriff is directory and not mandatory. *Mowry v. Starbuck*, 4 Cal. 275.

26. The legislature alone can determine in what cases the right to trial by jury may be waived. *Exline v. Smith*, 5 Cal. 113.

27. After a jury have once retired, it is error to allow them to come into court and receive instructions in the absence of the parties or their counsel. *Redman v. Gulnac*, 5 Cal. 148.

28. In chancery proceedings, parties are not entitled to a trial by jury, because it would be utterly fruitless. *Walker v. Sedgwick*, 5 Cal. 192; *Cahoon v. Levy*, 5 Cal. 294.

29. In chancery, certain issues of fact are submitted to, and are determined by a jury, the granting of a new trial is entirely discretionary with the chancellor and his action is not revisable. *Gray v. Eaton*, 5 Cal. 448.

30. What is actual and what is constructive possession in many cases must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 65.

31. Where there is no dispute as to the facts, and the law upon those facts declares a transaction fraudulent, it is not a question for the jury. *Chenery v. Palmer*, 6 Cal. 122.

32. In an action for malicious prosecution of a suit on a bill of exchange which was paid, whether the plaintiffs in that suit knew that the bill was in fact paid or not when they sued, is a question for the jury. *Weaver v. Page*, 6 Cal. 684.

33. In such cases there is no fixed rule as to the amount of damages, the jury are not confined to the actual pecuniary loss, but may take into consideration the character and position of the parties, and all the circumstances of the case. *Ib.* 685.

34. In a chancery case, where the jury are summoned to find certain issues of fact which, when found, are not obligatory, but simply obtained for the purpose of informing the conscience of the chancellor, it seems that it is no error to refuse to instruct the jury as to what would be the law on a given state of facts. In such a case the jury finds the fact, and if the

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court adopt the finding, it applies the law. *Dominguez v. Dominguez*, 7 Cal. 426.

35. The question of malice in an action for malicious prosecution is one solely for a jury, and the charge must be shown to have been willfully false. *Potter v. Seale*, 8 Cal. 220.

36. Where several defendants are tried together, they are not allowed to sever their challenges, but all must join therein. This applies as well to peremptory as to challenges for cause. *People v. McCalla*, 8 Cal. 303.

37. The 117th section of the civil code concerning the return of property replevied, to the defendant only applies where the issues of the case have been submitted to and passed upon by the jury, and not to a case of judgment and nonsuit. *Ginaca v. Atwood*, 8 Cal. 448.

38. Special issues framed by the court according to chancery practice may be tried by a jury in equity cases, but if the failure to present the issues is the result of plaintiff's own motion, he cannot be allowed to take advantage of it. *Brewster v. Bours*, 8 Cal. 505.

39. A court does not require the verdict of a jury to inform it of facts recurring in the presence of the court itself. *People v. Judge of the Tenth Judicial District*, 9 Cal. 21.

40. In an application for a mandamus to compel a district judge to sign a bill of exceptions which the relator alleges he refuses to do, and where the district judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: held, that the relator is not entitled to a jury to try the issue. *Id.*

41. What facts and circumstances constitute evidence of carelessness is a question of law for the court to determine. But what particular weight the jury should give to these facts and circumstances is a matter for the jury. *Gerke v. California Steam Navigation Company*, 9 Cal. 258.

42. Unless an irregularity complained of in the formation of the jury goes to the merits of the trial, or leads to the inference of improper influence upon their conduct, their verdict should not be disturbed. *Thrall v. Smiley*, 9 Cal. 538.

43. An objection is not well taken to the panel of a trial jury, on the ground that such jury was summoned by order of the

court after the commencement of the term. *People v. Rodriguez*, 10 Cal. 59.

44. The failure of the defendant to appear on the trial of an action of replevin when the cause is called is a waiver of a jury. *Waltham v. Carson*, 10 Cal. 180.

45. In order to detain and imprison a defaulter for fraud, it must be alleged in the complaint, passed upon by the jury and be stated in the judgment. *Davis v. Robinson*, 10 Cal. 412.

46. The question of abandonment of a mining claim should be left to the jury upon the facts adduced in evidence. *Waring v. Crow*, 11 Cal. 371.

47. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 181.

48. Where a jury are instructed to bring in a sealed verdict, and they retire and after agreeing upon the verdict, seal it up and give it to the officer in charge of them—the clerk being absent—and request him to give it to the clerk, which is done; and the verdict is opened and read in the court in the presence of the jury, and read by the clerk, without exception: held, that this is not an error sufficient to warrant a new trial. *Paige v. O'Neal*, 12 Cal. 493.

49. In chancery cases the court below may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 84.

50. A party cannot go on and try his case before a judge without objection, and after he has lost it complain that the case was not tried by a jury. *Smith v. Brannan*, 13 Cal. 115.

51. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to reasonable time for argument before the jury. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *People v. Keenan*, 13 Cal. 584.

52. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied and hence admitted. *Garfield v. Knight's Ferry and Table Mountain W. Co.*, 14 Cal. 36.

53. When it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have a right to draw the same conclusion as to



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that fact as if it had been proved in evidence, and to draw such conclusion as to all the issues on the record. *Powell v. Oullahan*, 14 Cal. 116.

54. In an action against a sheriff, the coroner or an elizor should summon the jury. *Pacheco v. Hunsacker*, 14 Cal. 124.

55. When the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. *Dorsey v. Manlove*, 14 Cal. 555.

56. Dedication of a street is a conclusion of fact to be drawn by the jury from the circumstances of each particular case; the whole question as against the owner of the soil being whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a public highway. *Harding v. Jasper*, 14 Cal. 648.

57. In ejectment, the verdict may be joint against several defendants without specifying their respective lots in a whole tract, where they file a joint answer, which contains no averment as to the particular portion of land occupied by each; no proof being offered on the point, no damages being claimed, and defendants being in possession, one jury was just as competent on this case to pass on the whole defense of both these defendants as two, and could as well render one verdict against the two defendants as two verdicts. *McGarvey v. Little*, 15 Cal. 31.

58. Questions of discretion in the judge below not reviewed in the supreme court except in cases of gross abuse to the injury of the party. *Smith v. Billett*, 15 Cal. 26.

59. After judgment by default in ejectment a jury trial cannot be awarded, there being no issue. *Ib.*

60. If on the return of a verdict on an indictment for murder it does not specify the degree, the court should order the jury to retire and return a specific finding of the degree. *People v. Marquis*, 15 Cal. 38.

61. The reasonableness of the use of water is a question for the jury, to be determined by them upon the facts and cir-

cumstances of each particular case. *Esmond v. Chew*, 15 Cal. 143.

62. A general verdict does not operate as an estoppel, except as to such matters as were necessarily awarded and determined by the jury. *McDonald v. Bear River and Auburn W. & M. Co.*, 15 Cal. 148; *Kidd v. Laird*, 15 Cal. 182.

63. Whenever a point of fact has been put in issue, and found by the jury, then the record is regarded as conclusive of that fact, whenever it is again drawn in question by the parties or their privies. *McDonald v. Bear River and Auburn W. & M. Co.*, 15 Cal. 148; *Kidd v. Laird*, 15 Cal. 182.

64. But the fact or title must be material and relevant, must be distinctly in issue, must be tried by the jury and constitute the basis of their verdict; and unless specially found, must have been necessarily passed upon by the jury. *Kidd v. Laird*, 15 Cal. 182.

65. A court sitting in equity may direct, whenever in its judgment it may become proper, an issue to be framed upon the pleadings and submitted to the jury. *Curtis v. Sutter*, 15 Cal. 263.

66. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting testimony, will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

67. In ejectment, the court having admitted the evidence as sufficiently proven, the mesne conveyances through which the plaintiff traced title—the defendants being mere trespassers—charged the jury that “the written evidence of title, together with the admissions of the parties, authorized them to find for plaintiff; since the execution of the papers had been passed upon by the court:” held, that if it had been objected to this instruction that it took from the jury the question of damages for rents and profits, the objection would have been tenable; but that, no objection being taken, the point must be regarded as waived, although the jury awarded such damages. *Stark v. Barrett*, 15 Cal. 372.

68. Where a rencounter occurs between two persons, one of whom is killed, and the witnesses as to the difficulty differ, or the circumstances are equivocal as to which one of the two commenced the affray, then the fact that one of the parties has previously procured a weapon for the avowed purpose of using it against the other—the weapon being found at the place of the affray—is a circumstance tending to show that the purpose was fulfilled, and hence is proper for the consideration of the jury. *People v. Arnold*, 15 Cal. 482.

69. Where a jury is waived and the cause is tried by the court, the court should find the facts and not merely state the proofs. *Heredink v. Holton*, 16 Cal. 104.

70. The act of March 29th, 1860, providing for the construction of the State capital at Sacramento, is not unconstitutional because it provides that the compensation to the owners of the land taken shall be ascertained by three commissioners, and thus deprives the owners of the right to a jury trial. The provision of the constitution, that "the right of trial by jury shall be secured to all, and remain inviolate forever," applies only to civil and criminal cases in which an issue of fact is joined. The proceeding to ascertain the value of property, under the act of 1860, and the compensation to be made, is not an action at law. It is an inquisition for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without a jury, opportunity being allowed to owners and parties interested in the property to give evidence as to its value, and to be heard thereon. *Koppikus v. State Capitol Commissioners*, 16 Cal. 253.

71. The language of the constitution as to the right of trial by jury was used with reference to the right as it exists at common law. The right of trial by jury cannot be claimed in equity cases, unless an issue of fact be framed for the jury, under the direction of the court. *Ib.*

72. Failure of defendant in ejectment to appear when the cause is called for trial—an answer being in—authorizes the court to try it without a jury. *Doll v. Feller*, 16 Cal. 433.

See CHALLENGE, GRAND JURY, INSTRUCTIONS, JURORS, VERDICT.

## JUSTICES OF THE PEACE.

- I. In general.
- II. Jurisdiction.
- III. Pleadings.
- IV. Judgment.
- V. Appeals to the County Court.
- VI. Fees.

### I. IN GENERAL.

1. On an election of justices of the peace, as associate justices of the court of sessions, the county judge and clerk are ex officio officers of the convention; but they have no authority other than that of presiding over and recording its proceedings, and the dissolution of the convention by the county judge is illegal. *Gorham v. Campbell*, 2 Cal. 137.

2. Justices are not regarded as supernumeraries of the court of sessions, but must begin with and continue through the trial. *People v. Ah Chung*, 5 Cal. 105; *People v. Barbour*, 9 Cal. 234.

3. A justice of the peace cannot take and certify the acknowledgment of a married woman. It must be done by a justice of the superior court, a judge of the district court, county judge or notary public. *Kendall v. Miller*, 9 Cal. 592; see contra, *Goode v. Smith*, 13 Cal. 84.

4. We see no reason why a justice of the peace should not be allowed to take an acknowledgment of a femme covert as well as a notary. *Goode v. Smith*, 13 Cal. 84.

5. A justice of the peace can take the acknowledgment of the wife to a deed of the homestead. *Ib.*

6. Courts take judicial notice of the official character of justices of the peace in their own States; and an affidavit, in which the official character of the justice before whom it is taken does not appear, is good. *Ede v. Johnson*, 15 Cal. 57.

### II. JURISDICTION.

7. It seems that Mexican justices of the peace had authority before the war to make grants of land in San Francisco. *Reynolds v. West*, 1 Cal. 326.

8. Justices of the peace alone have

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power to try and commit seamen deserters, under the act of congress of 1790, and commissioners of the United States courts can only arrest and convict for trial. *Ex parte Crandall*, 2 Cal. 144.

9. If a justice issue an attachment and take a bond in a suit for a sum exceeding his jurisdiction, the proceedings are void and no action lies in the bond. *Benedict v. Bray*, 2 Cal. 254.

10. A case of forcible entry and detainer wrongfully brought before a justice of the peace, and he being a witness in the cause, sent it to the mayor of the city, who having no jurisdiction, returned it to the successor of the justice before whom it was tried and decided: held, that the mere fact of having been proposed for jurisdiction to the mayor, who had none and who therefore did not pretend to exercise any, cannot be properly an error. *Davis v. Gallen*, 2 Cal. 360.

11. A summons issued from a justice of the peace at the suit of plaintiff against Adams & Co., which was returned served by "leaving a copy thereof with Captain Charles D. Macy": held, that a judgment by default would not bind Adams & Co., and there is nothing in the record to connect Macy with them. *Adams v. Town*, 3 Cal. 248.

12. A party who sues out a writ of replevin from a justice's court, having no jurisdiction, and obtains the property, cannot in an action on the replevin bond set up as a defense the want of jurisdiction of the justice. *McDermott v. Isbell*, 4 Cal. 114.

13. A cause having been transferred from the recorder's court to a justice who had jurisdiction, and the defendant appeared before the justice and consented to the time fixed for trial, is a waiver of his right to be brought in by summons and complaint. *Cronise v. Carghill*, 4 Cal. 122.

14. All cases of law and equity where the amount in dispute does not exceed two hundred dollars, exclusive of interest, are left undisposed of by the constitution, for the legislature to confer on county courts as special cases or on justices' courts, and any act conferring a jurisdiction on justices' courts over two hundred dollars, is unconstitutional and void. *Zander v. Coe*, 5 Cal. 234.

15. Justices have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from

the natural or artificial channel in which it is conducted. *Hill v. Newman*, 5 Cal. 446.

16. A justice disqualified by statute should transfer the cause to another justice. *Larue v. Gaskins*, 5 Cal. 509.

17. A justice, instead of trying a case for forcible entry and detainer, certified it to the district court. The transfer was illegal, and cannot defeat the plaintiff's rights by operating a discontinuance. He should have tried the case as if no transfer were made. *Ib.*

18. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention, when the amount claimed exceeds two hundred dollars. *Van Etten v. Jilson*, 6 Cal. 19; *Grass Valley Quartz Mining Co. v. Stackhouse*, 6 Cal. 414; *Small v. Gwinn*, 6 Cal. 449; *Freeman v. Powers*, 7 Cal. 105; *Swain v. Chase*, 12 Cal. 286.

19. Justices' courts have jurisdiction in all cases of forcible entry. *O'Callaghan v. Booth*, 6 Cal. 66; *Hart v. Moon*, 6 Cal. 162; *Freeman v. Powers*, 7 Cal. 105.

20. The jurisdiction of justices of the peace is limited by the constitution to cases in which the value of the thing in controversy does not exceed the sum of two hundred dollars, except in proceedings under the statute concerning forcible entry and unlawful detainer. *Freeman v. Powers*, 7 Cal. 105.

21. Judgment by consent or confession for over two hundred dollars in a justice's court, is void. Consent of parties cannot give jurisdiction prohibited by the constitution. *Feillett v. Engler*, 8 Cal. 77.

22. A justice of the peace cannot make a summons returnable in eleven days after service. *Deidesheimer v. Brown*, 8 Cal. 340.

23. The law presumes nothing in favor of the jurisdiction of justices' courts; and a party who asserts a right under the judgment of a justice, must affirmatively show every fact necessary to confer such jurisdiction. *Swain v. Chase*, 12 Cal. 285.

24. A judgment by default rendered in a justice's court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, indorsed on the summons by the

officer serving it, and filed with the justice who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Fagg v. Clements*, 16 Cal. 392.

25. Such certificate is sufficient, prima facie, to establish the jurisdiction of the justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Ib.*

### III. PLEADINGS.

26. Where a complaint in an action to recover possession of a mining claim, in a justice's court, contains no allegation of injury done and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten v. Jilson*, 6 Cal. 19.

27. The rule that a penal statute must be declared upon by the party seeking recovery under it, does not apply to pleadings in justices' courts. *O'Callaghan v. Booth*, 6 Cal. 66; *Hart v. Moon*, 6 Cal. 161.

28. A justice of the peace has the right to allow a complaint to be amended in all respects, so that the case may be determined on its merits; and this whether the defect be in the statement of jurisdiction or any other fact. *Linhart v. Buiff*, 11 Cal. 280.

29. Pleadings in justices' courts are not held to much strictness. *Liening v. Gould*, 13 Cal. 599.

30. Pleadings in justices' courts are construed with great liberality, and if the facts stated be sufficient to show the nature of the claim or defense, nothing further is required. To reverse a judgment had in such courts for defects in the complaint, the defects should be such as were calculated to mislead the adverse party. *Stuart v. Lander*, 16 Cal. 374.

### IV. JUDGMENT.

31. Where a judgment of a justice of the peace is for an amount exceeding his jurisdiction, the county court, on appeal, should dismiss the whole case. *Ford v. Smith*, 5 Cal. 331.

32. The failure of a justice to state in his docket that the summons was returned served, will not vitiate the judgment on appeal. *Denmark v. Leining*, 10 Cal. 94.

33. A defendant who has been properly served with process issued out of a justice's court, who allows judgment to be taken against him by default, admits the facts alleged in the complaint, and no appeal will lie from such judgment in reference to such facts, there being no issue of fact. *People v. County Court of El Dorado County*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328.

34. A justice, after having entered a judgment according to law, has no right to alter it without notice to defendant. *Chester v. Miller*, 13 Cal. 561.

35. The recital in the docket of a justice, who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself, and if the return fail to show sufficient service, the recital, being based on the return alone, amounts to nothing more than the opinion of the justice, and cannot be relied on to give validity to the judgment. *Lowe v. Alexander*, 15 Cal. 300.

36. Such a recital embraces no question of fact, and does not therefore raise the question whether the decision of an inferior court, establishing the existence of a fact essential to its jurisdiction, can be attacked in a collateral proceeding, upon which point this court expresses no opinion. *Ib.*

37. The record of the proceedings in a justice's court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice and void; and the failure of defendant, after summons served, to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Ib.*



38. Where the record shows that suit was brought in township No. 4, Sierra county, that the summons was served, by the constable of that township, in township No. 3, and it nowhere appears either that the defendant was a resident of township No. 4, or a nonresident of the county or that the suit was within any of the other exceptions of the statute, the judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder.\* *Ib.*; *Fagg v. Clements*, 16 Cal. 392.

39. An action will lie on a judgment obtained in a justice's court in this State, even when the time within which an execution could be issued on such a judgment had expired, and the court may refuse to permit the defendant from setting up the statute of limitations after he answers to the merits. *Stuart v. Lander*, 16 Cal. 375.

#### V. APPEAL TO THE COUNTY COURT.

40. An appeal does not lie from the judgment of a justice to a district court. *Gray v. Schupp*, 4 Cal. 185.

41. A notice of appeal from a justice's court stating that defendant appealed from the whole judgment, is a sufficient notice within the statute. *Price v. Van Caneghan*, 5 Cal. 124.

42. Notice of appeal from a judgment of a justice of the peace may be served on an attorney of the adverse party. *Welton v. Garibaldi*, 6 Cal. 246.

43. A justice of the peace has jurisdiction to grant appeals, and to stay proceedings thereupon; and his action cannot be renewed on certiorari. *Coulter v. Stark*, 7 Cal. 245.

44. An appeal from a justice's court to the county court, on questions of law alone, if a new trial be ordered, should take place in the county court. *People v. Freelon*, 8 Cal. 518.

45. Where a party appealed from a justice's court to a county court, and the justice neglected to send up the record with notice of appeal: held, that it was error to refuse to allow appellant the opportunity of moving to compel the justice to

send it up, by peremptorily dismissing the appeal. *Sherman v. Rolberg*, 9 Cal. 18.

46. The county court has the sole appellate jurisdiction in all cases, civil and criminal, arising in justices' courts, subject to such restrictions as the legislature may impose by making the decisions of the justice final in such cases as may be determined by law. *People v. Fowler*, 9 Cal. 88.

47. It is the duty of a justice of the peace when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection, it will be too late to disapprove it the next day. *People v. Harris*, 9 Cal. 572.

48. A refusal by a county court, on appeal from a justice, to permit an amendment of the complaint, is a matter of discretion. *Canfield v. Bates*, 13 Cal. 608.

49. On appeal from a justice's court in forcible entry and detainer, the execution of an appeal bond within ten days is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

50. On appeal from a justice's to a county court—the record not showing that notice of appeal had been served on the adverse party—appellant may prove by his affidavit that such notice was in fact served. *Mendioca v. Orr*, 16 Cal. 368.

#### IV. FEES.

51. One of the conditions of an appeal from a justice is the payment of the costs of the action. *McDermott v. Douglass*, 5 Cal. 89.

52. A justice of the peace may refuse to send up the transcript of a cause tried before him until his fees are paid by appellant; but if he sends it up without receiving his fees, the fact that they are not paid is no ground for dismissing the appeal. *Bray v. Redman*, 6 Cal. 287.

53. An offer to pay the justice his costs on appeal, as soon as the appeal papers are ready to transmit to the county court, is not a sufficient tender, under the statute. The fees must be tendered unconditionally. *People v. Harris*, 9 Cal. 572.

54. Where an alternate mandamus was issued to a justice of the peace to compel him to send up papers on appeal to the county court, to which he answered that his fees had not been paid or tendered

\*The statute of 1861, p. 28, enlarges the power of constables and enables them to serve process throughout the county.

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prior to the service of the alternate writ: held, that his answer is no defense to the writ being made peremptory, as the fees may have been paid since the service of the writ. *Ib.* 573.

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JUSTIFICATION.

1. On the application of justification of bail on appeal, the merits of the appeal will not be considered. *Bradley v. Hall*, 1 Cal. 199.

2. The failure of sureties upon an undertaking on appeal to justify when they are excepted to, leaves the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower v. Knox*, 10 Cal. 480.

3. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below on the second of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent, until the last hour stated in the notice. *Ib.* 481.

4. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case, the justification being made without notice, the appeal was ordered to be dismissed, unless appellants, within ten days, file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark v. Barrett*, 15 Cal. 364.

5. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking,

where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 375.

6. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the Court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

7. The statute requires the places of residence and occupation of the sureties to be stated in an undertaking on appeal, only when a stay of execution upon a judgment directing the payment of money is sought. *Ib.*

SEE SURETIES, UNDERTAKING.

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KIDNAPPING.

1. The fifty-fourth section of the act of April 16th, 1850, concerning crimes and punishments, is not repealed by the act of April 19th, 1856, (statutes 1856, 131) amendatory of and supplementary to the act of 1850. Section two of the act of 1856 does not conflict with section fifty-four of the act of 1850. These sections refer to a different class of offenses. Under the latter, the abduction must be accompanied with a removal into another county, State or territory, or a design to remove the party beyond the limits of the State. Under the former, the abduction need not be accompanied with any such removal or design—the intent to detain and conceal being the gist of the offense. *People v. Chu Quong*, 15 Cal. 393.

# ERRATA.

**N. B.—THE PROFESSION ARE REQUESTED TO EXAMINE THE PAGES AND CORRECT THE SAME BY THIS TABLE.**

**Page 46.** 2d column, 10th line, for "24 Cal.," read "14 Cal."

**Page 58,** 1st column, 48th line, for "267," read "367."

**Page 62,** 2d column, 50th line, for "10 Cal.," read "16 Cal."

**Page 88,** 1st column, 21st line, for "305," read "414."

**Page 88,** 1st column, 24th line, for "119," read "199."

**Page 93,** 2d column, 22d line, for "6 Cal.," read "9 Cal."

**Page 127,** 2d column, 34th line, for "23," read "213."

**Page 189,** 2d column, 34th line, read "Judson v. Atwill, 9 Cal. 478."

**Page 221,** 1st column, 25th line, omit "10 Cal."

**Page 303,** 2d column, 17th line, for "2 Cal. 38," read "2 Cal. 36."

**Page 372,** 1st column, 32d line, for "Corter," read "Porter."

**Page 507,** 1st column, 6th line, for "action denied," read "answer denied."









A  
DIGEST  
OF  
The Decisions of the Supreme Court  
OF THE  
STATE OF CALIFORNIA,  
CONTAINED IN THE SIXTEEN VOLUMES OF REPORTS,  
FROM THE FORMATION OF THE COURT, IN 1850, UNTIL JANUARY, 1861.  
WITH A COMPLETE LIST OF  
CASES AFFIRMED, REVERSED, QUALIFIED, COMMENTED  
UPON, OR ABROGATED BY STATUTE.

IN TWO VOLUMES—VOL. II.

By HENRY J. LABATT,  
COUNSELOR AT LAW.

SAN FRANCISCO:  
H. H. BANCROFT & COMPANY.  
1861.

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Entered according to Act of Congress, in the year of our Lord 1861, by  
**HENRY J. LABATT,**  
In the Clerk's Office of the District Court of the United States in and for the Northern District  
of the State of California.

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TOWNE & BACON, PRINTERS,  
EXCELSIOR OFFICE,  
536 Clay Street, San Francisco.



## LACHES.

1. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

2. L. advanced to H. four hundred and seventy-six dollars, and received from H. for collection an order for the amount upon a party indebted to him. The order not being collected, L. returned it to H., and took H.'s note for the amount advanced. In a suit on the note H. set up as a defense, laches on the part of L., in not presenting the order, by means of which the debt was lost: held, that if there were any laches, they were waived by the execution of the note. *Leonard v. Hastings*, 9 Cal. 237.

See ERRORS, MISTAKE, NEGLIGENCE.

## LAND.

- I. In general.
- II. Public Land.
- III. Pueblo Land.
- IV. Water Lots in San Francisco.
- V. Swamp and Overflowed Land.
- VI. Of Covenants or Rights to Land.
- VII. Bond for a Title.
- VIII. Warranty.
- IX. Vendor's Lien.
- X. Estoppel.

## I. IN GENERAL.

1. In an application for an order to incorporate a college under the act of 1850, it is necessary that subscriptions of real estate, if such subscriptions must not be cash under the statute, should define the boundaries or situation of the lands proposed to be given, and their value established.\* *Ex parte The California College*, 1 Cal. 330.

2. Where land is attached by process

of law, and the possession of the owner not disturbed, it is difficult to perceive how any thing further than nominal damages can be recovered for the injury caused by the attachment. *Heath v. Lent*, 1 Cal. 411.

3. An agent authorized by power of attorney to wind up and adjust the affairs of a mercantile house in New York, which had been conducted in the name of his principal, derives no authority from such power to bind his principal by a promissory note given for the purchase of real estate in San Francisco. *Fisher v. Salmon*, 1 Cal. 413.

4. Where a note was given on the sale of real estate, and the vendor had neither title, color of title, nor possession: held, that the consideration of the note might be enquired into as between the original parties, and there being no consideration, that the payee could not recover against the maker; and that a guaranty on the note without a consideration was not liable. *Ib.* 414.

5. A party already having the legal and equitable title, cannot sue for a further conveyance. *Truebody v. Jacobson*, 2 Cal. 82.

6. Caveat emptor applies to sales of real estate where there is no fraud or warranty. *Salmon v. Hoffman*, 2 Cal. 141.

7. Though a deed executed by an agent having power to convey in his own name be inoperative as a conveyance, it will be good as an agreement to convey, and the principal may be decided to convey. *Ib.* 142.

8. It is incumbent on him who asks the interposition of a court of equity to enforce a specific performance for the conveyance of land, that not only his possession, but that all his conduct in relation to the purchase be in good faith. *Conrad v. Lindley*, 2 Cal. 175.

9. A parol promise to pay for improvements upon land is not within the statute of frauds. *Godeffroy v. Caldwell*, 2 Cal. 292.

10. The authority by act of the legislature to a city or county to erect a court house and jail, would necessarily embrace the power to purchase the land on which to erect them. *Dewitt v. City of San Francisco*, 2 Cal. 295.

11. A power of attorney given "to at-

\*The above law is repealed by the corporation act.

## In general.

tend to all business affairs appertaining to real or personal estate," is too indefinite to sustain a transfer of real estate, more particularly that acquired long subsequent to its execution. *Lord v. Sherman*, 2 Cal. 501.

12. Where an assignment does not in terms convey real estate, and cannot be fairly construed so to do, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land in question. *Ib.* 502.

13. A purchaser under an implied warranty quietly to possess and enjoy, while he retains possession, cannot resist the payment of the purchase money, however defective the title, and has no right to a rescission of his contract. *Fowler v. Smith*, 2 Cal. 569.

14. Where one has an outstanding deed, which improperly clouds the title of the true owner, on the application of the latter, chancery will cancel and annul the deed, and will on like application interpose and prevent a sale, and the consequent execution of an improper deed. *Shattuck v. Carson*, 2 Cal. 589; *Guy v. Hermance*, 5 Cal. 75.

15. In an action to recover the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warranty deed for the land; the defendant in his answer denied that the plaintiff was the lawful owner or that he had any title to the land, it was held that to have enabled him to rescind the contract the defendant was bound to aver and to show a paramount title in another, and failing in this, his defense to the action was defective. *Thayer v. White*, 3 Cal. 228; *Riddell v. Blake*, 6 Cal. 262.

16. A deputy sheriff may execute a deed for land sold under execution, but in the name of the sheriff, otherwise it is decisive against the party claiming under it. *Lewes v. Thompson*, 3 Cal. 266.

17. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sale. *Duprez v. Moran*, 4 Cal. 196; *Cummings v. Coe*, 10 Cal. 531.

18. Under the code it is competent for the plaintiff to recover real property with damages for withholding it, and the rents and profits, and in the same action and as one cause of action. *Sullivan v. Davis*, 4 Cal. 292.

19. A power of attorney confirming all sales, leases and contracts of every description, confers the power to sell land. *Ib.*

20. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach v. Covillaud*, 4 Cal. 317.

21. Questions as to the performance of the conditions contained in a grant, can only be made by the grantor, and not by a mere naked trespasser. *Buckelew v. Estell*, 5 Cal. 108.

22. Lands held by no other tenure than possession may be the legitimate subjects of control; and sometimes in equity, chattel interests or personal property are made the subject of specific performance. *Johnson v. Rickett*, 5 Cal. 220.

23. The State has the most perfect right to determine what shall constitute evidence of title as between her own citizens, to all lands within her boundaries, and the act in question does only this in reference to a portion of them. *Nims v. Palmer*, 6 Cal. 13.

24. A bill in the nature of a bill of peace, and praying for a discovery against joint and several trespassers on real estate, will not lie in favor of a plaintiff out of possession, claiming title to the land. *Ritchie v. Dorland*, 6 Cal. 40.

25. It would be a great hardship to require a party in every instance to enclose his lands by a substantial fence; such enclosure would be evidence of possession, but the evidence of it would not be conclusive as against other acts of possession. *O'Callaghan v. Booth*, 6 Cal. 65.

26. If by construction of a railroad through the enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75.

27. A sale of land at auction where no note or memorandum is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People v. White*, 6 Cal. 75.

28. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to

## In general.

a complaint setting forth such grant on the ground of want of authority in the governor is not sustainable. *Den v. Den*, 6 Cal. 82; *Brown v. City of San Francisco*, 16 Cal. 458.

29. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money, on the ground that he is entitled to it as the oldest judgment and execution creditor; especially when there is an unsettled contest as to the priority of liens. *Williams v. Smith*, 6 Cal. 91.

30. Where an action was for restitution of land, and pending an appeal the plaintiff transferred his judgment to a third party, and sold the premises to the defendant, the plaintiff's recourse for rent, if any, is for use and occupation, and not on the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

31. A party cannot avail himself of a proceeding in chancery to avoid the payment of the purchase money, without offering to rescind the contract and return possession of land to the defendant. Nor does the fact that he has made valuable improvements take the case out of the rule. *Jackson v. Norton*, 6 Cal. 189.

32. The fact that the title of land is in dispute between the claimants and the United States, and that the claimants under a Mexican grant are in possession, affords no ground for exempting the land from taxation. *Robinson v. Gaar*, 6 Cal. 275.

33. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness, by holding lands devised therein, in trust for a devisee, and without having any interest therein himself. *Peralta v. Castro*, 6 Cal. 357.

34. Where in an action on a promissory note the defense is that it was the consideration for a deed from plaintiff for certain land, under false and fraudulent representations that plaintiff had an interest therein, the defendant, if he would avoid the payment, must offer to surrender the deed to be canceled, so that both parties could have been remitted to their original rights. *Tissot v. Throckmorton*, 6 Cal. 473.

35. It is a familiar principle of equity that time is not of the essence of a contract for the sale of land unless made so by the express agreement of the parties,

yet in every case it will devolve upon the party seeking relief in equity to account for his delay. *Brown v. Covillaud*, 6 Cal. 571.

36. Where a party seeks to enforce a contract to convey land to him, if there are circumstances showing culpable negligence on his part, or if the length of time which has been permitted to intervene, together with other circumstances, raises a presumption of abandonment of the contract, or if the property has greatly enhanced in value, and he has apparently laid by for the purpose of taking advantage of this circumstance, he will not be entitled to a decision in his favor. *Brown v. Covillaud*, 6 Cal. 571; *Pearis v. Covillaud*, 6 Cal. 621; *Green v. Covillaud*, 10 Cal. 324.

37. Damages assessed for the value of land taken for a railroad, should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession, who had filed his claim to the damages. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 640.

38. Great inadequacy of consideration paid for land, as compared with its actual value, is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof, at a constable's sale. *Argenti v. City of Sacramento*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

39. A right to land in its broadest sense, implies a right to the possession and the profits accruing therefrom, since without the latter the former can be of no value. *Billings v. Hall*, 7 Cal. 7.

40. A verbal sale of land is not valid under the Mexican law. *Hayes v. Bona*, 7 Cal. 158; *Stafford v. Lick*, 10 Cal. 17.

41. Where the plaintiff filed a bill in equity, in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run, he could not recover. *Dominquez v. Dominguez*, 7 Cal. 427.

42. Parties in possession of land, claiming title thereto, are presumed to be the owners thereof, and entitled to compensation before it can be taken for public uses. *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 579.

43. When a party in consideration of a

## In general.

conveyance of land to him, agrees to pay an outstanding note of his vendor, and writes his name on the back of the note as a memorandum of said agreement, at the same time acknowledging his liability: held, that the liability thus assumed is not the conditional liability of an endorser, but a primary and unconditional obligation to pay the note, for which he had received a full consideration. *Palmer v. Tripp*, 8 Cal. 97.

44. An appropriation of land carries with it the water on the land or a usufruct in the water, for in such cases the party does not appropriate the water, but the land covered with the water. *Crandall v. Woods*, 8 Cal. 143.

45. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained, and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer v. Boling*, 8 Cal. 389.

46. The authority to sell land conferred by a writ in the sheriff's hands, carries with it authority to execute all the instruments required by law to the completion of the sale, viz: a certificate; and in case of no redemption, a conveyance to the purchaser. *People v. Boring*, 8 Cal. 407; *Anthony v. Wessel*, 9 Cal. 104.

47. The order of the probate court directing the sale of the land of the deceased, is a judicial act. *Halleck v. Guy*, 9 Cal. 195.

48. An action for a false and fraudulent representation as to the naked fact of title in the vendor, of real estate, cannot be maintained by the purchaser, who has taken possession of the premises sold under a conveyance with express covenants. *Peabody v. Phelps*, 9 Cal. 226.

49. The right of the wife to acquire property by purchase during the marriage, can only exist as an exception to the general rule as laid down by the "act defining husband and wife." *Alverson v. Jones*, 10 Cal. 12.

50. The judgment of the board of land commissioners, the tribunal of original jurisdiction, is sufficient evidence of the

confirmation of the grant, unless the judgment be reversed, or its operation suspended by an appeal, which is still pending. *Sanders v. Whitesides*, 10 Cal. 90.

51. Until a consummation of a sale of land upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. *Cummings v. Coe*, 10 Cal. 531.

52. A trespasser upon lands of another cannot justify his acts by setting up an outstanding title, in which he has no priority. *Weimer v. Lowery*, 11 Cal. 112.

53. A decree of confirmation of a grant of the United States land commission and the United States district court, cannot be impeached in an action of ejectment between a party claiming under the grant and a third party. *Rose v. Davis*, 11 Cal. 140.

54. A private survey is no legal evidence of the facts contained therein, since if it were, any man might recover another's land by including it himself or getting some one else to do it within his boundaries. *Ib.* 141.

55. Where a party takes possession of a part of a tract of land under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed. *Ib.*

56. There can be no such thing as an abandonment of land in favor of a particular individual and for a consideration. *Stephens v. Mansfield*, 11 Cal. 365.

57. Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May v. Borel*, 12 Cal. 91.

58. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 133.

59. Property acquired by the husband and wife during the marriage and whilst living together, whether by onerous or lucrative title, and that acquired by either of them by onerous title, belonged to the community; whilst property acquired by either of them by lucrative title is solely constituted the separate property of the party



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making the acquisition. *Scott v. Ward*, 12 Cal. 471; *Noé v. Card*, 14 Cal. 596.

60. Possession of land at the death of a party gives prima facie title to his heirs or representatives. *Gregory v. McPherson*, 13 Cal. 572.

61. M. & B., the plaintiff, were partners in a ranch and hotel. The ranch was public land, taken up under the State law in the name of M. M. sells one-half to B., taking a mortgage back, B. agreeing to pay certain firm debts. This sale and agreement were afterwards canceled, and B. sold M. one-half the ranch. Defendant, Myers, agrees to buy of B. his half of the ranch; goes into possession, but afterwards refuses to buy, and buys the half from O., who bought the whole of M. At the time of this last purchase, O. and M. knew of B's title: held, that a bill in equity by B. against M., O. and Myers for an account of the partnership between M. and B., and for a decree establishing plaintiff's right to the ranch, does not lie; that his remedy at law for his half of the ranch against M., or any one claiming under him, with notice of his title, is clear; and that M. would be estopped from disputing the title. *Brush v. Maydwell*, 14 Cal. 209.

62. The statutory lien of a judgment upon the real estate of the judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 434.

63. A deed of land from A. to F., reciting the consideration at one hundred dollars and a contract not under seal, not acknowledged nor recorded, from F., agreeing to reconvey the land to A. upon payment within a given time of \$8,600, with interest at a specified rate, deducting the rents and profits of the land during the period limited for payment, were delivered between the parties at the same time: held, that the deed is not a mortgage in the absence of proof, that the consideration for it was a debt preëxisting, or created at the time, and still subsisting between the parties; that the provisions in the contract of reconveyance relative to the payment of interest and the rents and profits do not necessarily imply the existence of a debt, which is essential to a mortgage. *Ib.* 435.

64. Where the lease gives the lessee the privilege of purchasing the land at

the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or the purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock v. Page*, 14 Cal. 443.

65. Death of the principal revokes the authority of the agent, and a deed of land made by him after such death does not bind the representatives of the principal. *Travers v. Crane*, 15 Cal. 16.

66. But if the agent has a power coupled with an interest, that is, a power which conveys to the agent an interest in the property, then the execution of the power after the death of the principal is good. *Ib.*

67. If, on an executory contract for the purchase of land made by plaintiff with the agent during the life of the principal, money due the principal was paid after his death to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Ib.*

68. The complaint avers title in plaintiff to a tract of land; that the possession of defendants is forcible and unlawful; that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined, and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of the action: held, that injunction lies, although no action at law has been brought to try the title; that the jurisdiction of equity in such cases to grant, first, a temporary and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 116.

69. Land will sometimes pass without any specific designation of it as land. Thus the grant of a messuage, or a mesuage with the appurtenances, will pass the dwelling house and adjoining buildings; and also, its curtilage, garden and



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orchard, together with the close in which the house is built. *Sparks v. Hess*, 15 Cal. 195.

70. The rule is, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee. *Ib.*

71. So, the sale of a "bridge" across a certain stream, "together with the toll-house, stables and out-houses of every description," and "all the privileges and appurtenances appertaining, or in any wise belonging to said bridge," passes the land upon which the bridge rested and the other buildings were erected. *Ib.*

72. The doctrine that land may often pass by conveyance as essential to the enjoyment of, or as parcel of buildings, etc., erected thereon, is consistent with the doctrine that the ownership of the land may be in one person, and the ownership of the structures thereon in another—as in these latter cases the buildings are erected by permission of the owner of the land for the use of the builder, and generally under mutual expectation by the parties of their removal, or of compensation being made for them to the builder, or of the latter ultimately acquiring title to the land. *Ib.* 197.

73. Where a party purchases a bridge, toll-houses, stables and out-houses appurtenant, with the right and privilege of his vendor in and to a "dug road" made on each side of the bridge, neither the purchaser, nor those claiming under him with notice, can object to a decree enforcing the vendor's lien against the premises, that the "dug road" is public land, and that therefore nothing would pass under a sale upon the decree. *Ib.*

74. In a contract for the sale and purchase of land, which is silent as to the possession, there is no implied license for the purchaser to enter. *Gaven v. Hagen*, 15 Cal. 211.

75. Z., the owner of land, contracts in writing to sell it to K., nothing being said as to the possession. K. is to give three notes, falling due at different periods, for the purchase money. The first two notes become due at very short dates, and after they are paid Z. is to make a deed to K., with covenants against his own acts. First note is paid before the second falls

due; Z. deeds the land to plaintiff, subject to the contract with K., the deed containing covenants of warranty against acts of the grantor. Later, and on the day the second note is due, K. sells the land to McE., one of the defendants. K. took possession under the contract. Shortly after, plaintiff demanded of K. the payment of the second note, and tendered him a deed from himself (plaintiff) to K., with the covenants mentioned in Z.'s contract. K. said he could do nothing. Plaintiff then formally demanded payment and execution of the mortgage. K. wished to see his attorney. After the third note fell due, plaintiff demanded of McE. payment of the two notes, tendering the deed from Z. to him, (plaintiff) and also a deed from himself to McE., offering also a mortgage to be executed by McE. to secure the third note and demanding possession. McE. refused: held, that, under the contract, the purchaser was not entitled to possession at once; that payment of the first two notes or tender was a condition precedent to his right of possession; that until then, the vendor Z., or his assignee, had the legal title and could maintain ejectment against the vendee. *Ib.*

76. Section two hundred and fifty-four of the practice act enlarges the class of cases in which equitable relief could formerly be sought in quieting title. It authorizes the interposition of equity in cases where previously bills of peace would not lie. *Curtis v. Sutter*, 15 Cal. 262.

77. Under this section, a party in possession of real property may bring a bill in equity to quiet title against a party out of possession, who claims an estate or interest adverse to him, without waiting until he has been disturbed in his possession by legal proceedings against him, in which his title has been successfully maintained. *Ib.*

78. Suit under section two hundred and fifty-four of the practice act only lies with reference to property of which the plaintiff is in possession, and where suit is brought, under that section, to quiet title to a ranch, and plaintiff is in possession of a portion only, the suit must be considered as brought to determine the title to that portion, and no injunction lies to restrain parties who are entire strangers to the title from selling that portion, as their conveyances would not cloud plaintiff's ti-

In general.—Public Land.

tle. And if the grantees under such conveyance should invade the possession of plaintiff, or unlawfully detain the same, the remedy at law is ample. *Ib.*

79. A tract of land was held by several tenants in common, and on partition, a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the endorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 307.

80. In ejectment, plaintiff offered to introduce in evidence an executory contract by which S. & Co. agreed to sell to Wooster the land sued for, and when the purchase money was paid, to make a deed, W. to take possession at once, and to retain it so long as he complied with the contract. Plaintiff stated it to be his intention to show, in connection with the contract, that the defendant claimed under Wooster. The answer averred that Wooster mortgaged the premises to defendant, who foreclosed, and went into possession under the sheriff's deed: held, that the contract, with the other proof, was prima facie relevant to the issue, plaintiff's object being to show that Wooster had forfeited his rights under the contract, and that he, plaintiff, had succeeded to the right and title of S. & Co. *Palmer v. McCafferty*, 15 Cal. 335.

81. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchasers and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. Having no title himself, it is immaterial to him whether he be evicted by such purchasers or their vendor. *Treadwell v. Payne*, 15 Cal. 499.

## II. PUBLIC LAND.

82. The prospective preëmption act of Congress of 1841 is expressly confined to the surveyed lands, and was not extended to California at the time of the trespass, and a title under that act, or under the California statute of April, 1852, passed after the commencement of the suit, will not enable plaintiff to maintain an action against another about to cloud the title. *O'Connor v. Corbitt*, 3 Cal. 371.

83. Where the complaint alleged that in September, 1849, the plaintiff settled upon a tract of land, "the same being public land of the United States;" that subsequently a foreigner occupied a portion of it, and that defendant, his executor, is now offering the same for sale, and prays to enjoin said sale: held, that the injunction will not lie. *Ib.*

84. A system of preëmption has been adopted in all the territories and new States to encourage the immigration of foreigners, and there is no discrimination between foreigners and native citizens. *People v. Folsom*, 5 Cal. 379.

85. Prior possession of public lands will entitle the possessor to maintain an action against a trespasser. *Grover v. Hawley*, 5 Cal. 486.

86. The right of enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Ib.*

87. The statute making out the possessory right of settlers on public lands for agricultural or grazing purposes yield to the rights of miners has legalized what would otherwise be a trespass, and the act cannot be extended by implication to a class of cases not especially provided for. *Burdge v. Underwood*, 6 Cal. 46.

88. To enable a party to recover lands under the possessory act of this State, it is necessary that he shall have complied with the provisions of the act. *Sweetland v. Froe*, 6 Cal. 147.

89. The lands settled by the missions were not conveyed to any one, but remained the property of the government, and even the church buildings thereon did not become the property of the church corporate until the decree of seculariza-

## Public Land.

tion of 1833. *Nobili v. Redman*, 6 Cal. 342.

90. The right to be protected in the possession of the public lands in this State is founded alone on the doctrine of presumption, for a license to occupy from the owner will be presumed. *Conger v. Weaver*, 6 Cal. 556.

91. The settlers' act of 1856 does not discriminate between an innocent and a tortious possession, nor is it a mere attempt to avoid circuity of action by providing for an equitable adjustment of the whole subject in one suit. By its terms, it applies to past as well as present cases. It takes from a party that which before was his, for if he refuses to pay for the improvements on his land, against his will, by a trespasser, he loses not only the improvements but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the constitution. *Billings v. Hall*, 7 Cal. 6.

92. One who locates upon public lands for the purpose of appropriating them to his own use, becomes the absolute owner thereof as against every one but the government, and is entitled to all the privileges and incidents which appertain to the soil, subject to the single exception of rights antecedently acquired. *Crandall v. Woods*, 8 Cal. 143.

93. A party has no lawful right to turn a settler off by force, conceding that the former had the legal title to the land. *People v. Honshell*, 10 Cal. 87.

94. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and inclose twelve acres of mineral land in the mining districts, as against persons who subsequently enter upon the land in good faith for the purpose of digging gold therein, and who in such operations do no injury to the comfortable use of the premises as a residence, or of any mechanical or commercial business. *Martin v. Browner*, 11 Cal. 14.

95. The right to a preëmption in public land is not assignable, but it may be mortgaged. *Whitney v. Buckman*, 13 Cal. 539.

96. Neither the act of 1858, as to the location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Burdge v. Smith*, 14 Cal. 383.

97. How far the right of miners to go upon public mineral land in possession of another for the purpose of mining must be modified to secure any rights of such possessor, reserved. *Ib.*

98. The possession of agricultural land is prima facie proof of title against a trespasser, but where it is shown that a party goes on mineral land to mine there is no presumption that he is a trespasser, and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Ib.*

99. The presumption under our statute is that all land in the State is public land, until the legal title is shown to have passed from the government to private parties, and this presumption is reconcilable with the presumption of title arising from possession. *Ib.*

100. A party claiming land under the possessory act of 1852, must show compliance with the provisions of the act. He must be a citizen of the United States; must file the affidavit required by section 2; and make his improvements within the ninety days, &c. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, &c., is not sufficient. *Wright v. Whitesides*, 15 Cal. 47.

101. Mere entry on public land, without enclosing it, does not give a right of action on the possession alone. *Ib.*

102. Miners have a right to enter upon public mineral land, in the occupancy of others for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of the agriculturist. And this, whether the land is enclosed, or taken up under the possessory act. *Clark v. Duval*, 15 Cal. 88.

103. The right so to enter and mine, carries with it the right to whatever is indispensable for the exercise of this mining privilege—as the use of the land, and such elements of the freehold or inheritance as water. *Ib.*

104. Merely going on waste, uninclosed public land, and building and occupying a house and corral, and even subsequently cutting hay on part of the land, does not give a party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the

## Public Land.—Pueblo Land.

party claimed and entered under the possessory act of this State, and pursued the necessary steps prescribed by it; or, probably, if he had made his entry under the preëmption laws of the United States. *Garrison v. Sampson*, 15 Cal. 95.

105. Where, in such case—there being no claim under the possessory act, or the preëmption laws of the United States—plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession, to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy—there being no proof, except defendant's general consent as above named, that the defendant agreed to hold the whole tract for plaintiff. *Ib.*

106. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold; that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings. Held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 104.

107. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Ib.*

108. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the survey of the United States—which selections are only subject to three qualifications: 1st, they must not be of lands reserved from sale by any law of Congress or the proclamation of the President; 2d, they must be in parcels of not less than three hundred and twenty acres each; and 3d, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Doll v. Meador*, 16 Cal. 331.

109. State selections will not become absolute and definite until the survey—until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

110. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be actual and not constructive; and the right it confers must be distinguished from the right given by the possessory act of this State. *Coryell v. Cain*, 16 Cal. 573.

111. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from the government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Ib.*

### III. PUEBLO LAND.

112. Under the Mexican laws, municipal lands become the absolute property of the pueblo, subject only in their disposition



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to the general laws of Mexico. *Cohas v. Raisin*, 3 Cal. 448.

113. It is too late now to question the authority of an alcalde elected in 1846. If invalid, his acts as a de facto officer must be held good by this court. *Ib.* 452.

114. By the laws of Mexico towns were invested with the ownership of land. *Ib.* 453.

115. By the laws, usage and customs of Mexico the alcaldes were the heads of the ayuntamientos; were the executive officers of the towns, and rightfully exercised the power of granting lots within the towns, which were the property of the towns. *Ib.*

116. Before the military occupation of California by the army of the United States, San Francisco was a Mexican pueblo, or municipal corporation, and was vested with title to the lands within her boundaries. *Ib.*

117. A grant of a lot in San Francisco, made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer, that he had authority to make the grant and that the land was within the boundaries of the pueblo. *Ib.*

118. If a private natural person can grant lands upon conditions subsequent and upon their nonperformance resume the ownership, then it follows from the views preceding that a municipal corporation can do the like. *Touchard v. Touchard*, 5 Cal. 307.

119. The power and authority of towns, under the Spanish and Mexican systems, to acquire and dispose of lands, and the conclusion there attained after a careful examination of the Spanish and Mexican decrees, places their right upon as high ground as that of natural persons. *Ib.*

120. Denouncement is the mode of taking advantage of the nonperformance of subsequent conditions in grants made by the government, and it is therefore the only mode, because the government has agreed that denouncement shall be the result of nonperformance. *Ib.*

121. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch v. Sullivan*, 8 Cal. 197; contra *Hart v. Burnett*, 15 Cal. 616. See *Holladay v. Frisbie*, 15 Cal. 634; *Wheeler v. Miller*, 16 Cal. 125.

122. The board of commissioners of the

old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

123. The pueblo of San Francisco had a certain right or title to the lands within its general limits, and the portions of such lands which had not been set apart or dedicated to common use or special purposes, could be granted in lots, by its municipal officers, to private persons, in full ownership. *Hart v. Burnett*, 15 Cal. 616.

124. The authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who at the time represented it, or who had succeeded to its "powers and obligations." *Ib.*

125. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

126. These municipal lands, to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or the new, the subject of seizure and sale under execution. *Ib.*

127. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and the federal government had no such control or supervision. *Ib.*

128. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Ib.*

129. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and that her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. *Ib.*

130. A defendant in ejectment, holding



## Water Lots in San Francisco.—Swamp and Overflowed Land.

such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Ib.*

See *ALCALDE, GRANT, SAN FRANCISCO.*

## IV. WATER LOTS IN SAN FRANCISCO.

131. In the plan of a city the survey into blocks, lots and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping, and it was necessarily anticipated that the water lots would be filled up to a level suitable for building or land carriage. *Eldridge v. Cowell*, 4 Cal. 87.

132. On the formation of the State government, the title to water property passed to this State. *Chapin v. Bourne*, 8 Cal. 296.

133. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviabie interest, subject to sale under execution. *Holladay v. Frisbie*, 15 Cal. 636; *Wheeler v. Miller*, 16 Cal. 125.

134. *Smith v. Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay v. Frisbie*, 15 Cal. 637.

135. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judg-

ment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold, previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 125.

136. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

See *WATER LOTS.*

## V. SWAMP AND OVERFLOWED LAND.

137. The act of May 3, 1852, "providing for the disposal of the 500,000 acres of land granted by Congress to this State," is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims v. Palmer*, 6 Cal. 13.

138. This State has a right to dispose of the swamp and overflowed lands granted to her by Congress prior to the issuing of a patent from the United States so as to convey to the patentee a present title as against a trespasser. *Owens v. Jackson*, 9 Cal. 324; *Summers v. Dickinson*, 9 Cal. 556.

See *SWAMP AND OVERFLOWED LANDS.*

## VI. OF COVENANTS OR RIGHTS TO LAND.

139. The assignment of a covenant to convey will not deprive the land of the lien; it is wholly controlled by the lien, and falls whenever it comes into conflict with it. *Truebody v. Jacobson*, 2 Cal. 287.

140. Where an assignment does not in terms convey real estate, and cannot be fairly construed to do so, it is inadmissible to prove a conveyance previous to a given date, and the equitable ownership of the land. *Lord v. Sherman*, 2 Cal. 502.

141. The transfer of a bond for title to land, upon a promise by the assignee to

pay a certain debt of the assignor, binds the assignee to perform the trust, and the obligation to pay the debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor under the transfer had already vested. *Connelly v. Peck*, 6 Cal. 353.

142. Nor is the obligation of the assignee affected by the fact that the land was partnership property of the assignor, and assigned where it was not so held out to the world, and where the partnership was unknown to the creditor. *Ib.*

143. Where the assignee was a commercial firm and the assignment was made to an agent acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm, and subsequently the firm sold the land to their successors in business, constituting a new firm of which some of the old firm were members: held, that purchasers are chargeable with notice of the trust. *Ib.*

144. The right to a preëmption is not assignable, but may be mortgaged. *Whitney v. Buckman*, 13 Cal. 539.

#### VII. BOND FOR A TITLE.

145. An assignee of a covenant to convey cannot keep possession of land subject to a lien for purchase money, and also refuse the purchase money. *Truebody v. Jacobson*, 2 Cal. 286.

146. A vendor of real estate who makes no conveyance, but gives a bond conditioned for the execution of a conveyance on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as security for the enforcement of his lien. *Gouldin v. Buckelew*, 4 Cal. 111.

147. Where the parties to a bond for title stipulate among themselves for a forfeiture, such forfeiture cannot defeat the plaintiff's rights to the purchase money. *Bagley v. Eaton*, 5 Cal. 500.

148. The breach of a bond for title does not discharge the debt due for the purchase money, and the plaintiff can resort to equity to enforce its performance, or maintain an action at law. *Ib.*

149. At common law a bond for a title

is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclosure. *Merritt v. Judd*, 14 Cal. 73.

#### VIII. WARRANTY.

150. Generally a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. *Blackwell v. Atkinson*, 14 Cal. 471.

151. In real estate the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Ib.*

152. A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after acquired title. *Gee v. Moore*, 14 Cal. 473.

153. In considering the operation of a mortgage upon subsequently acquired title, it is immaterial whether it be regarded as a conveyance of a conditional estate as at common law, or as creating a mere lien or incumbrance, as by the law of this State whatever in the instrument, treating it as a conveyance, would operate to transfer a subsequently acquired title to the grantee, equally operates, treating the instrument as a lien or incumbrance, to subject such acquired interest to the purposes of the original security. *Clark v. Baker*, 14 Cal. 626.

154. By common law there were only two classes of conveyances which were held to operate upon after acquired title—those of feoffment, by fine or by common recovery—and those by indenture of lease, no other forms of conveyance in the absence of covenants of warranty had any effect in transferring the title subsequently acquired, a grant or lease only operated on the estate actually held at the time of its execution by the grantor or releasor. *Ib.*

155. The general doctrine prevailing in

## Warranty.—Vendor's Lien.

the United States is that no estate can be passed by the ordinary terms of a deed unaccompanied with covenants of warranty, which is not vested in interest at the time, and that estates subsequently acquired, whether by purchase or descent, are unaffected by such previous conveyances in the hands of the grantor or those claiming under him. *Ib.* 627.

156. In the United States, conveyances by feoffment, fine or common recovery, are not in use, and no greater effect is given to a grant or a conveyance, by bargain and sale, or lease or release unaccompanied by covenants of warranty, than at common law under the statute of uses. *Ib.*

157. The general doctrine is, however, subject to this qualification—that where it distinctly appears on the face of the instrument, without the presence of the covenant of warranty, either by recital or otherwise, that the intent of the parties was to convey and receive reciprocally a certain estate—the grantor will be estopped from denying the operation of the deed according to such intent. *Ib.* 629.

158. The thirty-third section of the act concerning conveyances changes the rule of common law as to the effect of the deed, under the statute of uses, upon subsequently acquired interest of grantor, and gives to them an operation equivalent to the most expressive covenant of warranty. And this section applies to mortgages, equally as to conveyances, absolute in their form. *Ib.* 630.

See WARRANTY.

## IX. VENDOR'S LIEN.

159. A vendor has a lien on the land sold for the purchase money, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 142.

160. A failure of the vendee to pay the purchase money for two years does not forfeit his right under the contract, and the vendor may enforce payment at any time after due; and if the vendor, under power of sale reserved in the contract, sells the property, either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and payment may be decreed by a judgment. *Gouldin v. Buckelew*, 14 Cal. 111.

161. A vendor of real estate has a lien on the same in the hands of the administrator of the purchase money. *Cahoon v. Robinson*, 6 Cal. 226.

162. It would be a fraud which no court of equity could tolerate, to hold that the vendor of land on a contract to convey, receiving a portion of the purchase money, and seeing the vendee expend large sums of money, improving the property without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of the contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny on his part all obligation to comply with his engagements. *Farley v. Vaughn*, 11 Cal. 236.

163. Equity raises no lien in respect to real estate, except that of a vendor for the purchase money. *Ellison v. Jackson Water Co.*, 12 Cal. 554.

164. Land on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. *McHendry v. Reilly*, 13 Cal. 76.

165. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon the failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 192.

166. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction and execution for any deficiency, or award an execution in the first place and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

167. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative

## Vendor's Lien.—Estoppel.

force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises be sold to raise such money, and that the vendee pay any deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

168. In such case of an unexecuted conveyance, the vendor may ask either a decree directing performance, and in case of refusal, a sale of the premises or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to take a mere foreclosure of the vendor's right to a deed. *Ib.*

See VENDOR'S LIEN.

## X. ESTOPPEL.

169. The owner of land who stands by and sees another sell it, or silently permits another who believes his title good to expend money upon land, without making known his claim, is forever estopped from setting up his title against an innocent purchaser. *Godeffroy v. Caldwell*, 2 Cal. 491.

170. The fact that the plaintiff stood by and permitted defendant to settle on the land, will not warrant an instruction that the plaintiff is thereby estopped from asserting his title. *Gunn v. Bates*, 6 Cal. 272.

171. Where a party enters into the possession of land claiming under another and in subordination of his title, he is estopped from questioning it. *Ellis v. Jeans*, 7 Cal. 416; *Walker v. Sedgwick*, 8 Cal. 402.

172. Where a party has an equity and also actual possession of the land, a purchaser of the legal title is bound to take notice. *Bryan v. Ramirez*, 8 Cal. 467.

173. Where a person knowingly though

passively looks on and suffers another to purchase and expend money on land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to assert his legal right against such person. *Ib.*

174. Where the defendants, claiming to be preëmptioners of the premises in controversy under the laws of the United States, offered parol evidence to show that the four leagues as surveyed and patented to the plaintiff were different from the tract designated in the grant upon which the patent issued, and the map to which the grant made reference, and that a correct location of the tract as granted would not include the premises in suit: held, that the court properly excluded the evidence, as the patent is conclusive evidence of the validity of the original grant and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all the interest of the United States in the land. *Boggs v. Merced Mining Co.*, 14 Cal. 361.

175. The private survey of Fremont to "Las Mariposas," in 1849, and his presentation of the same to the board of land commissioners as embracing and identifying the tract he claimed, and subsequent public and repeated disclaimers by him at the time the defendant took possession of the premises in controversy in 1851, and afterward up to July, 1855, of any title or claim to the property, and of any title or claim to any land within the exterior bounds of the grant to Alvarado, except that designated in his survey; and the fact that he knew of the occupation and improvements of the defendant from the time the possession was taken, without forbidding the same or claiming the premises until July, 1855, do not estop him from claiming the premises under his patent, there being no proof that he made such declarations and disclaimers willfully, or that he intended to deceive or defraud defendant or influence his conduct. *Ib.* 373.

176. By the patent, the government is estopped from asserting title to the premises; and if Fremont is estopped from asserting title against defendant, then it would have, by merely occupying the land as public land, rights superior to both, and that, too, in the face of an express prohi-



## Estoppel.—Landlord and Tenant.

bition of the sale, by the government, of the mineral lands. *Ib.*

177. A party will, in many instances, be concluded by his declarations or conduct, which have influenced the conduct of another to his injury; but it must appear first, that the party making the admission, by his declarations or conduct, was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such carelessness and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and fourth, that he relied directly on such, and will be injured by allowing its truth to be disproved. *Boggs v. Merced Mining Co.*, 14 Cal. 367; *McCracken v. City of San Francisco*, 16 Cal. 626.

See ESTOPPEL.

See ABANDONMENT, ALCALDE, CONVEYANCE, DEED, COMMON PROPERTY, EJECTMENT, GRANT, HOMESTEAD, LEASE MORTGAGE, POSSESSION, USE AND OCCUPATION.

## LANDLORD AND TENANT.

1. The entry of a landlord upon his tenant's premises without his consent during the lease, and reletting them, is a discharge of the tenant from his covenants. *Dewey v. Gray*, 2 Cal. 377.

2. The relation of landlord and tenant exists where the landlord is an alien non-resident, and is obligatory upon the tenant, and he cannot be allowed to controvert the title of the lessor. *Ramirez v. Kent*, 2 Cal. 560.

3. Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, or by one of two belligerent parties claiming the land, this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson v. Shaeffer*, 3 Cal. 201.

4. The allegation that the use and occupation of the lot in question was at the request of the defendant, and by the permission of plaintiff, was the allegation of a contract, and this plaintiff is bound to establish, to enable him to succeed. *Ib.*

5. In an action for use and occupation, the court was asked to instruct the jury "that it was necessary to enable the plaintiff to recover, that he should show that the defendant used and occupied the premises by the permission of the plaintiff; but they must find a verdict for the defendant," which the court refused: it was held that in this the court erred. *Ib.*

6. The thirteenth section of the act concerning forcible entries and unlawful detainers, was intended to make the non-payment of rent work a forfeiture of the estate of the tenant; but the statute must be pursued strictly, and the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chipman v. Emeric*, 3 Cal. 283; *Gaskill v. Trainer*, 3 Cal. 339.

7. A waiver of demand of rent will never be implied for the purpose of making a forfeiture; for from its very nature, a forfeiture cannot take place by consent and is not favored by the rules of law. *Gaskill v. Trainer*, 3 Cal. 340.

8. The right to recover for use and occupation is founded alone upon contract. *O'Connor v. Corbitt*, 3 Cal. 373.

9. By the terms of an award which was decisive between a landlord and his tenant, the latter was to leave the premises on the ninth: held, that the plaintiff had no right to give notice to quit until the tenth, and then the plaintiff had six days to remove before the plaintiff could sue for unlawful detention. *Ray v. Armstrong*, 4 Cal. 208.

10. The owner of a building leased a portion of it. There was access to the part reserved without going through the part leased, it was held that the lessor had no implied right of way to the part reversed through any portion of the lessee's portion. *Ramirez v. McCormick*, 4 Cal. 246.

11. A landlord cannot sue for forcible entry and detainer, in his own name, for unlawful entry upon the possession of his tenant. *Treat v. Stuart*, 5 Cal. 114.

12. No action for rent will lie where the possession is adverse and tortious, for



## Landlord and Tenant.

such possession excludes all idea of a contract. *Ramirez v. Murray*, 5 Cal. 223.

13. To enable a party to recover rent eo nomine, he must show that the defendant's possession was by virtue of some express or implied agreement. *Ib.*

14. A demand of rent at any time during the term when the same might be due, will be sufficient diligence to hold a party who has guaranteed its payment. *Evoy v. Tewksbury*, 5 Cal. 287.

15. Where an action was for restitution of land, and pending the appeal the plaintiff transferred his judgment to a third party and sold the premises to the defendant: held, that the plaintiff's recourse for rent, if he have any, is against the defendant for use and occupation and not upon the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

16. Where the plaintiff leased a tract of land claimed by him under a Mexican grant, to defendant, upon condition that he was not to pay any rent for two years, and if the title was confirmed within that time, defendant was to give up his improvements; but if not confirmed in two years, defendant was to remain on until confirmation, with the privilege of buying in case of sale; and if not confirmed, defendant was to hold it as public land; and the defendant at the end of two years took up the tract as public land: held, in an action for the possession and damages, that defendant's improvements erected before, after he thus terminated his tenancy, were only a substitute for the first two years' rent, and that he was chargeable for rent thereafter accruing. *Gunn v. Pollock*, 6 Cal. 241.

17. After the forfeiture of the lease by the nonpayment of rent, if the landlord received the rent, he waives the forfeiture and the lease continues. *Barroilhet v. Battelle*, 7 Cal. 454.

18. Tenants have a right to remove buildings erected by them at any time before the expiration of their lease, but not after a forfeiture or reëntury for covenant broken. *Whipley v. Dewey*, 8 Cal. 38.

19. There is no moral obligation under such circumstances sufficient as a consideration to support a subsequent promise of the landlord to allow the tenant to remove his buildings. *Ib.* 39.

20. Where a landlord agreed to allow

his tenant a reasonable time, after the expiration of his lease, to remove his buildings and the tenant surrendered or forfeited his lease before the expiration thereof, the intention of the parties must be confined to its legal expiration and not to the wrongful act of the lessee in terminating it, and the lessee can claim no rights under the contract. *Ib.*

21. A tenant may show that his landlord's title has terminated, or that his attornment was made under mistake of fact or by fraud. *McDevitt v. Sullivan*, 8 Cal. 596.

22. When a party rents property of another and he learns afterward that the title of his landlord is disputed, he may at once proceed in the proper mode to settle the question. If he fail to do this, he cannot dispute the title, except in the cases stated, where the title of his landlord has ceased, or when the lease was obtained by fraud. *Ib.* 597.

23. A tenant who puts up machinery for a mill in a house leased, and fastens it by bolts, screws, etc., to the house, has the right to remove it; but as between vendor and vendee, such machinery would be considered part of the realty. *McGreary v. Osborne*, 9 Cal. 121.

24. In an action of ejectment, a tenant cannot deny the title of the vendee of his landlord. *McKune v. Montgomery*, 9 Cal. 576.

25. Where one of two tenants, holding the household in partnership, purchases the fee in his own name and with his own money, it inures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Laffan v. Naglee*, 9 Cal. 676.

26. The lessor of plaintiffs is a competent witness in an action of trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *McCormick v. Bailey*, 10 Cal. 232.

27. A tenant may remove what he had added to the freehold when he can do so without injury to the estate, unless it has become by its manner of addition an integral part of the original premises; but as against a vendor, all fixtures pass to the vendee, even though erected for the purpose of trade and manufacture, unless specially reserved in the conveyance. *Sands v. Pfeiffer*, 10 Cal. 264.

28. A tenant, by failing to pay rent when due, forfeits his lease. *Treat v. Liddell*, 10 Cal. 303.

29. Where T. & C. executed a joint lease to L. of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Ib.*

30. The rule of estoppel, which prevents a tenant from disputing his landlord's title, extends to all persons who enter upon premises under a contract for a lease, and to all persons who, by purchase, fraud or otherwise, obtain possession from such tenant. *Rose v. Davis*, 11 Cal. 141.

31. Where a lease contained the usual covenants for rent and reëntury for non-payment, and provided for the appraisal of improvements erected by the lessee and payment of their value by the lessor at the expiration of the term, and the lessor reëntered for the nonpayment of rent: held, that the lessee could not maintain an action upon being evicted for the value of his improvements. *Lawrence v. Knight*, 11 Cal. 303.

32. An executory agreement between a landlord and tenant, that after the title to the premises is settled by a suit to be prosecuted by the former against third persons, the tenant may purchase, does not destroy the relation of landlord and tenant. *Smith v. Brannan*, 13 Cal. 114.

33. Possession of a tenant is not notice of his landlord's title. *Smith v. Dall*, 13 Cal. 511.

34. *Semble*, if a man sues for rent for January and February, he is not to be denied a right of recovery for either month, simply because he had before sued for rent due in January, which suit was still pending. *Thompson v. Lyon*, 14 Cal. 42.

35. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt v. Judd*, 14 Cal. 69.

36. Such machinery, when applied to quartz leads, is a trade fixture, removable

by the tenant if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the premises under a right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

37. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

38. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lease. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

39. Where a lease gives the lessee the privilege of purchasing the land at the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock v. Page*, 14 Cal. 443.

40. If the landlord forcibly enter and eject the tenant, the tenant may recover damages for the vegetables and grape vines growing on the land, and planted by the tenant, for sale, he not being permitted to enter and gather them. *Fox v. Brissac*, 15 Cal. 225.

41. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary

## Land Commission of the United States.

to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 90.

See LEASE, RENT.

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LAND COMMISSION OF THE UNITED STATES.

1. A decision of the United States board of land commissioners confirming the title of defendants to the land only amounts to an acknowledgment on the part of the government that it has no claim thereto, and in no way affects the title as between parties. *Brown v. Covillaud*, 6 Cal. 474.

2. The confirmation of the title of the city of San Francisco by the board of United States land commissioners and the dismissal of the appeal by the attorney general, have settled that no title to lands within the limits of that city can hereafter be acquired from the United States. *Norton v. Hyatt*, 8 Cal. 539.

3. The judgment of the board of land commissioners, the tribunal of original jurisdiction, is sufficient evidence of such confirmation, unless the judgment be reversed, or its operation suspended by an appeal which is still pending. *Sanders v. Whitesides*, 10 Cal. 90.

4. A deed of confirmation of a grant of the United States land commission and the United States district court cannot be impeached in an action of ejectment between a party claiming under the grant and a third party. *Rose v. Davis*, 11 Cal. 140.

5. The decrees of the board of land commissisners and of the district court are not indispensable to a recovery in ejectment on a grant, but are admissible and conclusive against the government and against those holding by its license or permission. *Gregory v. McPherson*, 13 Cal. 572.

6. In ejectment on a Mexican grant, the decree of the land commission confirming it, rendered final by the withdrawal on the part of the United States of any

appeal therefrom, and an order of the district court permitting the claimant to proceed thereon as on final decree, are conclusive evidence of the validity of the grant, of its recognition by the United States, and also of the location of the specific quantity granted, the decree in the case confirming the claim under the grant to a particular tract, describing it with specific boundaries. Such a decree and order, in connection with the grant, are as conclusive as to the title of plaintiff as a patent; provided, the premises are within the designated boundaries. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 550.

7. There were pending before the board of United States land commissioners three cases—No. 558, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases No. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before the said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case No. 558, and on file therein; and to use their “best endeavors to procure the confirmation of said claim No. 558.” B. was the attorney for the Miranda claim, which was for the same land as claim No. 558. To defeat claim No. 558 he acted for the United States law agent in taking said depositions, which were important to the government in defeating claim 558, and he attempted to carry out his agreement to withdraw said depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement: held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to government as an attorney, carry out such agreement. *Valentine v. Stewart*, 15 Cal. 397.

LAND COMMISSION OF THE STATE.

1. That portion of the act prescribing that no injunction shall be issued against the land commissioners appointed for the sale of the State interest within the water line is invalid. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy v. Hermance*, 5 Cal. 74.

2. The sale of a portion of the beach and water lot property in San Francisco, by the State board of land commissioners, under the act of May 18th, 1853, passed nothing but the state reversionary interest. *Chapin v. Bourne*, 8 Cal. 296.

3. The authority of the board of commissioners under the act of May 1st, 1855, relative to a sale of the state's interest in the water line front of the city of San Francisco, as defined by the act of March 26th, 1851, is limited to the property within the boundaries defined by the act; and a sale by them of lots not within these boundaries is a nullity and cannot constitute a cloud of title. Hence an injunction against such a sale will not lie. *Kisling v. Johnson*, 13 Cal. 57.

LARCENY.

1. On the trial of an indictment for grand larceny, punishable with imprisonment or death, at the discretion of the jury, a juror was asked by the prosecuting attorney, whether he had any conscientious scruples against the infliction of capital punishment, to which he answered that he would hang a man for murder, but would not for stealing: held, that the juror was not competent. *People v. Tanner*, 2 Cal. 258.

2. In cases of grand larceny it was the intention of the legislature that the jury should only assess the punishment when they thought that the defendant deserved the punishment of death, and if they do not agree to such a punishment, then they should find a general verdict. *People v. Littlefield*, 5 Cal. 356.

3. A party cannot be convicted of larceny for taking his own property. *People v. Mackinley*, 9 Cal. 250.

4. An indictment for larceny describing the money as "three thousand dollars lawful money of the United States," is insufficient. The particular denomination or species of coin must be set forth. *People v. Ball*, 14 Cal. 101.

5. An indictment for grand larceny, found at a special term of the court of sessions, is valid, under the statute authorizing that court to hold special terms in certain cases; the court when specially called has the same powers as at a regular term. *People v. Carabin*, 14 Cal. 439.

6. Defendant was indicted for stealing a steer. The court charged the jury, in effect, that though defendant killed the steer, believing it to be his own, yet when he appropriated it to his own use and benefit, it was evidence of a felonious intent, and the jury will so find: held, that the charge was erroneous, because it assumes as a fact that defendant did appropriate the steer, which was for the jury, and thus makes the mere fact of appropriation conclusive proof of guilt. *Ib.* 440.

7. An indictment charging defendant with "stealing, taking and leading or driving away," the property stolen, etc., is not defective under our statute as charging the offense in the disjunctive. The gravamen of the offense is taking and removing the stolen property, and it is immaterial whether the asportation be by means of leading the animals stolen or driving them. The offense is complete by the union of either of these acts and the seizure or appropriation. *People v. Smith*, 15 Cal. 409.

8. Either leading or driving away horses charged to have been stolen, etc., is a carrying away within the law. *Ib.* 410.

9. An indictment for larceny describing the property as "a black or brown mare or filly, branded with a small mule shoe on the left shoulder," is sufficiently particular in description. To state the color is not necessary, and putting it in the alternative is not a fatal objection, especially when other terms of description are given, which identify the property. Our statute does not require more exactness than obtained at common law. *Ib.* 410.

10. Confessions of a defendant indicted

Larceny.—Laydays.—Lease in general.

for larceny, made to the prosecutor and owner of the property stolen, upon inducements held out by him that if defendant would disclose his confederates he would use his influence to get defendant acquitted, are not admissible in evidence against him. *Ib.*

11. An indictment for larceny, describing the property stolen as "fifteen twenty dollar pieces, and twenty-five ten dollar pieces, and ten five dollar pieces, of the gold coin of the United States, of the value of five hundred and fifty dollars," is not defective, as not averring the value of each particular piece of coin. *People v. Green*, 15 Cal. 513.

12. To convict a defendant of larceny upon the testimony of an accomplice, together with corroborating evidence, the corroborating evidence must connect the defendant with the offense charged. It is not sufficient that it corroborates the accomplice as to the fact that a larceny was committed. *People v. Eckert*, 16 Cal. 112.

13. McB., the accomplice, swore to the larceny by the defendant. The court instructed the jury, "that though the witness McB. was impeached, if his testimony was corroborated by the testimony of witnesses unimpeached, they were bound to believe his testimony:" held, that the instruction was wrong, as taking from the jury their right to judge of the credibility of all the statements of the witness. *Ib.*

14. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about \$1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento, instead of the mill. Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there, he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been paid before L. took the property. Ruled

out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness had been paid. *People v. Stone*, 16 Cal. 371.

15. Larceny is compounded of the taking and carrying away, and the felonious intent. Whatever has a legal tendency to show the intent is proper evidence. *Ib.*

16. A man may steal his own property, if by taking it his intent be to charge a bailee with the property, and thus impose a loss upon him. *Ib.*

See CRIMES AND CRIMINAL LAW, INDICTMENT, STOLEN GOODS.

LAYDAYS.

1. In the absence of any custom to the contrary, Sundays are computed in the calculation of laydays at the port of discharge; but where the contract specifies working laydays, Sundays and holidays are excluded in the computation. *Brooks v. Minturn*, 1 Cal. 483.

See ADMIRALTY.

LEASE.

I. In general.

II. Assignment of a lease.

I. IN GENERAL.

1. A priest had no authority to lease lands appertaining to the missions after the cession of California to the United States,

In general.

and a title thus derived is invalid. *Brown v. O'Connor*, 1 Cal. 419.

2. In an action by a lessor against two subtenants of the lease, when it appears that the subtenant did not occupy any portion of the premises jointly, it was held that a several and not a joint judgment would be proper. *Pierce v. Minturn*, 1 Cal. 471.

3. Where the value of the premises was agreed upon, the offer of the defendant to prove that he could not rent them was properly refused. *Lord v. Sherman*, 2 Cal. 502.

4. Where the defendant leases a store and certain stands for the sale of goods, which stands were erected on the sidewalk of the public street, and were shortly afterwards removed by police regulation, this is no eviction, as it was a mere privilege, and the lessee should have protected himself with covenants. *McLarren v. Spaulding*, 2 Cal. 513.

5. A lessee admits the authority of his lessor by taking a lease, and no averment of the lessor's right to lease is necessary as against him. *Morse v. Roberts*, 2 Cal. 516.

6. A lease for two years executed by the lessees, and by an agent of the lessors, but who had no written authority to do so, is within the statute of frauds. *Folsom v. Perrin*, 2 Cal. 604.

7. Plaintiff and defendant took a joint lease for improving certain property. Plaintiff, at the instance and request of the defendant, furnished the necessary funds on interest, and the defendant drew the contract. Plaintiff sued to recover the half portion of the outlay: held, that the improvements were not made at plaintiff's own risk. *Young v. Polack*, 3 Cal. 211.

8. Where the petition set forth a lease and contract to pay rent in kind, and a refusal to pay, and an intent to defraud plaintiff of his rent by removing the crop, and a prayer for an injunction: held, that the complaint must aver the insolvency of the defendant or an inability to realize the rent by attachment or execution. *Gregory v. Hay*, 3 Cal. 334.

9. The surrender of a leasehold estate operates as a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect. *Gaskill v. Trainer*, 3 Cal. 340.

10. A party holding a lien on a lease-

hold estate has a right to enforce it, notwithstanding a subsequent failure of the lessee to pay rent and, a surrender of the lease to the lessor. *Ib.*

11. The nature of an interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Ib.*

12. Improvements made by an owner of property after the surrender of a lease by a tenant, upon whose leasehold interest a mechanic's lien had previously attached, can no more impair the lien than if made by the tenant himself. *Gaskill v. Moore*, 4 Cal. 235.

13. A clause in a lease exempting the tenant from liability to restore the house in case it should be destroyed by fire, does not release him from paying rent in case of such destruction. *Beach v. Farish*, 4 Cal. 340.

14. The premises were leased for six years, and the lessees were to build a wharf on the land, but stipulated for no particular time: held, that the lessor, before the expiration of the term, could have no legitimate cause of complaint. *Ib.*

15. A covenant "to let the lessor have what land he and his brothers might want for cultivation" cannot be enforced for uncertainty. *Ib.*

16. A covenant for a lease to be renewed indefinitely at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law. *Morrison v. Rossignol*, 5 Cal. 65.

17. Where a clause of renewal in a lease discloses no certain basis for the ascertainment of the rent to be paid, such clause will be held void for uncertainty. *Ib.*

18. A executed a lease to B, and at the time of the execution C wrote underneath it, "I hereby agree to pay the rent stipulated above, when it shall become due, provided that the said B does not pay the same: held, that the agreement of C being added as an agreement running with the lease and executed at the same time, it must be considered as a part of the lease itself, and not within the statute of frauds. *Eroy v. Tewksbury*, 5 Cal. 286.

19. If a party leases from another a tract of land for agricultural purposes, upon which there is a mine, any irreparable injury to the mine would not affect his estate, but the injury would be to the estate of the landlord, and the remedy in

In general.

respect to that injury must be sought by the latter. *Merced Mining Co. v. Fremont*, 7 Cal. 327.

20. Where plaintiff leased a lot to B. for ten years, at a monthly rent payable monthly; at the end of the term, B. to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained this clause: "And it is further agreed, that the brick house now being built shall always be and remain as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" held, that it was a mortgage and that it might be foreclosed on the nonpayment of the first or any month's rent. *Barroilhet v. Battelle*, 7 Cal. 452.

21. Where the lessee completed the business and subsequently mortgaged the lease to T., and then assigned the lease to T. for further security, and T. entered as tenant and paid rent, there being back rents due from the original lessee: held, that T. was bound to know the terms of the lease and the mortgage therein contained; that plaintiff had a right to foreclose, and sell the reversionary interest of the original lessee, to wit: two-thirds of the value of the house at the end of the term; that T., provided she paid the rent, would have the right of possession until the end of the term, the acceptance of rent from her having waived the forfeiture of the lease. *Ib.* 454.

22. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Ib.*

23. Tenants have a right to remove buildings erected by them at any time before the expiration of their leases, but not after a forfeiture or reëntury for covenant broken. *Whipley v. Dewey*, 8 Cal. 38.

24. Admitting that the landlord had agreed to allow the plaintiff to remove after the expiration of the lease, the intention of the parties must be confined to the legal expiration thereof, by its own limitation, and not by the wrongful act of lessees terminating the same. *Ib.* 39.

25. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by

the tenant: held, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 596.

26. A covenant in a lease to the lessee, his heirs and assigns for a term of eight years, that if the lessee shall sell or dispose of the demised premises the lessee is to be entitled to the refusal of the same, is a covenant running with the land. *Laffan v. Naglee*, 9 Cal. 676.

27. Every covenant in the lease relating to the thing devised attaches to the land and runs with it. *Ib.* 677.

28. Where one of two holders of the leasehold holding in partnership purchases the fee in his own name and with his own money, it enures equally to the benefit of the other, to which he becomes entitled on payment of his proportion of the purchase money. *Ib.* 678.

29. Where T. and C. executed a joint lease of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T., and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. & C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Treat v. Liddell*, 10 Cal. 303.

30. A tenant, by failing to pay rent when due, forfeits his lease. *Ib.*

31. The validity of a lease under which a lessee of a State's prison held the prisoners cannot be tried in an action of forcible entry and detainer, nor can the lessee be deprived of the advantages resulting from the possession of the premises under the lease, by a forcible ouster under legislative enactment. *McCauley v. Weller*, 12 Cal. 528.

32. The purposes for which premises are leased cannot alter the nature of the leasehold interest as property. *Ib.*

33. Whether a lease gives the lessee the privilege of purchasing the land at the expiration of the lease on certain terms, the privilege is limited to the whole land, and the lessee, or a purchaser from him of a portion of the land, cannot claim the right to buy that portion. *Hitchcock v. Page*, 14 Cal. 443.

34. A steam engine and boiler fastened to a frame timber, bedded in the ground of a quartz ledge sufficient to make it level,

In general.

with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt v. Judd*, 14 Cal. 69.

35. Such machinery, when applied to quartz leads, is a trade fixture, removable by the tenant if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the premises under a right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

36. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

37. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of the mortgagee of the lease. Here the question is between grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

38. A landlord has no right to enter for a breach of covenant in the lease, and forcibly eject the tenant, the lease reserving no right of entry for such breach. *Fox v. Brissac*, 15 Cal. 225.

39. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not. *Minturn v. Burr*, 16 Cal. 109.

40. Where a lease of a lot in San Francisco, for ten years, stipulated that the lessee should place "on said premises a building thirty by eighty feet, which has been shipped from the port of New York, to be put up immediately on arrival; or if lost, a similar one is to be ordered, got up, and put up in the shortest possible time," and also, in a final clause, that if no agreement was made between the parties for a renewal of the lease for a further period, "then the valuation of the *buildings* is to be made by three disinterested persons," etc., and the lessor was to pay to the lessee

the amount agreed on; and the lessee erected a building worth about \$1,000, which was burned, and then another similar one, and subsequently sublet the premises to plaintiff, who put up a valuable building, costing \$50,000—defendants, who had bought the lot, notifying him, before he erected his building, that they would not pay for it: *Held*, that at the expiration of the term, defendants were not bound to pay plaintiff for his improvements; that the term "*buildings*," though in the plural, refers to the building mentioned in the fore part of the lease, and not to any buildings the lessee might erect—especially when the conduct of the parties, the nature of the transaction, and the surrounding circumstances are considered. *Woodward v. Payne*, 16 Cal. 448.

41. The terms of this lease so construed as to give completeness to the agreement, and to make it a just, fair, and equitable contract, mutually obligatory in its essential provisions, instead of a one-sided and unreasonable contract. *Ib.*

42. A power of attorney, authorizing the agent Schoolcraft to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name, release others, or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a lease of real estate, containing a clause that the lessee "shall have the privilege of purchasing any part of said land during the continuation of this lease, at its value, in preference to any other person. *De Rutte v. Muldrow*, 16 Cal. 512.

43. Where a lease gives the lessee the privilege of purchasing the land during the lease, at its value, in preference to others, this privilege is as much a term of the contract, and binding on the lessor, as any other term of the instrument; and though the lessee be not bound to purchase, and the lessor's contract may amount only to a proposition, until accepted by the lessee, yet, upon his acceptance, it becomes a valid agreement. *Ib.*

44. Where a lease contains such privi-

In general.

lege in favor of the lessee to purchase, he has an equity as against his lessor to have the agreement executed. *Ib.*

45. M. had a lease, dated December, 1849, from Sutter, through his agent, S., containing a clause of purchase of the land during the lease. April, 1850, M. received a letter from Sutter, directed to S., his agent, and M., in which Sutter stated that he had sold to M. the land in dispute for \$2,800, two hundred dollars of which had been paid, and the balance was to be paid in three equal payments of six hundred dollars, for which M. was to execute his notes, and reform the lease so as to relinquish his right to purchase the balance of the land leased; that M. was to have a bond for forty acres of the land, and the balance of the land he was to have at any time during the continuation of the lease, upon the payment of eight hundred dollars additional; that M. then and there executed the three notes for six hundred dollars each, and S., as the attorney of Sutter, executed and delivered to M. a bond for the forty acres, and changed and reformed the lease. M. took possession of a portion of the land on the execution of the original lease. Prior to October 22d, 1850, M. paid the \$2,800, and Sutter, by his then attorney, F., executed to M. a deed for the land in dispute. Plaintiffs received from Sutter a deed of the land, dated May 3d, 1850, made in pursuance of an agreement between the parties, dated January 26th, 1850. Plaintiffs also had another deed from Sutter, dated November 20th, 1850. When plaintiffs purchased, they had notice of M.'s equity and interest in the land: held, that this letter constituted a valid agreement as to the land, and, when taken in connection with the execution of the agreement by the deed of Sutter to M., by his agent, F., in April, 1850, with the possession of the premises by M., notice to plaintiffs of M.'s rights makes out an equitable title in M. sufficient to defend in ejectment by plaintiffs. *Ib.* 513.

46. The fact that such letter had no date is not essential, either by Spanish or common law, to make the letter a perfect agreement. The transaction being closed by F. a day or two subsequently, and the notes of M. taken in execution of the agreement, the omission as to date could be supplied by the notes. *Ib.*

47. Where land is described in a lease

as "land lying along the American fork, bounded by said fork, and running down to land owned by Mark Stewart; thence easterly and north-easterly along a slough to the north of A street, and following the bank of said slough around to where the high land slopes to said American fork," etc., the true construction of this description fixes the boundary on the slough, and the words "around where the high land slopes," if they have any meaning at all, can only be applied to the bank or high ground adjoining the slough. *Ib.* 514.

48. *Query*: Whether a leasehold estate for a term of years is property in such sense that a judgment docketed becomes a lien thereon. *McDermott v. Burke*, 16 Cal. 589.

49. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee, at the time, has actual or constructive notice of the mortgage. *Ib.*

50. The interest of the lessee, in such case, depends for its duration—except as limited by terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

51. There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises—except where the purchaser is precluded, by his acts or declarations, from thus treating him. *Ib.*

52. The purchaser cannot, for the want of privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, expressed or implied, is made between them with reference to the occupation. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment, if offered, unless the acts or declarations of the purchaser, anterior to the purchase, qualify the subsequent relation of the parties, or the rights springing from it. *Ib.*

In general.—Assignment of a Lease.

53. There are cases where the purchaser on a sale under a decree of foreclosure would be estopped from treating the tenant of the mortgagor as a trespasser; as, for instance, when the lease was taken upon the encouragement of the mortgagee, and the purchaser was cognizant of the fact at the time of his purchase. *Ib.*

54. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

55. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

56. But the tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

2. Assignment of a Lease.

57. An assignor of a leasehold estate, who has parted with his whole interest therein, is liable for the rents and profits of the premises after the assignment, from the single fact that the assignee has continued to occupy them. *Gunter v. Geary*, 1 Cal. 475.

58. It is questionable whether a breach of a covenant not to assign a lease would be enforced so as to produce a forfeiture. It is in restraint of alienation, and therefore against the policy of the law. *Chipman v. Emeric*, 5 Cal. 51.

59. The assignment of a lease as collateral security for the payment of a debt does not vest the estate in the assignee

until a breach of the agreement; and an assignee is only entitled to the reversion by privity of estate, or the actual occupation and beneficial enjoyment. *Engles v. McKinley*, 5 Cal. 154.

60. A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of reëntury upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate. *Smiley v. Van Winkle*, 6 Cal. 606.

61. The valuable privilege of preëmption attached to a lease belongs to the whole property, and is therefore assignable. *Laffan v. Naglee*, 9 Cal. 677.

62. The assignee of a lease may discharge himself from all liability under the covenants of the lease by assigning over; and the assignment over may be to a beggar, or a femme covert, or a person on the eve of quitting the country forever, provided the assignment be executed before his departure; and even though a premium be given as an inducement to accept the transfer. *Johnson v. Sherman*, 15 Cal. 292; *People v. Brooks*, 16 Cal. 25.

63. If some of the covenants of the lease do not bind the assignee, the State cannot have relief on that ground; she can claim no greater exemption than an individual from the consequences of an unwise contract. *State v. McCauley*, 15 Cal. 457; *People v. Brooks*, 16 Cal. 25.

64. The act of March, 1856, having authorized the commissioners to execute a lease of the State prison, without prescribing any specific form, or containing any restrictions as to assigning; and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment. The security of his bond was not impaired thereby. *State v. McCauley*, 15 Cal. 457; *People v. Brooks*, 16 Cal. 25.

See LANDLORD AND TENANT, RENT.

LEGACY.

1. The taking of a legacy by the wife under the will of the husband will not prevent her from contesting the validity of the will, so far as it disposes of the half interest in the common property of others. *Beard v. Knox*, 5 Cal. 257.

2. A legatee who has been represented by counsel at the allowance of accounts against the estate will not be allowed, after a lapse of time, to come in and have the allowance set aside on a mere general averment of newly discovered evidence. *Williams v. Price*, 11 Cal. 213.

3. Bill filed by a judgment creditor of J. upon an order of court permitting it against defendants as executors. Bill avers that the will of deceased directed, by written or oral instructions, the executors to sell certain cattle, and retain the proceeds for the use and benefit of J., after first discharging his then debts. That it also declared that he, the testator, had made a secret assignment for J., which the executors would carry into effect according to his instructions when convenient. Bill charges that defendants have not sold the cattle, but have converted them to their own use: held, that a demurrer was properly sustained; that a pleading must be taken most strongly against the pleader; and that there is no law giving effect to an oral instruction of a testator as a will or part of a will; and that the creditor of J. can have no more rights than J. himself. At most, J. is only a legatee, and the executors of the trustees of the legacy; and the bill not stating that the estate is settled, nor that the property or the money is not necessary to pay off the debts or expenses of administration, nor that J. would be entitled before final settlement to his legacy without tendering a refunding bond, cannot be maintained. *Sparks v. De la Guerra*, 14 Cal. 111.

See ADMINISTRATOR, ESTATES OF DECEASED PERSONS, PROBATE COURT, WILL.

LEGISLATURE.

See CONSTRUCTION OF STATUTES, III.

LEVY.

See ATTACHMENT, V; EXECUTION, III.

LEX LOCI.

1. Personal property beyond the limits of this State assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing and being at the time in the foreign jurisdiction where the property was, and possession being taken by the latter vests in the assignee according to the lex loci, and his title will be maintained here against creditors of the assignor. *Forbes v. Scannell*, 13 Cal. 278.

LIBEL AND SLANDER.

1. It was error for the court to instruct the jury that when a person injuriously slanders the title of another, malice is presumed. *McDaniel v. Baca*, 2 Cal. 338.

2. If the circumstances raise a strong presumption that fraud has been perpetrated in getting possession of an estate, there is no malice accompanying a publication of caution to the public in the purchase thereof. *Ib.*

3. In action for slander, where words are charged to have been spoken of and concerning a defendant, as a clerk or tradesman, which it is alleged was his profession, it is unnecessary to allege special damages. *Butler v. Howes*, 7 Cal. 89.

4. In action for an alleged libel, a variance between the date of the libel as set forth in the complaint, the twenty-third of June, and the date as shown in the evidence—the twenty-fourth of June is not material unless the defense is misled by it. *Thrall v. Smiley*, 9 Cal. 536.

5. To constitute a justification, in an action for a libel, the answer must aver the truth of the defamatory matter charged. It is not sufficient to set up facts which only tend to establish the truth of such matter. Without an averment of its truth, the facts detailed can only avail in mitigation of damages. *Ib.*

6. In an action for slander for words spoken in the presence and hearing of the plaintiff, and immediately after the defendant had uttered the slanderous words the plaintiff replied to them, which reply the plaintiff offered to prove on the trial, and the court refused to hear such proof: held, that such ruling of the court was error, as the reply might have qualified or explained the slanderous words, or shown in what sense they were uttered, or might have even admitted their truth. *Bradley v. Gardner*, 10 Cal. 372.

LICENSE.

1. The State has the power to require the payment by foreigners of a license fee for working the gold mines in this State. *People v. Naglee*, 1 Cal. 242.

2. The statute of California authorizing the granting of license to keep a gambling house, should not be construed as conferring the right to sue for a gaming debt, but as a protection solely against a criminal prosecution. *Bryant v. Mead*, 1 Cal. 444.

3. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespassers. The State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell v. Hagood*, 6 Cal. 148.

4. A ferry-license being a franchise is not the subject of levy and sale under ex-

ecution. *Thomas v. Armstrong*, 7 Cal. 287.

5. An act of the legislature authorizing boards of supervisors to appoint a collector of foreign miners' license is not unconstitutional. Assessors and tax collectors are constitutional officers; but it is not necessary under the thirteenth section of article eleven of the constitution, that every portion of the revenue pass through their hands. The legislature may authorize the tax-payer to pay his taxes directly into the treasury. *People v. Squires*, 14 Cal. 16.

6. The foreign miners' license, though in some sense a tax, yet probably it is not so in the sense involved in the necessary duties of a tax collector, as a tax on land or personal property. *Ib.*

7. The statement of the existence of a general license from the United States to work the mines which the public lands contain is inaccurate as applied to the action, or rather, want of action of the government. There is no license in the legal meaning of that term. A license to work the mines, implies a permission to extract and remove the metal. Such license from an individual owner can be created only by writing, and from the general government only by act of Congress. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the general government consists in its simple forbearance. *Boggs v. Merced Mining Co.*, 14 Cal. 374.

See BRIDGES AND FERRIES, FRANCHISE, WHARF.

LIEN.

- I. In general.
- II. In Admiralty.
- III. By Attachment.
- IV. Of a Judgment.
- V. Of a Vendor.

In general.—In Admiralty.

I. IN GENERAL.

1. An attorney has no lien upon a judgment recovered by him in favor of his client for a quantum meruit compensation for his services; such lien extends only to costs given by statute. *Ex parte Kyle*, 1 Cal. 332; *Mansfield v. Dorland*, 2 Cal. 509; *Russell v. Conway*, 12 Cal. 103.

2. Where the estate of an insolvent is subject to liens or mortgages created before the application in insolvency, proceedings therein do not affect such liens or mortgages, and the right of the assignees is confined to the surplus. *Rix v. McHenry*, 7 Cal. 92.

3. If the purchasers from parties alleged to have been insolvent, bought in good faith, it is immaterial how many valid prior liens may have attached on the property; they are entitled to what remains after the liens are satisfied; or they would have a right to pay the liens and keep the property; and a court of equity would not interfere in such a case. *Kinder v. Macy*, 7 Cal. 207.

4. The true theory of our probate system is that both the real and personal estate of the intestate vest in the heir, subject to the lien of the administrator for the payment of debts and the expenses of administration, and with the right in the administrator of present possession. *Beckett v. Selover*, 7 Cal. 231; *Haynes v. Meeks*, 10 Cal. 120.

5. A lien having attached to property in the hands of a receiver, follows it in the hands of a successor appointed by the court. *Adams v. Woods*, 9 Cal. 29.

6. Where a mortgage upon a homestead is executed, without the wife joining in the execution, it has no validity as a lien upon the premises to the exemption of \$5,000. *Moss v. Warner*, 10 Cal. 297.

7. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one to whom the other had meanwhile sold, the mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere and give the mortgage priority over intervening liens. *Dingman v. Randall*, 13 Cal. 514.

8. The lien of firm creditors is para-

mount to the lien of individual creditors upon the firm property. *Conroy v. Woods*, 13 Cal. 632.

9. A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money do not discharge the lien of the mortgage. *Perre v. Castro*, 14 Cal. 528.

10. Where plaintiff obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them and the decree being in the usual form for the amount due, sale of the premises, application of the proceeds and execution against the property of the husband for any deficiency; and after the entry of the decree the husband died: held that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. The decree binds the specific premises mortgaged, and the property passed into the hands of the executrix of the husband's estate subject to its lien, she took what remained after the lien was satisfied. *Cowell v. Buckelew*, 14 Cal. 641.

11. A party erecting buildings upon the property of an infant, under contract with his guardian, made without authority of law, has no equitable lien on the property for the value of the improvements—such party being fully informed of the title and condition of the property. *Guy v. Du Uprey*, 16 Cal. 200.

12. A decree in insolvency, discharging the husband and setting apart to him certain premises as a homestead, does not discharge or impair the lien of a mortgage thereon previously executed by the husband. The mortgagee has vested rights which could not thus be divested; nor was such the intention of our insolvent act. *Bowman v. Norton*, 16 Cal. 218.

II. IN ADMIRALTY.

13. The master of a ship has a lien on the cargo for the freight, and is not bound to deliver to a consignee any part of the goods specified in a bill of lading until the whole freight is paid; and an offer to give good security for the payment of the freight is not sufficient to compel a delivery by the master. *Frothingham v. Jenkins*, 1 Cal. 44.

14. Possession is always essential to the existence of a lien. It is the right which one has to retain that which is in his possession belonging to another, until certain demands of the person in possession are satisfied. *Lineker v. Ayesford*, 1 Cal. 80.

15. Where the vendor ships goods to his own order, that he might retain a lien on them until the price of the sale of them to the purchaser be paid, and the master of the ship delivers them, nevertheless, to the purchaser: held, that the vendor can recover of the master his interest in the goods—that is, the price for which the goods were sold with the interest. *Persse v. Cole*, 1 Cal. 370.

16. A right to detain goods until the freight is paid by reason of the lien of the owner, grows out of the usage of trade. *Brown v. Howard*, 1 Cal. 424.

17. Where it appears clearly from a charter party that the intention of the owner of a ship and the charterer is, that the former shall have no lien on the freight but shall give a personal credit to the charterer, the former loses his right of lien on the cargo and can look only to the personal responsibility of the charterer for payment of the hire of the vessel. *Ib.*

18. One part owner of a vessel has no lien on the shares of the other part owners for his advances and disbursements. *Sterling v. Hanson*, 1 Cal. 480.

19. The owner of a chartered vessel has no lien upon the cargo for the charter price. *Mayo v. Stansbury*, 3 Cal. 467.

III. BY ATTACHMENT.

20. The remedy by attachment is not a distinct proceeding in the nature of an action in rem, but is an adjunct, or a proceeding auxiliary to the action at law, designed for the purpose of securing the property of the debtor to answer the judgment which may be obtained. *Low v. Adams*, 6 Cal. 281.

21. A lien by attachment enables a creditor to file a creditor's bill without waiting for judgment and execution. *Heyneman v. Dannenberg*, 6 Cal. 379; *Scales v. Scott*, 13 Cal. 78; *Conroy v. Woods*, 13 Cal. 633.

22. A fund in the possession of a receiver can only be distributed by order of

the court in whose custody it is; and no party can by adverse procedure acquire a lien on such funds. *Adams v. Hackett*, 7 Cal. 205.

23. As soon as a vessel is seized by service of process in a court of admiralty, a lien attaches in favor of the party at whose suit the seizure is made; it is not necessary that the vessel should be attached. *Meiggs v. Scannell*, 7 Cal. 408; *Fisher v. White*, 8 Cal. 423.

24. Every sale of property and personal chattels is good as between the parties, and cannot be attacked for fraud, except by a creditor who had obtained a lien by judgment and taken out execution which has been returned unsatisfied in whole or in part, and where the statute gives a lien upon a seizure by attachment. *Thornburg v. Hand*, 7 Cal. 565.

25. The lien of attachment having become fixed upon funds in the hands of a receiver, follows the property in the hands of his successor. *Adams v. Woods*, 9 Cal. 29.

26. The lien of an attachment takes effect immediately upon the fulfillment of the statutory provisions, and cannot be divested by a failure of the sheriff to make a proper return. *Ritter v. Scannell*, 11 Cal. 249.

27. A deposit in the recorder's office of a writ of attachment, with a description of the property attached, is sufficient to operate as notice of the lien to third parties. *Ib.*

28. Such a lien cannot be divested by the failure of the sheriff to make a proper return of the writ. *Ib.*

29. Where a first attachment against an insolvent is set aside as fraudulent, in a suit brought by a subsequent attaching creditor, to which various other attaching creditors, prior and subsequent, are parties, the plaintiff in the suit cannot claim priority over the attachments preceding his, on the ground that by his superior diligence the fraud had been discovered. The prior attachments became liens, in the nature of a legal estate vested in the sheriff for the benefit of the creditors. *Patrick v. Montader*, 13 Cal. 444.

30. The lien of firm creditors must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods*, 13 Cal. 631.

31. Plaintiff, January 10th, 1858, in a

By Attachment.—Of a Judgment.

suit entitled "C. v. M. and others, composing the Wisconsin Quartz Mining Co.," a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1858, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company, August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following, W. the purchaser. Defendants here are in possession, under sheriff's sale on the decree. Plaintiff claims title under his judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his return of the judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 403.

IV. OF A JUDGMENT.

32. A conveyance which would come within the statute of frauds if made by an individual, if made by a corporation would be liable to the same construction; and if void in the former case, would be void in the latter, and will not affect the lien of a judgment regularly obtained against the grantor. *Smith v. Morse*, 2 Cal. 552.

33. A conveyance made without authority will not affect the lien of a judgment. *Ib.* 556.

34. An appeal from a judgment suspends the lien, which is merely an incident; and the statutory limitation of a lien commences to run only from the date of the remittitur from the appellate court. *Dewey v. Latson*, 6 Cal. 134.

35. The perfecting an appeal does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 281.

36. The judgment debtor cannot set up errors in docketing the judgment as destroying the lien, when the property has

been sold on execution under the judgment; if the property sold is his, the levy operates as a lien; if not, he has no right to complain. *Ib.*

37. The issuing and levy of an execution before the lien of a judgment upon which the execution issues expires, will not operate to prolong the lien of the judgment beyond the time limited in section two hundred and four of the code. *Isaac v. Swift*, 10 Cal. 81.

38. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien; and the fact that he takes the transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarty v. Christy*, 13 Cal. 81.

39. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment. A copy of the judgment is not sufficient. *Haskell v. Manlove*, 14 Cal. 57.

40. The statutory lien of a judgment upon the real estate of the judgment debtor can attach only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 438.

41. A judgment recovered against the husband does not become a lien on the homestead, and a sale of the homestead upon an execution issued on such judgment is void. *Ackley v. Chamberlain*, 16 Cal. 183.

42. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ib.* 183.

43. In this State, a judgment cannot become a lien upon the homestead. It can become a lien only upon the real property of the judgment debtor. *Bowman v. Norton*, 16 Cal. 220.

44. If an undertaking on appeal to the supreme court be insufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this where the undertaking was excepted to, there being no effort to enforce the

judgment pending the appeal. *Chapin v. Broder*, 16 Cal. 420.

45. Section two hundred and forty-six of the practice act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted; and such personal judgment, when docketed, becomes a lien. But the mere contingent provision, for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as a judgment lien, until the amount of the deficiency to be recovered has been ascertained and fixed. In this latter case, the limitation upon the lien does not commence to run until the deficiency be ascertained, and an execution can be issued therefor. *Ib.*

46. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien on property until the levy of an execution. *Ib.*

47. Query: whether a leasehold estate for a term of years is property in such sense that a judgment docketed becomes a lien thereon. *McDermott v. Burke*, 16 Cal. 589.

V. OF A VENDOR.

48. A vendor has a lien on the land sold for the purchase money unless he has taken security for its payment, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 142.

49. The lien which springs out of the title bond predicated upon the covenants for the purchase money, attaches to the land unless expressly reserved, and if such reservation is made it lies upon the purchaser to show that the vendor agreed to rest on other security. *Truebody v. Jacobson*, 2 Cal. 286.

50. When a vendor of real estate makes a conveyance, but gives no bond conditioned for the execution of a conveyance on payment of the purchase money by the vendee, he has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of the lien. *Gouldin v. Buckelew*, 4 Cal. 111.

51. A failure of the vendee to pay the purchase money for two years does not forfeit his right under the contract, and the

vendor may enforce payment at any time after due; and if the vendor, under power of sale reserved in the contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and payment may be decreed by a judgment. *Ib.*

52. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser, for the unpaid purchase money. *Cahoon v. Robinson*, 6 Cal. 226.

53. The right of a vendor to a stoppage in transitu exists until the goods arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitus. *Markwald v. His Creditors*, 7 Cal. 214.

54. Where the plaintiff sold a number of bales of drillings to A. for the purpose of making sacks, deliverable to A. as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A. the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett v. Flint*, 7 Cal. 264.

55. A vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker v. Sedgwick*, 8 Cal. 403.

56. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner, the fact that he is a creditor does not divest the lien; he may be both a creditor and a purchaser and still have a prior lien to that of the redemptioner; this can only be so on the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed. *Knight v. Fair*, 9 Cal. 118.

57. In all cases where a mere lien exists, the legal estate may lie in some other party than the mortgagee; this legal estate and the consequent right to discharge the lien and save the estate is of value and can be sold. *Ib.*

Of a Vendor.—Limitation, Statute of.

58. A vendor's lien does not exist in this state where a mortgage security is taken for purchase money. The silent lien is extinguished, whenever he manifests an intention to abandon or not to look to it. *Hunt v. Waterman*, 12 Cal. 305.

59. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal mortgage as one properly done. *Ib.*

60. A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Ib.*

61. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money. *Ellison v. Jackson Water Co.*, 12 Cal. 554.

62. Land on which a vendor's lien exists for the purchase money, may become a homestead, but the homestead right is subordinate to the lien. *McHendry v. Reilly*, 13 Cal. 76.

63. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 192.

64. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

65. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case, the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a con-

veyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract, and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises will be sold to raise such money, and that the vendee pay such deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

66. In such case of an unexecuted conveyance, the vendor may ask either a decree directing performance, and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to make a mere foreclosure of the vendor's right to a deed. *Ib.*

67. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non iudice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 382.

See MECHANIC'S LIEN.

LIMITATION, STATUTE OF.

1. It is better to place the statute within the discretion of the court, so as to allow it to be pleaded at any time upon terms, if it be proper, where the ends of justice will be attained by it. *Cooke v. Spears*, 2 Cal. 411.

2. If the defendant fail to plead the

statute at the proper time, he will not be permitted to amend his answer so as to introduce the plea, unless it would further the end of justice. *Ib.*

3. The act of May 4th, 1852, only alters a portion of the act of April 22d, 1850, section seventeen; it does not change the period of five years in which suit may be brought on judgments or decrees of courts of the United States, or any State or territory. *Cavender v. Guild*, 4 Cal. 253.

4. A foreign judgment is not a contract obligation or liability founded on an instrument of writing, executed out of this State, within the meaning of the statute. *Patten v. Ray*, 4 Cal. 287.

5. Such instruments as bear upon their face, "audited and approved," are not barred by that portion of the statute of limitations applying to accounts. *San-nickson v. Brown*, 5 Cal. 58.

6. In an action for contribution, between joint obligors, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff. *Sherwood v. Dunbar*, 6 Cal. 55.

7. Where the payment was made by plaintiff, by settlement of accounts with the payee of a note, the statute only begins to run from the date of the appropriation of the money due by the payee to the plaintiff, to the payment of the note. *Ib.*

8. After twenty years' acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California. *Castro v. Castro*, 6 Cal. 161.

9. The act of 1855 is the only statute of limitations to actions for the recovery of real property, and that the time fixed therein runs only from the date of that act. *Billings v. Harvey*, 6 Cal. 383; *Billings v. Hall*, 7 Cal. 3.

10. Statutes of limitations do not act retrospectively; they do not begin to run until they are passed, and consequently cannot be pleaded until the period fixed by them has fully run since their passage. *Nelson v. Nelson*, 6 Cal. 433; *Lehmaier v. King*, 9 Cal. 374.

11. While time is not of the essence of the contract, ordinarily, yet in every case it will devolve on the party seeking relief to account for his delay, and if there are circumstances showing culpable negligence on his part, or if the length of time which

has been permitted to intervene, together with other circumstances, raises the presumption of an abandonment of the contract; or if the property has greatly advanced in value in the meantime, and the purchaser has laid by apparently to take advantage of the circumstance, he will not be entitled to a decree in his favor. *Brown v. Covillaud*, 6 Cal. 571; *Pearis v. Covillaud*, 6 Cal. 621; *Green v. Covillaud*, 10 Cal. 324.

12. Statutes of limitation have been properly denominated statutes of repose, because the law, for the purpose of preventing litigation, has wisely determined that there should be a period affixed beyond which a party ought not to be allowed to assert a stale demand, and that the presumption of payment, or of title, ought to arise after he had neglected to assert his right for a certain length of time. *Billings v. Hall*, 7 Cal. 3.

13. The statutes of limitation are designed to affect the remedy, and not the right or contract; that they do not enter into the contract, as a part of the law thereof; and that it would be inconsistent with sound morality and wise legislation to suppose that it was ever intended that when a party gave his obligation to pay a particular debt, he was presumed to have had in his mind a particular period of time, beyond which if he protracted his obligation his liability would cease. *Ib.* 4.

14. A claim against an estate when allowed, has the effect of a judgment against the administrator, and it would not be barred unless time enough has run to bar a judgment. *Beckett v. Selover*, 7 Cal. 229.

15. The presentation of the claim to the administrator is the commencement of a suit upon it, and is sufficient under the statute to stop the running of the statute of limitation. *Ib.* 241.

16. The statute of limitations of this State only commences running against a judgment from the time of the final entry thereof. *Parke v. Williams*, 7 Cal. 249.

17. Where the plaintiff filed a bill in equity in 1852, to set aside a sale of land made in 1835, on the ground of fraud: held, that his right to recover would be barred by ten years' prescription under the Mexican law, and that the full period having run he could not recover. *Dominguez v. Dominguez*, 7 Cal. 427.

18. It is the duty of the consignee, not only to inform his principal of the sales, but to remit the proceeds, and where he fails so to do, the statute of limitations will not run against the claim. *Kane v. Cook*, 8 Cal. 458.

19. Statutes of limitations are intended to prevent the assertion of stale claims, which it may be difficult or impossible to defeat by furnishing the requisite proof, owing to the lapse of time; and also proceeding upon the presumption of payment. They are not intended to protect the party, who by a fraudulent concealment, has delayed the assertion of a right. *Ib.*

20. A fraudulent concealment of the fact, upon the existence of which the cause of action accrues, is a good reply to the plea of the statute of limitation. *Ib.* 461.

21. An execution can only be issued upon a judgment obtained before a justice of the peace, within five years after the entry of the judgment. In contemplation of the statute, there is no judgment after that time. *White v. Clark*, 8 Cal. 513.

22. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third person no party to the suit, then a prior possessor might never gain repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird v. Lisbros*, 9 Cal. 5.

23. The purchaser is bound to know the chain of title through which he claims; and if that chain only leads him back to the possession of his grantors, and the period of that possession is short of the time fixed by the statute of limitations, he must be held responsible for all the acts of those through whom he claims. *Ib.* 6.

24. A part payment made before a contract has expired by limitation, is insufficient to take the case out of the statute. *Fairbanks v. Dawson*, 9 Cal. 92.

25. The object of the statute was to substitute a written contract for that which might be implied from admissions, and to avoid the mischief arising from parol testimony, to prove either an express promise, or facts from which a promise would follow as a legal and logical result. *Ib.*

26. Where it appears upon the face of a bill in equity, that the suit is barred by limitation, the defendant may demur.

Sublette v. Tinney, 9 Cal. 425; *Barringer v. Warden*, 12 Cal. 314.

27. The statute of limitations, therefore, can only be construed to apply to judgments not in esse at the time of the passage of the act of 1855, or as giving two years from the passage of the act within which to sue upon such as were not already barred by the act of 1850. *Scarborough v. Dugan*, 10 Cal. 308.

28. Where D. had a running account with L., from 1838 to 1849, at which time L. died intestate, and no administration was had on his estate until 1857, and D. within one year after the granting of letters of administration, commenced his suit on said account against the estate: held, that the suit was commenced in time. *Danglada v. De la Guerra*, 10 Cal. 386.

29. If a defendant has been out of the State, it must be so averred in an indictment. Prima facie the lapse of time is a good defense; and where the statutory exception is relied on, it must be set up. *People v. Miller*, 12 Cal. 295.

30. Where a complaint shows prima facie upon the facts stated, that the claim or debt upon which suit is brought is barred by the statute of limitation, the defendant may take advantage by demurrer. But when the complaint does not directly show prima facie a case for the operation of statute, a demurrer cannot be sustained on this ground. *Barringer v. Warden*, 12 Cal. 314.

31. Where a note only operated to extend the time of payment of a debt to the time a note fell due, the statute of limitations would commence running only from that time. *Griffith v. Grogan*, 12 Cal. 324.

32. The question of the statute of limitation cannot be raised on appeal, unless presented in some form on the trial below, even though it be pleaded. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

33. An equitable action to set aside a fraudulent deed of real estate, when the effect would be to restore the possession to the defrauded party, is an action for the recovery of real estate, and governed by the statute of limitations applicable to such actions. *City of Oakland v. Carpentier*, 13 Cal. 552.

34. Where a reward was for such information as would lead to the arrest and

conviction of a criminal, there could be no claim for the money until trial and conviction. The statute of limitations begins to run from that time, and the limitation would be four years, as on a written contract. *Ryer v. Stockwell*, 14 Cal. 137.

35. Two defendants filed a joint plea of the statute of limitations, and the plea being held bad as to one defendant, the court on the trial permitted the other defendant to file a separate plea of the statute: held, that this was no such gross abuse of discretion as to enable the supreme court to revise it. *Robinson v. Smith*, 14 Cal. 254.

36. The commissioners of the funded debt of the city of San Francisco have power, under the act of 1851, authorizing them to sell the realty conveyed to them by the commissioners of the sinking fund, created by ordinance of said city, to receive the three per cent. scrip of the city instead of cash on the sale, it being conceded that the assets of the city were sufficient to pay all debts. Whether the statute of limitations runs against a trust like this of the commissioners of said funded debt, and whether they may not pay claims barred, query? *People v. Commissioners of the Funded Debt of the City of San Francisco*, 14 Cal. 541.

37. The grand jury may inquire into all offenses committed within the county not barred by the statute of limitations. *People v. Beatty*, 14 Cal. 570.

38. The three hundred and forty-fifth section of the code authorizing the supreme court, on the reversal or modification of the judgment or order below, to make restitution of the property and rights lost by the erroneous judgment or order, does not exclude the lower court from exercising the same power, and the party aggrieved may proceed in the lower court by motion, against which there seems to be no statute of limitations, there being in this case no unreasonable delay. *Reynolds v. Harris*, 14 Cal. 678.

39. The eleventh section of the act of 1856, for the protection of actual settlers, and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton v. Folger*, 15 Cal. 284.

40. The general language of section one of the limitation act of 1855, that actions in the cases therein named "can only be

commenced within two years from the time the cause of action has accrued, or shall accrue," is controlled and limited by the twenty-second section of the limitation act of 1850. *Palmer v. Shaw*, 16 Cal. 96.

41. Suit commenced January 8th, 1859, on a note executed in New York, and due January 1st, 1856. Defendant not in this State when the cause of action accrued, but arrived here March 28th, 1856, and remained until June 20th, 1856, from which time he was absent until February 14th, 1857. Plaintiff resided in New York, and was fully informed of the movements of defendant. Some evidence tending to show that defendant came to this State in 1856, for a temporary business purpose, intending to return to New York and form a partnership, according to previous arrangement. Defense, statute of limitations of two years: held, that the case is within the statute, and that the statute commenced running on the arrival of the defendant here in March, 1856—there being no fraud or concealment on the part of defendant, and his presence here between March and June being open and public, and sufficient for the commencement of a suit. *Ib.*

42. The word "return," used in the twenty-second section of the limitation act of 1850, is held by the authorities to apply as well to persons coming from abroad as to the citizens of the country going abroad for a temporary purpose and returning. But the coming from abroad must not be clandestine, and with an intent to defraud the creditor, by setting the statute in operation and then departing. *Ib.*

43. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest held by him for plaintiff until called for, there is a continuous trust, and the statute of limitations does not begin to run in favor of defendant until after demand made by plaintiff. *Baker v. Joseph*, 16 Cal. 176.

44. It is not error for a court to refuse permission to set up the statute of limitations after answering to the merits. *Stuart v. Lander*, 16 Cal. 375.

45. An executor or administrator, holding a debt against the estate of deceased, cannot pay himself and claim a credit

Limitation, Statute of.—Lis Pendens.—Lottery.

when he has never presented his claim for allowance to the probate judge. The statute requires claims against the estate to be presented in accordance with its directions, whether the claims be held by executors and administrators or by other creditors of the deceased; and if not so presented within ten months from publication of notice for presentation, they are barred. *Estate of Taylor*, 16 Cal. 434.

46. The sale of December 26th, 1853, under ordinance No. 481, being void, no title passed to the purchaser at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *McCracken v. City of San Francisco*, 16 Cal. 632.

47. The statute of limitations runs only in favor of parties in possession claiming title adversely to the whole world, and not in favor of those who assert the title to be in others. It therefore never run in favor of the plaintiff, and the grantees of the plaintiff are in no better position. Their possession cannot be tacked on to that of the grantors, so as to render adverse the possession for the entire period subsequent to the sale. *Ib.* 635.

48. To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title, and this claim, when founded "upon a written instrument as being a conveyance of the premises," must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be "exclusive of any other right;" and to render the adverse possession thus commenced effectual as a bar to a recovery by the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in

others, the statute cannot, of course, run in their favor. Their possession under such circumstances is not adverse. *Ib.* 636.

LIS PENDENS.

1. A bona fide purchaser of land without notice of proceedings pending for its condemnation at the time of purchase, no notice of lis pendens being filed, is not affected by the proceedings. *Bensley v. Mountain Lake Water Co.*, 13 Cal. 319.

2. The effect of a lis pendens is to make a subsequent purchaser from the party a mere volunteer, affected by the judgment rendered, or which might be rendered in the suit of the pendency of which notice was given. *Gregory v. Haynes*, 13 Cal. 594; *Curtis v. Sutter*, 15 Cal. 263.

3. To enforce a vendor's lien, a bill in equity will lie, and the filing of notice of lis pendens will impart to purchasers information of the claim, and protect the property against transfers pendente lite. *Sparks v. Hess*, 15 Cal. 193.

See LIEN.

LOTTERY.

1. When suits have been commenced before a magistrate against the drawers of prizes in a lottery, to forfeit the prizes drawn to the State, a bill for an injunction against the owners of the lottery to restrain them from disposing of the prizes until the decision of those suits will properly lie in the district court; the prizes are forfeited as soon as drawn and before they are delivered. *People v. Kent*, 6 Cal. 90.

LUNATIC.

See INSANITY.

Malice.—Malicious Prosecution.

MALICE.

1. It was error for the court to instruct the jury "that when a person injuriously slanders the title of another, malice is presumed." It was also error to instruct them that fraud could not be presumed, but may be established by circumstances, but not of a light character; the circumstances must be of a most conclusive nature. *McDaniel v. Baca*, 2 Cal. 339.

2. A homicide being admitted or proved, the law raises the presumption of malice, which it is necessary for the prisoner to rebut by proof. *People v. Milgate*, 5 Cal. 129; *People v. March*, 6 Cal. 547.

3. It is the duty and province of the jury to draw the inference of express malice from the facts and the circumstances of the case, and the court properly refused to instruct the jury that there was no evidence of express malice. *People v. Roberts*, 6 Cal. 217.

4. There can be no murder without malice, express or implied. *People v. Moore*, 8 Cal. 93.

5. Public policy and security require that prosecutors should be protected by the law for civil liabilities, except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both occur. *Potter v. Seale*, 8 Cal. 220.

6. Though malice be proved, yet if there was probable cause, the action must fail. *Ib.*

7. The question of malice is one for the jury to decide. It may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. *Ib.*

8. Malice cannot be presumed in a prosecution when the defendant has incurred all the moral guilt of the charge, although he may have evaded the penalty of the law. *Sears v. Hathaway*, 12 Cal. 279.

a court, to grant a new trial on the ground of excessive damages for malicious prosecution, when the verdict is greatly inconsistent in its relation to the facts. *Potter v. Seale*, 5 Cal. 411.

2. S. paid P. for certain promissory notes, which P. failed to deliver, saying he would get them out of pledge and deliver them up, which he afterwards refused to do. S. had P. arrested, when he was discharged on a technical ground: held, that it was not a malicious prosecution, and that S. had probable cause. *Ib.*

3. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after and was paid, together with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in the suit on said bill knew that the bill was in fact paid at the time they commenced suit, was a question for the jury. *Weaver v. Page*, 6 Cal. 684.

4. In actions for a malicious prosecution, the jury are not confined to the actual pecuniary loss, but may take into consideration the character and position of the parties, and all the circumstances of the case. *Ib.* 685.

5. Public policy and security require that prosecutors should be protected by law for civil liabilities, except in those cases where the two elements of malice in the prosecutor and want of probable cause for the prosecution both occur. *Potter v. Seale*, 8 Cal. 220.

6. Though malice be proved, yet if there was probable cause, the action must fail. *Ib.*

7. Malice may be inferred from want of probable cause, but want of probable cause cannot be inferred from malice, but must be affirmatively shown by the plaintiff. *Ib.*

8. Where the defendant has fully and fairly laid his case before counsel and acts by advice thereof, it is a good defense to the action, though the question whether the defendant acted bona fide under such advice is a question of intention, to be determined by the jury. *Ib.*

9. Plaintiff and one C., partners in the mercantile business, purchased of defend-

MALICIOUS PROSECUTION.

1. It is the proper exercise of power in

Mandamus.

ant goods on credit, which were shortly afterward sold by plaintiff and his partner at a sacrifice and the proceeds immediately invested in a homestead in the name of C., who was the brother-in-law of plaintiff. Defendant subsequently caused plaintiffs to be arrested upon the charge of cheating, from which arrest they were discharged. Afterwards defendant caused plaintiff and C. to be arrested on a charge of concealing property with intent to defraud and delay their creditors; the charge was dismissed as to plaintiff, and C. was sent up to the criminal court to answer. Plaintiff thereupon brought his action against defendant for malicious prosecution: held, that if plaintiff was entitled to any damage, he could recover only the actual damage which he sustained by the arrest. *Sears v. Hathaway*, 12 Cal. 279.

MANDAMUS.

1. Authority is vested by the statute in the supreme court to issue writs of mandamus in all cases in which it may appear to form the appropriate remedy, and the constitution warrants that authority whenever the issuance of that writ may be necessary to render the appellate jurisdiction effectual. *People v. Turner*, 1 Cal. 145; *White v. Lighthall*, 1 Cal. 348.

2. To enable a court of strictly appellate jurisdiction to issue the writ of mandamus, it must be shown to be an exercise or be necessary to the exercise of appellate jurisdiction. *People v. Turner*, 1 Cal. 146.

3. The very nature of a writ of mandamus implies the idea of a superior and an inferior tribunal. *Ib.* 148.

4. The district courts of the State have all the same jurisdiction and powers and stand on the same level, and one cannot attempt by a writ of mandamus to supervise, direct or restrain the action of another. *Ib.* 149.

5. The writ of mandamus will lie if the applicant have no other specific and adequate legal remedy, and if the effect of it would be not to interfere with the exer-

cise of the discretionary powers of the court. *Ib.* 151.

6. An attachment for contempt for disobedience of a mandamus will not issue, unless it appear affirmatively that the mandamus was sought to be enforced by some party. *Ib.* 189.

7. Where a mandamus directed the the judge of a district court to reinstate certain parties expelled by him to the rolls of practicing attorneys, and they were summoned to appear and show cause for an offense alleged to have been committed subsequently: held, that the court would thereupon presume that the mandate had been obeyed. *Ib.*

8. This writ will lie when another remedy, if any lie, would be too uncertain, and subject the party to great delay, and will lie to an inferior court to restore an attorney removed by it. *Ib.* 190.

9. Judgment may be affirmed as to a mandamus, but reversed as to costs. *McDougal v. Roman*, 2 Cal. 80.

10. In an application for a mandamus the statute does not require a replication, except where, in the discretion of the court, it is necessary to explain or avoid facts set up in defendant's answer. *Fowler v. Pierce*, 2 Cal. 166.

11. A mandamus may issue to compel the controller of State to account to a legislature for the daily compensation fixed by law. *Ib.*

12. A mandamus lies to compel a judge of a district court to enter a judgment on the report of a referee. *Russell v. Elliott*, 2 Cal. 247.

13. A mandamus is not the proper remedy where an inferior court refuses to enter a judgment for costs. The party complaining should appeal or bring his action for costs. *Peralta v. Adams*, 2 Cal. 595.

14. A mandamus will not lie where there is any other specific, speedy and adequate remedy. *People v. Olds*, 3 Cal. 173.

15. Title to an office cannot be tried upon a mandamus, neither at common law nor under the statute. *Ib.* 175.

16. A mandamus can give no right, but may be sought, to put a party in a position to assert his right. *Ib.*

17. A mandamus will not lie where the office claimed is filled, or against an incumbent de facto, unless the party be without other remedy. *Ib.*

Mandamus.

18. The distinction between writs of mandate and quo warranto, as held in England, is not abolished by the statute of this State, but is fully recognized. *Ib.* 177.

19. On a mandamus to compel a party to allow a claim in which they have discretionary powers, he cannot be permitted in the same breath to admit the right to compensation and then refuse to grant it. *Selkirk v. City of Sacramento*, 3 Cal. 326.

20. Mandamus may be sought to compel an officer to do an act which is sought to be enforced in all cases where the officer has no discretion and where he is under no obligation to do the specific act and there is no adequate remedy in the ordinary course of law. *McDougal v. Bell*, 4 Cal. 176.

21. A mandamus will not issue to compel any person, inferior officer, court or corporation to act in any particular manner where such person, officer, court or corporation is invested with discretionary power. *Ib.*

22. A mandamus against the controller is defective if it fails to allege that there is "money not otherwise appropriated by law" out of which the statute authorizes the appropriation in question to be paid. *Redding v. Bell*, 4 Cal. 333.

23. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale who refuses to pay the purchase money, on the ground that he is entitled to it as the oldest judgment and execution creditor, especially when there is an unsettled contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

24. A mandamus can only compel a board of supervisors to act, but cannot direct their action, and the rejection of an account is an action upon it, which is all a mandamus could require where the compensation claimed in the account is not fixed by law. *Pierce v. Sacramento County*, 6 Cal. 255.

25. A mandamus to a board of supervisors to issue a warrant for a specific sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne County v. Stanislaus County*, 6 Cal. 442.

26. Where the district court granted an injunction, from the order granting which the defendant appealed, and then disobeyed the injunction, whereupon plaintiff

asked for an attachment for contempt, which was refused, on the ground that the appeal superseded the injunction: held, that a mandamus may issue to compel the district judge to issue the attachment, the plaintiff's remedy, by appeal, being inadequate. *Merced Mining Co. v. Fremont*, 7 Cal. 133.

27. A mandamus will issue from a superior to an inferior court, to compel the issuance of an attachment for contempt where the proceeding is, in substance, a private right, though in form, a case of contempt. *Merced Mining Co. v. Fremont*, 7 Cal. 133; *Ortman v. Dixon*, 9 Cal. 24.

28. The writ of mandamus can only be issued to compel the performance of an act or duty clearly enjoined by law, and in a case where the party has no other plain, speedy and adequate remedy. *Draper v. Noteware*, 7 Cal. 278.

29. Where supervisors, in the exercise of their discretion, determined after hearing the testimony, that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law, and award the license to another, supposing that he has succeeded to the rights of the owner of the franchise, the error may be corrected by mandamus or any other proper proceeding. *Thomas v. Armstrong*, 7 Cal. 287.

30. A mandamus will not issue to compel the court below to enter a decree upon the report of a referee; the remedy is by appeal. *Ludlum v. Fourth District Court*, 9 Cal. 12.

31. The remedy of a plaintiff, if there is error in the order modifying the injunction, is by appeal; but he cannot have a mandamus to compel the issuance of an attachment for contempt. *Fremont v. Merced Mining Co.*, 9 Cal. 19.

32. In an application for a mandamus to compel a district judge to sign a bill of exceptions, which the relator alleges he refuses to do, and where a district judge in his answer avers that he has signed a true bill of exceptions, and that the one presented by relator is not a true bill: held, that the relator is not entitled to a jury to try the issue, under section four hundred and seventy-two of the code. *People v. Tenth District Court*, 9 Cal. 21.

Mandamus.

33. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, can be commenced in the county where the relator resides. *McMillan v. Richards*, 9 Cal. 420.

34. Where an alternative mandamus was issued to a justice of the peace to compel him to send up papers on appeal to the county court, to which he answered that his fees had not been paid or tendered, "prior to the service of the alternate writ:" held, his answer is no defense to the writ being made peremptory, as his fees may have been paid since the service of the writ. *People v. Harris*, 9 Cal. 573.

35. To supersede the remedy by mandamus, a party must not only have a specific adequate legal remedy, but one competent to afford relief upon the very subject matter of his application. *Fremont v. Crippin*, 10 Cal. 215.

36. Where a writ of restitution has been awarded in such a case, and the sheriff refuses to execute the same on the ground that the mine is in possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. *Ib.*

37. Neither a remedy by criminal prosecution, nor by action on the case for neglect of duty, will supersede that by mandamus, since it cannot compel a specific act to be done, and is, therefore, not equally convenient, beneficial and effectual. *Ib.*

38. A mandamus will not lie against the clerk of the district court, to compel him to issue execution on a money judgment, rendered in the court of which he is clerk. *Goodwin v. Glazer*, 10 Cal. 333.

39. Where the board of supervisors of a county have canvassed the return of an election, and in the exercise of their discretion declared the result of an election adversely to a party claiming to have been elected, a mandamus will not lie upon the application of such party to compel the board to issue to him a certificate of election. *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

40. When a judgment is rendered against a county, it is the duty of the supervisors to apply such funds in the treasury of the county as are not otherwise appropriated, to its payment; and if there are no funds, and they possess the requi-

site power to levy a tax for such purpose, and if they fail or refuse to apply the funds or to execute the power, resort may be had to mandamus. *Emeric v. Gilman*, 10 Cal. 410.

41. A mandamus directing a board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts; such board has a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim; such writ does not control or prescribe the mode, or determine the result of their action. *People v. Supervisors of San Francisco County*, 11 Cal. 47.

42. A mandamus will not lie against a county treasurer, to compel him to pay interest due on county bonds. *People v. Fogg*, 11 Cal. 390.

43. The question of the eligibility of a district judge cannot be tried on mandamus for his salary. *Turner v. Melony*, 13 Cal. 623.

44. Mandamus does not lie to compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff. *People v. Supervisors of Santa Barbara County*, 4 Cal. 102.

45. The supreme court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers, and its authority to issue process necessary to give them effect. *Purcell v. McKune*, 14 Cal. 231.

46. But where the judge below requires such statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. *Ib.* 232.

47. On mandamus by the assignee of a sheriff's certificate of sale, to compel the execution of a deed, the question whether such a certificate is not merged in a deed made to the assignee by the execution debtor after the sale, cannot be tried. The right to the deed is the only matter in controversy. *People v. Irwin*, 14 Cal. 436.

48. A mandamus may issue to compel a judge to settle a bill of exceptions first, and then to sign it. *People v. Lee*, 14 Cal. 512.

Mandamus.—Manslaughter.

49. The supreme court will not issue a mandamus to the clerks of the district courts in the first instance. The action or refusal to act of the clerks in suits pending in the several courts of this State can only be reviewed in this court through the ruling in relation to such action or refusal of the courts of which they are ministerial officers. *Cowell v. Buckelew*, 14 Cal. 642.

50. County courts, under the statute, have jurisdiction in proceedings by mandamus, and the statute is constitutional. *People v. Day*, 15 Cal. 92.

51. In forcible entry and detainer tried in the county court, on appeal from a justice's court, plaintiff having obtained a verdict for one hundred and fifty dollars damages, moved that they be trebled. Motion denied, and judgment entered for one hundred and fifty dollars, with restitution of the premises. Plaintiff applies to the supreme court for mandamus to compel the court below to render judgment for treble damages: held, that the application must be denied, as plaintiff has an adequate remedy by appeal; pending which, plaintiff can enforce so much of the judgment as awards restitution. The judgment can be corrected in this court, if proper, by trebling the damages. *Early v. Mannix*, 15 Cal. 150.

52. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate, and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: held, that on these facts, the probate court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 Cal. 221.

53. The State prison contract between the State and Estill remaining obligatory, not qualified by any legislation, it was the duty of the controller, upon demand of relators—assignees of Estill—to have issued warrants upon the treasurer for the sums claimed under the contract; and the performance of this can be enforced by mandamus. *People v. Brooks*, 16 Cal. 38.

54. Mandamus will issue to the governor in certain cases. *Ib.* 63.

55. Distinction, from political considerations, between the governor and the inferior officers of the executive department, as to the issuance of this writ, stated. *Ib.*

56. Relator conveyed to Y. one-third of certain real estate, in consideration that Y. should attend to a suit pending in the name of relator, for the recovery of the property. Y. employed an attorney to conduct the suit, the attorney of plaintiff being discharged. Relator moved the court below to substitute another attorney in place of the one employed by Y. Court refused to grant the motion—the only reason urged for the substitution being that Y. had neglected to prosecute the suit; and it not being shown that the agreement between him and relator had been canceled by the parties. Relator applies to this court for mandamus: held, that the writ lies; that the agreement between relator and Y. does not exclude the former from the right to prosecute the suit, and employ such attorney as he chooses; that the exercise of this right will not affect any right Y. may have in the property or suit; that he may intervene, if a proper case be made, or prosecute his rights independently, or wait until a recovery, and then claim his rights under the contract with relator. *People v. Norton*, 16 Cal. 440.

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## MANSLAUGHTER.

1. To reduce the crime of murder charged in the indictment to manslaughter, a provocation must be established, apparently sufficient to render the passion irresistible. *People v. Freeland*, 6 Cal. 98.

2. The defendant was convicted of manslaughter, upon an indictment charg-

## Manslaughter.—Marriage.

ing the crime of murder. The verdict was on his motion set aside, and a second trial had: held, that the defendant can plead the former conviction of manslaughter, as an acquittal of the crime of murder, and that he may be again tried under the same indictment and convicted for manslaughter. *People v. Gilmore*, 4 Cal. 378; *People v. Backus*, 5 Cal. 278.

3. No words of reproach, how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon, from murder to manslaughter. *People v. Butler*, 8 Cal. 441.

See CRIMES AND CRIMINAL LAW, MURDER.

## MARRIAGE.

1. By the Mexican law, marriage lawfully contracted in the face of the catholic church and between the members thereof, cannot be dissolved by the civil tribunals. *Harman v. Harman*, 1 Cal. 215.

2. Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the intention, and the assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding. *Graham v. Bennett*, 2 Cal. 506.

3. A marriage which is legitimate in form, but by the existence of a legal disability at the time rendered void, is a marriage deemed null in law, but the statute protects the issue and makes them legitimate. *Ib.*

4. In marriages null in law, the issues are the inheritors of the father's name or his heirs apparent, and entitled to look to and demand from him his care, maintenance and protection; and he has the same right to their custody, control and obedience as if the issue of a valid marriage. *Ib.*

5. Living together as man and wife is not marriage, nor is an agreement so to live a contract of marriage. *Letters v. Cady*, 10 Cal. 537.

6. Where the plaintiff averred in her

complaint, in a suit brought for distributive share of the estate of an alleged deceased husband, that the deceased made proposals of marriage to her, which she accepted, and consented to live with him as his true and lawful wife; and that in accordance with his wishes she thenceforth lived and cohabited with him as his wife, always conducting herself as a true, faithful and affectionate wife should do; held, that these were insufficient averments of the existence of a marriage, and that the facts averred were only prima facie evidence of marriage. *Ib.*

7. There is no presumption of law that a marriage took place at any particular point, nor that property, especially money "and other personal property," was acquired in any particular locality. *Dye v. Dye*, 11 Cal. 167.

8. In an action for the division of the common property of husband and wife after a decree of divorce, it is not material where the marriage was solemnized if the parties afterwards, and after the passage of the act, resided and acquired the property here. *Ib.*

9. Marriage is regarded as an acknowledgment by the husband that the child is his; but as in all cases of acknowledgement, to be effective, there must be knowledge at the time of the fact admitted. *Baker v. Baker*, 13 Cal. 99.

10. Marriage is considered by our law as a civil contract to which the consent of the parties is essential, and is subject to avoidance for material and substantive fraud in its procurement. *Ib.*

11. A marriage procured without a contract can never be deemed valid. There is no more reason for sanctioning a marriage procured by fraud than one procured by force and violence. The consent is as totally wanting in view of the law in the former, as in the latter case. *Ib.* 102.

12. A woman, to be marriageable, must at the time be able to bear children to her husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation to that effect is false and fraudulent. *Ib.* 103.

13. Upon a trial on an indictment for an attempt to contract an incestuous marriage, something more must be shown than

## Marysville.—Master and Servant.

mere intention to contract such marriage. Preparations for the attempt indicate the intention, but between this and the attempt itself there is a wide difference. *People v. Murray*, 14 Cal. 159.

14. Where a court dissolves the bonds of matrimony it has no power to impose any restraint upon a second marriage, in the absence of express statute confirming it. *Barber v. Barber*, 16 Cal. 378.

See ADULTERY, COMMON PROPERTY, CRUELTY, DESERTION, DIVORCE, GUARDIAN AND WARD, HEIRS, HOMESTEAD, HUSBAND AND WIFE, INFANCY, PARENT AND CHILD.

## MARRIED WOMAN.

See HUSBAND AND WIFE, SOLE TRADER.

## MARYSVILLE.

1. The amendments to the charter of the city of Marysville provide that the common council shall not take any stock "in any public improvement, or effect a loan for any purpose," without first obtaining the consent of the people, at an election held for that purpose: held, that this could not be extended to improvements other than municipal in their character, and that the legislature did not intend to invest the city with authority to embark in speculative enterprises of improvement. *Low v. City of Marysville*, 5 Cal. 216.

## MASTER AND SERVANT.

1. Where no definite period of employment is agreed upon, the master can dis-

charge the servant at any time and eject him by force from his house if the servant refuses to leave after notice given to that effect. *DeBriar v. Minturn*, 1 Cal. 450.

2. Where the master ejects the servant from his premises, on his refusal to leave, after his discharge and being notified, the former should use no more force than is actually necessary to accomplish the object, in which latter case nominal damages can only be recovered. *Id.*

3. Where a person agrees to work for a certain period at a certain price, or to perform certain services for a fixed amount, he cannot break off at his own pleasure and maintain an action for the work so far as he has gone; performance is a condition precedent to payment. *Hutchinson v. Wetmore*, 2 Cal. 312.

4. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is, that both parties understood that the same salary was to be paid, and it is therefore error in a suit by the servant to allow him to recover upon a quantum meruit. *Nicholson v. Patchin*, 5 Cal. 475.

5. A master is bound to use reasonable care and diligence to prevent accident or injury to his servant, in the course of his employment; and if he fails to do so, he will be held responsible for the damages. *Halloway v. Henley*, 6 Cal. 210.

6. Where it appears that a coach, at the time of the accident, was driven by the servant or agent of the owner, the rule in such cases is, that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him. *Wardrobe v. California Stage Co.*, 7 Cal. 120.

7. In an action where the defense set up is, the negligence of the servant of plaintiff, the servant is not a competent witness for his employer. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 256.

8. Where the plaintiff was the step-mother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants: held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock v. Murdock*, 7 Cal. 513.

9. The rule respondeat superior, as its

terms imply, belongs to the relation of superior and subordinate, and is applicable to that relation whenever it exists, whether between principal and agent or master and servant, and to the subjects on which that relation extends, and is coëxtensive with it, and ceases when the relation itself ceases to exist. *Boswell v. Laird*, 8 Cal. 489.

10. Where parties employed architects reputed to be skilled in their profession, to construct, at a designated point on a creek, a dam or embankment of certain specific dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed at a given time; and before the embankment was completed it was broken by a sudden freshet, and a large body of water confined by it rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs, with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiffs sued to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable, and that the relation of master and servant or superior and subordinate did not exist between them, and therefore the doctrine respondeat superior does not apply to the case. *Ib.* 490.

11. A person who undertakes the erection of a building or other work for his own benefit, is not responsible for injuries to third persons occasioned by the negligence of a person, or his servants, who are actually engaged in executing the whole work under an independent contract. *Ib.*

12. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J's contract: held, that his claim is not subject or liable to J's contract. *Jenkins v. Redding*, 8 Cal. 603.

13. Possession of personal property is prima facie evidence of ownership. The possession of the servant is the possession of the master. *Goodwin v. Garr*, 8 Cal. 617.

14. Where an employee receives a

regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary. *Cany v. Hal-leck*, 9 Cal. 201.

15. In a suit to recover for services for half a year, under a contract to work a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. *Hogan v. Titlow*, 14 Cal. 256.

16. In a suit by a female against two parties in a ranch, for services as servant to the firm, under an implied contract as on a quantum meruit, proof that plaintiff is the wife of one defendant is good under the general issue, as showing that there was no implied contract to pay for the services. *Angulo v. Sunol*, 14 Cal. 402.

See WAGES.

## MASTER OF A VESSEL.

1. The conduct and management of a ship are always entrusted to a master, whether he has or has not a partial property in it, and in either case he is the confidential servant or agent of the owners at large. *Loring v. Nisley*, 1 Cal. 31.

2. The master of a vessel, as such, has no interest in it which can be the subject of levy and sale, under execution. He is but a naked agent, and has no substantial interest in the property which can be levied upon and sold. *Ib.*

3. If a master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Ib.*

4. The responsibility of taking a position or berth for a vessel in port, rests upon the master of the vessel or the harbor master, therefore the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. *Griswold v. Sharpe*, 2 Cal. 24.

5. Where the master of the vessel was in possession, and the record did not dis-



## Mechanics' Lien.

close any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 373.

6. The captain of a vessel drew on the owner for six hundred dollars to defray the expenses of the first mate, who was ill. In an action against the owner by the captain for wages, the owner endeavored to set off the draft: held, that this could not be done without producing the draft or showing payment of it. *Waterman v. Vanderbilt*, 3 Cal. 382.

See ADMIRALTY.

## MECHANICS' LIEN.\*

1. To enable those persons entitled to the benefit of the statute of the mechanics' lien law to avail themselves of this extraordinary remedy, all the provisions of the law must be strictly complied with. *Walker v. Hauss Hijo*, 1 Cal. 185; *Bottomly v. Grace Church*, 2 Cal. 91.

2. A material man, to enforce his lien for the price of the material furnished, must file in the notice his intention to hold a lien in statute time, or his lien, will be lost. *Walker v. Hauss Hijo*, 1 Cal. 185.

3. If the verdict of a jury fails to find a lien, the court cannot render a judgment essentially different from the verdict, and a verdict, so far, will be reversed. *Ib.* 186.

4. Under Mexican law, a person who furnishes materials for the erection of a building, has no lien on the building to secure payment for the materials furnished. *Macondray v. Simmons*, 1 Cal. 394; *Stowell v. Simmons*, 1 Cal. 452.

5. The description of property in a mechanic's lien, as situated on Battery, between Pacific and Jackson streets, in San Francisco, is sufficiently certain. *Hotaling v. Cronise*, 2 Cal. 63.

6. A transfer of property cannot defeat a lien which had already accrued upon the property. *Ib.* 64.

7. The materials must not only have been used in the construction of the building, but they must have been by the express terms of the contract furnished for the particular building on which the lien is claimed, and these facts must be alleged and proven. *Bottomly v. Grace Church*, 2 Cal. 91; *Houghton v. Blake*, 5 Cal. 240.

8. One who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the lien law, but must rest upon the equity of his case. *Godeffroy v. Caldwell*, 2 Cal. 491.

9. The statute of April 12th, 1850, has placed liens for materials and liens for labor on the same footing, and the proceeds of sale must be distributed in conformity to the same. *Moxley v. Shepard*, 3 Cal. 64.

10. The statute of April 12th, 1850, limits the structures on which the lien can exist to buildings and wharves. No lien can therefore exist on a bridge. *Burt v. Washington*, 3 Cal. 246.

11. Where a lien attaches upon a leasehold interest, it so attaches subject to all the conditions of the lease, and he who holds it can enforce it, notwithstanding a subsequent failure of the lessee to pay rent and a surrender of the lease to the lessor. *Gaskill v. Trainer*, 3 Cal. 339; *Gaskill v. Moore*, 4 Cal. 235.

12. It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagors without notice," no mention is made of liens; hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date.\* *Rose v. Munie*, 4 Cal. 173.

13. Unless the answer of the garnishee discloses liens having a privity of claim upon the funds in his hands, judgment must be entered for the amount he admits due. *Cahoon v. Levy*, 4 Cal. 244.

14. A county court has no jurisdiction to enforce a mechanic's lien where the amount in controversy exceeds two hundred dollars. *Brock v. Bruce*, 5 Cal. 279.

15. T. & Co. were in the possession of certain property under a verbal agreement of sale from G., and employed W. to erect a building upon it. Before the completion

\* The mechanics' lien law has undergone many changes in legislation, repeated alterations being made to meet the difficulties presented by the decisions of the supreme court upon the statute as then in force. See repealed statutes 1850, p. 211; 1853, p. 202; 1856, p. 156. The law now in force is statutes of 1856, p. 203; amended in 1857, p. 84; 1858, p. 225, and 1861, p. 406.

\*The lien law, as subsequently enacted, abrogates this decision and gives liens precedence over unrecorded instruments

of the building, G. signed a deed to the land, and at the same time T. & Co. executed a mortgage for the purchase money: held, that the conveyance and mortgage were but one act, and that no prior lien on the general property of T. & Co. could have priority over the plaintiff's mortgage. *Guy v. Carriere*, 5 Cal. 512.

16. The statute concerning mechanics' liens was designated for two classes of laborers and contractors: first, contractors or material men, who contract directly with the owner of the building himself; and second, laborers, subcontractors, etc., who have no privity of contract with the owner. *Cahoon v. Levy*, 6 Cal. 296.

17. Contractors have an actual lien from the commencement of the work until sixty days after its completion; the subcontractors or laborers have their remedy by giving notice to the owner, and their lien attaches by the service of such notice. *Ib.*

18. A garnishment served on the owner, in a suit against the head contractor after the commencement of the building, and before notice served, must prevail over the lien of a sub-contractor or laborer. *Ib.* 297.

19. The remedy given, the subcontractor is simply in its nature an attachment without suit, but by notice, and having to give notice, he must yield to the claim of the attaching creditor. *Ib.*

20. Mortgages and liens of record form no exception to the rule prescribed by section 136 of the "act to regulate the estates of deceased persons," and the claims secured by them must have been presented to the executor or administrator and rejected by him before an action can be maintained. *Ellissen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 558.

21. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, where he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien cannot object to the legality of the mortgage in the face of which he contracted. *Ferguson v. Miller*, 6 Cal. 404.

22. An endorser of a note given in payment of a contract for building is incompetent as a witness to establish a mechanic's lien in favor of the holder of the

note upon the property of the maker, being directly interested to have the lien established. *Soule v. Dawes*, 6 Cal. 475.

23. The lien of a subcontractor filed and notice given to the owner of a building within thirty days after the completion of the work, under the act of 1855, attaches from the time the work was commenced, and takes precedence over a garnishment served on the owner against the head contractor after the work was commenced and before the filing and serving notice of lien. *Tuttle v. Montford*, 7 Cal. 360.

24. The lien of the mechanic, artisan and material man is favored in law, because those parties have in part created the very property on which the lien attaches. *Ib.*

25. A mechanic's lien is in the nature of a mortgage; is a charge upon the land, and can only be assigned in writing. *Ritter v. Stevenson*, 7 Cal. 389.

26. Where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. releases a mortgage on the lot, and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently, on its completion, by agreement with the builders, gave his note for \$10,000, instead of the lot he was to convey, and the builders filed a notice of lien and assigned note and lien to plaintiff: held, that as much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. *Soule v. Dawes*, 7 Cal. 576.

27. The lien of the contractor, if filed in time, takes effect, by relation, from the date of the commencement of the work, and all persons who deal with the property during the work are charged with notice of the claim of the contractor. But if a party is informed of the nature of the contract between the owner and builder, and takes a conveyance of the property subject to it, no subsequent change of the terms of the contract can create an incumbrance which will have priority of his conveyance. *Soule v. Dawes*, 7 Cal. 576; *Crowell v. Gilmore*, 13 Cal. 56.

28. The following notice of mechanic's lien does not contain such a description of

the premises as the statute contemplates: "A dwelling house lately erected by me for J. W. Conner, situated on Bryant street, between Second and Third streets, in the city of San Francisco on lot No. —." *Montrose v. Conner*, 8 Cal. 347.

29. The evident intention of the mechanic's lien act was to give mechanics and artisans a lien on all work done by them, upon any description of property, and to give the mechanic a lien upon whatever interest the person who caused the superstructure had. *McGreary v. Osborne*, 9 Cal. 122.

30. Where a civil engineer's lien for work done for the defendants in the construction of a canal or ditch was filed in the recorder's office of the county where the ditch is located on the sixth day of May, 1856, and suit was not commenced to enforce the lien until the twenty-sixth day of January, 1857: held, that the time fixed by statute for the enforcement of the lien had expired before the commencement of the suit. *Green v. Jackson Water Co.*, 10 Cal. 375.

31. A decree for the sale of premises in a suit to enforce a mechanic's lien has the same and no greater effect upon the rights of purchasers and incumbrances prior to the commencement of the suit that a similar decree would have upon the foreclosure of a mortgage. *Whitney v. Higgins*, 10 Cal. 551.

32. The liens which, by the act of April 19th, 1856, entitled "an act for securing liens to mechanics and others," are required to be exhibited and proved upon publication of notice in some newspaper of the county, or be deemed waived, are liens arising under that act, and do not apply to other liens. *Ib.*

33. All persons interested in the premises prior to the suit brought to foreclose a mortgage, or to enforce a mechanic's lien, whether purchasers, heirs, devisees, remainder men, reversioners or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interest by conveyance or incumbrance after suit brought, need not be made parties. *Ib.* 552.

34. Where a mechanic's lien attached on certain premises January 18th, 1856, and a mortgage was placed on the same premises February 21st, 1856, and a suit was brought subsequent to the execution

and record of the mortgage, to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrances of the mechanic's lien was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Ib.* 553.

35. In a mechanic's lien, it is not necessary to give the items of the work and materials in the statement of the lien filed, where the contract for the construction of the building is in a sum in gross. *Heston v. Martin*, 11 Cal. 42.

36. Neither the mechanic's lien law of 1855 or 1856 give a lien upon canals or ditches. The language of the statute is "building, wharf, or other superstructure." A ditch is not a building or a wharf, and in no sense can it be designated a superstructure. *Ellison v. Jackson Water Co.*, 12 Cal. 554.

37. Under the mechanic's lien act of 1856, the owner of a building may contract to pay for it as soon as completed, and he is not liable to material men until notice served on him, and then only to the extent of the sum due the contractor at the date of the notice. *Knowles v. Joost*, 13 Cal. 621.

38. Under the mechanic's lien act, it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars v. McKay*, 14 Cal. 128.

39. A suit to enforce a particular lien, under the act, is a proceeding to enforce all the liens against the property, and an intervention in a suit already pending, if filed within the six months, is as much a compliance with the act as an original suit. *Ib.* 129.

40. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention, and where the suit has been pending some time, and the application to intervene was made just as

## Mechanics' Lien.

plaintiff was taking judgment, the application was properly refused. *Hocker v. Kelley*, 14 Cal. 165.

41. For extra work on a building by the contractor, in pursuance of the general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgagee, given by the owner before the extra work was commenced; provided, the work was done with the knowledge of the mortgagee, and without objection from him. *Soule v. Dawes*, 14 Cal. 250.

42. R. & Co., defendants, had two mechanic's liens upon certain property, one filed October 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. signed an entry on the record of liens, stating that the liens did not fall due until January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble v. Voll*, 15 Cal. 509.

43. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.* 510.

44. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment of the liens, by paying the money justly due, interest, costs, etc.—he

not having been party to the suit by the lienholder. *Ib.*

45. Plaintiffs here cannot object that the premises are not so described in the liens as to pass title under such sale. If from insufficient description R. & Co. got no title, plaintiffs have their remedy in ejectment. *Ib.*

46. In this case, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from the decree. *Ib.*

47. Under the mechanic's lien act of 1858, material men, subcontractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself from the debt. By giving such notice, the owner becomes liable to pay the subcontractors, material men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin v. Duncan*, 16 Cal. 127.

48. The notice of mechanic's lien, filed in the recorder's office, need not set out the items of the account; a general statement of the demand, showing its nature and character, and the amount due or owing thereon, is sufficient. *Brennan v. Swasey*, 16 Cal. 142.

49. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Ib.*

50. If the party attempts to pursue them in separate actions, he might be put to his election; but it is no defense to an action to enforce the mechanic's lien, that in a previous suit for the same debt an attachment was issued and levied upon the property of the debtor, particularly when such suit has been dismissed, and nothing was realized by the attachment. *Ib.*



## MERGER.

1. The surrender of a leasehold estate operates as a merger in the fee, but this cannot be suffered to defeat the right of a third party, whose rights intervened before the merger took effect. *Gaskill v. Trainer*, 3 Cal. 340.

2. The reconveyance of the leasehold estate, by mesne conveyances of such a description as amount to assignments of the lease, passes the entire estate of the lessee, which thereby becomes merged in the fee and extinguished. *Smiley v. Van Winkle*, 6 Cal. 606.

3. A judgment against one or more joint guarantors of a note bars the action against the others; when the contract is joint and not joint and several, the entire cause of action is merged in the judgment. *Brady v. Reynolds*, 13 Cal. 33.

4. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable in estimating the rents and profits of a water ditch—involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc. This is in its nature an equity proceeding—at least, to be disposed of according to equity practice. *Raun v. Reynolds*, 15 Cal. 471.

5. The party so in possession, under sheriff's sale, is in no better position than if he entered directly under the mortgage, to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefits of the amount so received. In equity he is not a purchaser, but a mortgagor; and although the sale was not set aside until after the receipt of the rents and profits, still when it was set aside, the order took effect upon the relations of the parties as they existed before the sale, the mortgagors and the mortgagee have the same right they had before. *Ib.*

6. The foreclosure in this case did not merge the mortgage—at least, for all the purposes of this question as to accounting for the rents and profits. H. or his assignee was as much mortgagee after the decree as before. The reversal of the

decree would not affect the mortgage, and if H. had entered into possession after the decree, but before any sale, he would have been bound to account for what he had received as mortgagee. Possibly the lien of the mortgage might have been destroyed by the judgment, but the mortgage was not destroyed, nor the relations of the parties as mortgagor and mortgagee. *Ib.*

7. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by execution and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and sale of the real estate: held, that this decree was coram non judice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 382.

## METES AND BOUNDS.

1. Where the boundaries of a lot of land granted by an alcalde were uncertain, the jury should determine the true location of the lot in question. *Reynolds v. West*, 1 Cal. 328.

2. A description of premises in a lease, though imperfect, is sufficiently certain, if the boundaries of the premises can be ascertained with a reasonable degree of certainty, and they have taken possession of and occupied under the lease. *Pierce v. Minturn*, 1 Cal. 472.

3. The description in a mechanic's lien as situated on Battery, between Pacific and Jackson streets, in San Francisco, is sufficiently certain. *Hotaling v. Cronise*, 2 Cal. 63.

4. Hearsay evidence, even with regard to boundaries of parishes or towns, is only received where such boundary is of remote

## Metes and Bounds.

antiquity, and query if ever it should be received to affect a private right. *Vanderslice v. Hanks*, 3 Cal. 45.

5. The boundaries of the water lot property of San Francisco are particularly set forth in the act of March 26th, 1851, and the question of what was the water line of the city at the date of the act, is one of fact. *Cook v. Bonnet*, 4 Cal. 398.

6. To describe land by a certain name is as good a description as by metes and bounds, if it can be rendered sufficiently certain by the evidence. *Castro v. Gill*, 5 Cal. 42.

7. Where a tract of land sold for a gross sum is described by specific boundaries, and as containing so many acres, more or less, the vendor cannot recover for the overplus, if on a survey it be ascertained that more land is contained in the tract than the precise amount named in the deed. *Chipman v. Briggs*, 5 Cal. 77.

8. Where the defendant claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of, or marked and visible boundaries, embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 166.

9. Where the line of a creek was the boundary between a city and the remainder of a county, both the city and county have the right to build a bridge over the creek. *Gilman v. Contra Costa County*, 5 Cal. 428.

10. In an action of foreclosure, where the complaint has a copy of the mortgage annexed, to which it refers: held, that a correct description of the land in the mortgage is sufficient for the purpose of the suit. *Emeric v. Tams*, 6 Cal. 156.

11. The statute requires that an assessment shall contain a list of the real estate, "giving the quantity of acres in each tract, as near as may be possible, except in case of city and town lots, which may be described by reference to numbers and streets." To require a particular description of mineral lands, would be imposing an unnecessary burden on the officer. *Palmer v. Boling*, 8 Cal. 388.

12. A patent for swamp and overflowed lands is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive as between the United States and the State. *Owens v. Jackson*, 9 Cal. 324.

13. Where two several mining companies agree upon a boundary line between the claims of two companies, and subsequently other parties purchase the several interest of the two companies with a knowledge of the boundary line so fixed, both parties are concluded by it and are estopped from denying the line. *McGee v. Stone*, 9 Cal. 606.

14. The lines of a quarter section of government land, which are distinctly marked by natural boundaries and by stakes placed at convenient distances so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for trespass thereon, under the provisions of the act of April 11, 1850. *Taylor v. Woodward*, 10 Cal. 91.

15. Where there is a conflict between the boundaries of a grant of land as designated in the grant by parallels of latitude, and as designated by a map referred to in the grant, parol evidence is admissible in explanation of the boundaries, and to fix the location of the land granted. *Ferris v. Coover*, 10 Cal. 624.

16. If, taking the grant and map together, any portion of the description must be rejected, reference will be had to the circumstances under which the grant was made and the intentions of the parties, and parol evidence is inadmissible in such case for that purpose. That portion will be rejected, and that construction adopted which will give effect to the intentions of the parties. *Ib.* 628.

17. The rules adopted in the construction of boundaries are those which will best enable the court to ascertain the intention of the parties. Preference is given to monuments, because they are least liable to mistake; and the degree of importance given to natural or artificial monuments, courses and distances is just in proportion to the liability of parties to err in reference to them. But they do not occupy an inflexible position in regard to each other. It may sometimes happen in case of a clear mistake that an inferior means of location will control a higher. *Ib.*

18. When the quantity is mentioned in addition to a description of the boundaries or other certain designations of the land, without an express covenant that it contains that quantity, the whole is considered as a mere description. The quantity being the least certain part of the description,

must yield to the boundaries or number if they do not agree. *Stanley v. Green*, 12 Cal. 164.

19. The courts can ascertain and fix the position of boundaries which are designated, but cannot give boundaries to a specific quantity which has none, and lies in a larger tract. To give precision and location to such specific quantity, a survey must be made by the proper department of government, in which the subject is vested by the legislation of Congress. *Waterman v. Smith*, 13 Cal. 408; *Moore v. Wilkinson*, 13 Cal. 486.

20. Lands outside of a city or incorporated town must be described in an assessment by metes and bounds—the number of acres, as nearly as possible, and the locality and township must be given. *Lachman v. Clark*, 14 Cal. 183.

21. The Pulgas grant, in San Mateo county, is a grant by boundaries and not by quantity, being “tract known under the name of Las Pulgas, the boundaries of which are, on the south the creek of San Francisquito, on the north that of San Mateo, on the east the estuaries, and on the west the cañada de Raimundo” and “the tract of which mention is made is of four leagues of latitude and one of longitude.” *Mc Garvey v. Little*, 15 Cal. 31.

22. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action, is admissible in another action between different parties, as hearsay evidence upon the location of such lines, after his death. *Morton v. Folger*, 15 Cal. 278.

23. The declarations—on a question of boundary—of a deceased person, who was in a situation to be acquainted with the matter, and who was at the time free from any interest therein, are admissible, whether the boundary be one of a general or public interest, or be one between the estates of private proprietors, and their admissibility cannot be affected by the fact that they are reduced to writing and were made under oath in a judicial proceeding. *Ib.* 280.

24. In England, such evidence is confined to showing boundaries of parishes, manors, and the like, which are of public interest, and is not allowed to establish the boundary of a private estate, unless the matter be identical with that of a public or *quasi* public nature. *Ib.* 281.

25. Hence the deposition of Vioget, as

to the position of the southern boundary of the Sutter grant, offered in connection with the map drawn by him, is admissible as hearsay evidence, though taken in another action between different parties. *Ib.* 282.

26. Such evidence is admissible as hearsay evidence from the necessity of the case, which, in this instance, presents itself with peculiar force. The survey by Vioget was made in 1841, when the valley of the Sacramento was occupied almost exclusively by roving tribes of Indians, and no interest was felt in preserving, on the surface of the ground, the evidence of its lines. At that time there were no white men, nor were there for years afterwards, to question Sutter's claim, or to dispute as to its boundaries. Whatever landmarks were originally made must have soon disappeared. Two cities, Sacramento and Marysville, one of them the second in population in the State, are built upon the land supposed to be within the grant to Sutter; and residents of these cities, and occupiers of land lying between them—numbered by thousands—have taken conveyances from Sutter, and expended their money in improvements, relying upon the survey and map of Vioget as evidence that their property is within the grant. *Ib.*

27. Besides, the land is divided into a large number of farms; and the doctrine is, that where the tract originally surveyed was large, and was subsequently divided into numerous farms, the boundary of the original tract serving as a boundary of the several farms, such evidence is admitted on principles similar to those which relate to the boundaries of a manor or parish. *Ib.*

28. In ejectment for land within Sutter's fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment “named New Helvetia,” and the grant in which is conceded the land referred to in the petition “named New Helvetia,” be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing “Sutter's Fort,” and the inclosures and settlements around it, was

## Metes and Bounds.

known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his inclosures at the fort; the evidence would be prima facie evidence, if not conclusive proof, that the premises were covered by the grant. *Ib.* 283.

29. Where a Mexican grant refers in its description of the premises to the plat or map accompanying the expediente, the plat or map becomes, for the purpose of identifying the land, as much a part of the grant itself as if incorporated therein. *Seaward v. Malotte*, 15 Cal. 306.

30. In an action of forcible entry and detainer, the complaint described the premises as "about ten rods square, situated within and comprising the north-westerly corner of that certain piece or parcel of land, bounded and described as follows, to wit:" (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres). "The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter's Point. Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

31. Where the land granted by an Alcalde is shown to be within the limits of the four square leagues thus measured, the presumption attaches that it was public land, grantable as such, and that the Alcalde grant passed the title to the grantee. This presumption might be repelled by

proof of an express assignment of the lands of the pueblo, which did not include the land granted by the Alcalde, or by proof that this was land reserved as a fort site, etc, or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Payne v. Treadwell*, 16 Cal. 227.

32. A plaintiff suing for a lot in San Francisco may rest his case, prima facie, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinance. *Ib.*

33. San Francisco having been constituted, by a public, political act of the former government, a pueblo, Courts will take judicial notice of its existence, powers and rights, and among these last its general boundary and jurisdiction. *Ib.*

34. To hold the question of boundary lines shall be left to be determined in every case according to parol proof, would be to open the door to endless and fruitless litigation, and give rise to such uncertainties as would deny practically the benefit of any rule to those interested. It would be of little use to any man to have an alcalde grant, if there were no means left of locating the premises, or if this question were to be perpetually subject to opposing parol contestation. *Ib.* 228.

35. *Morton v. Folger*, 15 Cal. 275, holding the declarations, on a question of boundary, of a deceased person who was in a situation to be acquainted with the matter, and who was, at the time, free from any interest therein, to be admissible, whether the boundary were one of general or public interest, or were one between the estates of private proprietors, affirmed. *Cornwall v. Culver*, 16 Cal. 428.

36. Circumstances under which the depositions of Vioget, now deceased, as to the boundary lines of the Sutter grant are admissible, stated. *Ib.* 429.

37. A complaint in ejectment, describing the premises as "lot No. 1, in block No. 23, as per plot of the town of Red Bluff, as laid out by the Red Bluff land corporation in 1853, being on the corner of Main and Sycamore streets, twenty-five feet on Main by one hundred and fifteen feet on Sycamore, and running back to the



alley," and specifying the county in which they are situated, by the terms "county of Tehama," in the title of the suit, sufficiently describes the premises. The description by metes and bounds is required only so far as they may be necessary to identify with certainty the property. *Doll v. Feller*, 16 Cal. 433.

38. Where land is described in a lease as "land lying along the American fork, bounded by said fork, and running down to land owned by Mark Stewart; thence easterly and north-easterly along a slough to the north of A street, and following the bank of said slough around where the high land slopes to said American fork," etc., the true construction of this description fixes the boundary on the slough, and the words "around where the high land slopes," if they have any meaning at all, can only be applied to the bank or high ground adjoining the slough. *De Rutte v. Muldrow*, 16 Cal. 514.

39. In ejectment on a patent, defendant introduced a witness who stated that he knew where the defendant resided; that he knew where Dry creek was, and where it entered Bear river; that he knew no other Dry creek than the one named, and did not think there was any other creek by that name between the foot-hills and Bear river. He was then requested to state, if he knew, whether the lands occupied by the defendant for the last two years or more, or any part thereof, lay below Dry creek and Bear river, the counsel declaring the object of the inquiry to be to show that the lands were not within the calls of the patent or grant. To this inquiry objection was made and sustained, on the ground that it did not relate to the starting point or monument named in the patent; the court offering at the time to allow the witness to be asked whether the lands were situated below the oak tree marked at the commencement or first monument of the patent: held, that the court below did not err in ruling out the testimony, because the question put to the witness did not, as it should have done,—limit the inquiry to that Dry creek at the junction of which the marked oak tree stood—it appearing from a map, incorporated into the patent, that there were two streams emptying into Bear river, within the calls of the patent, each of which was termed Dry creek, and that below one of them,

and above the other, the premises in controversy were situated; and it further appearing that the description in the patent commenced at an oak tree marked with an (x) and certain figures and letters, at the junction of Dry creek and Bear river, and the map designated the position of the tree—the starting point—at the mouth of the lower Dry creek. *Mott v. Smith*, 16 Cal. 558.

40. From the description in the patent, and from the map, the position of this starting point was fixed beyond doubt; and, as the witness stated he knew only of one Dry creek, the inquiry made of him and ruled out would only tend to mislead and confuse the jury, unless that inquiry were limited to the Dry creek at the junction of which the marked tree stood; and the ruling of the court did not tend to exclude legitimate proof that the premises lay below the creek which the patent designated, but to require it to be directed to such creek, and not to the other creek of the same name. *Ib.*

41. The fact that a complaint in ejectment, in addition to giving a description of the premises by metes and bounds, designates them as one-half of a certain preëmption claim taken up by Morris, from whom plaintiff traced title, in 1850, and surveyed by the county surveyor, and recorded in conformity with the statute, does not make it essential, to entitle the plaintiffs to a recovery as against the defendant in possession, that they should allege in their complaint and establish on the trial such facts as would bring them within the provisions of the preëmption laws of the United States, or of the possessory act of this State. The designation of the property as a part of a preëmption claim does not preclude the claimants from relying upon any other source of title than the United States or the State. *Coryell v. Cain*, 16 Cal. 572.

See DESCRIPTION.

## MEXICAN TITLE.

See ALCALDE GRANT, LAND.

## MILL.

1. Where the plaintiffs and defendants entered into a partnership, by the terms of which the plaintiffs were to advance a sum of money and material for a saw mill, which they did, and the defendants removed the materials furnished by plaintiffs, and appropriated the same, including the money, to their own use: held, that the plaintiffs had a right to sue therefor at law, and for damages caused by defendants' violation of the partnership contract. *Crosby v. McDermitt*, 7 Cal. 148.

2. The engine and boilers, etc., used in a flour mill, being permanently fastened to the mill, which had its foundation in the ground: held, to be fixtures covered by a mortgage upon the premises, though put up after the execution of the mortgage, and held to pass to the purchaser of the mortgaged premises under a decree of foreclosure. *Sands v. Pfeiffer*, 10 Cal. 265.

3. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same or any other purpose. *Ortman v. Dixon*, 13 Cal. 38.

4. No distinction can be drawn between a mill owner and a miner as to their rights in appropriating water. *Ortman v. Dixon*, 13 Cal. 39; *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 236.

5. Where a party takes up a mill seat on public agricultural land, erects a saw mill, dwelling, etc., and appropriates the water of the stream for the use of the mill, he may use the water for a grist mill erected at the same place years afterwards. *Ib.* 237.

6. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt v. Judd*, 14 Cal. 69.

7. Such machinery, when applied to quartz leads, is a trade fixture, removable by the tenant, if otherwise removable; but this removal can only be during the tenancy and during such further period of possession by the tenant as he holds the

premises under a right still to consider himself a tenant, and not during the time he may actually hold possession after his lease has expired. *Ib.*

8. A renewal of a lease terminates the tenant's right to remove fixtures; so with any other agreement which terminates possession under a lease. *Ib.* 72.

9. Although a lessor of land cannot in a given case claim the fixtures, it is otherwise of a mortgagee of the lease. Here the question is between the grantor and grantee, and the latter holds all fixtures, whether for trade or manufacture, agriculture or habitation. *Ib.* 73.

10. A general deed of mortgage or of bargain and sale passes the fixtures as part of the freehold. *Ib.*

11. At common law, a bond for a title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Ib.*

See FIXTURES.

## MINES AND MINING.

- I. In general.
- II. Mineral Lands.
  - 1. Rights of Miners.
  - 2. Notice of Claim.
- III. Mining Rules.
- IV. Taxation on Mines and Miners.

## I. IN GENERAL.

1. Although the jurisdiction of mining claims is given to justices' courts, yet if the amount in controversy is above two hundred dollars, the district court has jurisdiction. No statute can deprive the latter court of the jurisdiction confirmed and defined by the constitution. *Hicks v. Bell*, 3 Cal. 224.

2. In a suit brought by one of the partners in a mining company against the com-

## In general.

pany to recover his share, which had been sold for an alleged nonpayment of an assessment, and also to recover the sum of his proportionate share of the gold taken out by the said company, the district court had jurisdiction. *Schupler v. Evans*, 4 Cal. 212.

3. In a controversy between two mining companies it was competent to prove the execution of certain receipts for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located and was in operation at the time the receipts purport to be signed. *Lone Star Co. v. West Point Co.*, 5 Cal. 447.

4. Where the complaint in an action to recover possession of a mining claim in a justice's court, contains an allegation of injury done and a prayer for damages, the latter should be disregarded or stricken out, and the plaintiff be allowed to try his right to the claim. *Van Etten v. Jilson*, 6 Cal. 19.

5. Justices of the peace have no jurisdiction in actions to recover damages in a sum over two hundred dollars for injury to a mining claim, or for its detention. *Van Etten v. Jilson*, 6 Cal. 19; *Small v. Gwinn*, 6 Cal. 449; *Freeman v. Powers*, 7 Cal. 105.

6. Where a mining company, not incorporated, forms a trading copartnership with an individual under a firm name, each member of the mining company is a member of the firm. *Rich v. Davis*, 6 Cal. 163.

7. Where one of the mining company acted as salesman of the firm, it cannot be pretended that he was a dormant partner whose acts would not bind the firm. *Ib.*

8. In an action for a mining claim, when the defendants asked for an instruction to the jury "that if the plaintiff had abandoned the claim and did not intend to return and work it before the commencement of the suit," and the court gave the instruction "subject to the seventeenth section of the statute of limitations:" held, that the qualification to the instruction was error. *Davis v. Butler*, 6 Cal. 511.

9. A bill of sale, not under seal,\* is insufficient to convey a mining claim. *McCarron v. O'Connell*, 7 Cal. 153; *Clark v. McElvy*, 11 Cal. 160.

10. The removal of gold from a mining claim is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Merced Mining Co. v. Fremont*, 7 Cal. 327.

11. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes notice of J.'s contract: held, that his claim is not subject or liable to J.'s contract. *Jenkins v. Redding*, 8 Cal. 603.

12. The interest of a miner in his mining claim is property, and not having been exempted by law, may be taken on execution. *McKeon v. Bisbee*, 9 Cal. 142.

13. Where two several mining companies agree upon a boundary line between the claims of the two companies, and subsequently two other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line. *McGee v. Stone*, 9 Cal. 606.

14. The law will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. *Partridge v. McKinney*, 10 Cal. 183.

15. Parties taking possession of a quartz lead under an agreement made with another party, cannot retain possession and refuse compliance with their agreement made in consideration of such possession and right to the lead. *Hitchens v. Nougues*, 11 Cal. 36.

16. Where such parties conveyed to H. one-third interest in the lead, by deed purporting to convey in the fee simple absolute, and subsequently acquired another title: held, that such subsequent acquisition of title inured to H.'s benefit. *Ib.*

17. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring v. Crow*, 11 Cal. 371.

18. The purchaser of a mining claim can only acquire by such purchase such right or title as his vendor had at the time of the sale. *Ib.*

19. The whole course of legislation and

\*The statute of 1860, p. 175, permits bills of sales of mining claims without seal to pass the title.

## In general.

judicial decisions in this State since its organization has recognized a qualified ownership of the mines in private individuals. *State of California v. Moore*, 12 Cal. 70.

20. In an action of trespass for entering upon the mining ground of plaintiff and digging the same up and converting the gold-bearing earth, the vendor of the plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe v. Bradley*, 12 Cal. 230.

21. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the sheriff who had the execution in going on the ground and digging up the soil and taking the gold it contained. *Ib.*

22. Work done outside of a mining claim with intent to work the claim, to be considered by intendment as work done on the claim, must have direct relation and be in reasonable proximity to it. *Mc Garrity v. Byington*, 12 Cal. 432.

23. A bill of sale of a mining claim is sufficiently proven when the handwriting of the subscribing witness, who is absent from the State, and the execution by the vendor are proven. *Jackson v. Feather River Water Co.*, 14 Cal. 22.

24. A steam engine and boiler fastened to a frame of timber, bedded in the ground of a quartz ledge sufficient to make it level, with a roof or shed to protect the machinery, and used for the purpose of working the ledge, are so annexed to the freehold as to become a fixture. *Merritt v. Judd*, 14 Cal. 54.

25. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and those certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs to show their interest in the ground and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that

their execution was not proved: held, that the certificates, etc., were relevant to show possession in plaintiffs, but that their execution should have been proven. *Pennsylvania Mining Co. v. Owens*, 15 Cal. 136.

26. In this case the court instructed the jury: 1st, that if they found plaintiffs located their claims as now claimed before the location of defendants' claim, then they should find for plaintiffs; and 2nd, if they found that defendants never located any claim adjoining plaintiffs' claim, then they should find for plaintiffs: held, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it until a prior and paramount right was shown in plaintiffs; that it was not essential to defendants' possession to show that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Ib.*

27. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this State, as a stockholder, and holds the office of secretary—to which no person but a stockholder is eligible—is not a competent witness for the company in an action against it for overflowing plaintiffs' mining claim. He is liable for the debts of the company, and therefore interested. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

28. Defendant killed deceased while in the act of injuring a mining claim. On the trial defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the *res gestæ*, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted it may not have amounted to a justification. *People v. Costello*, 15 Cal. 353.



## Mineral Lands.

## II. MINERAL LANDS.

29. The mines of gold and silver in the public lands are as much the property of the State, by virtue of her sovereignty, as are similar mines in the hands of private proprietors. *Hicks v. Bell*, 3 Cal. 227.

30. The State, therefore, has the sole right to authorize the mines to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

31. The act of April, 1852, gives permission to all persons to work the mines upon public land, notwithstanding they may be in the possession and enjoyment of another for agricultural purposes. *Stokes v. Barrett*, 5 Cal. 39.

32. The mines of gold and silver in this State are the property of the State, and the policy of her administration permits all persons to work for these metals. *Ib.*

33. The government of the United States will issue no patent to a preëmption claimant upon mineral land who claims the same for agricultural purposes. *McClintock v. Bryden*, 5 Cal. 99.

34. The government of this State being a government of the people, has, as far as its action has been determined, modified the claim to the precious metals by the sovereign, and permitted its citizens and others to use the public lands for the purpose of extracting the most valuable metals from their soil. *Ib.*

35. A person who has settled for agricultural purposes upon any of the mining lands of this State has settled upon lands subject to the rights of miners, who may proceed in good faith to extract any valuable metal there may be found in the lands so occupied by the settler, to the least injury of the occupying claimant. *Ib.* 102.

36. Miners have a right to dig for gold on the public lands. *Irwin v. Phillips*, 5 Cal. 143.

37. The miner who selects a piece of ground to work must take it as he finds it, subject to prior rights, which have an equal equity on account of an equal recognition from the sovereign power. *Ib.* 147.

38. In permitting miners to go upon public lands occupied by others, it has le-

galized what would otherwise have been a trespass, and the act cannot be extended by implication to a class of cases not specially provided for. *Fitzgerald v. Urton*, 5 Cal. 309; *Burdge v. Underwood*, 6 Cal. 46; *Weimer v. Lowery*, 11 Cal. 112.

39. Persons settled in good faith upon lots in the mining towns, and carrying on business, should be reasonably protected, and not left to a fear of invasion on the specious pretext of mining. *Fitzgerald v. Urton*, 5 Cal. 310.

40. Settlers may occupy public lands and enclose the same for their immediate benefit, except in the mining regions, else the entire gold region might have been enclosed in large tracts under the pretense of agriculture and grazing. *Tartar v. Spring Creek W. and M. Co.*, 5 Cal. 398.

41. The right to mine for the precious metals can only be exercised upon public lands, and although it carries with it the incidents of the right, such as the use of wood and water, those incidents also must be of the public domain. *Ib.* 399.

42. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespassers. The State alone can enforce the law prohibiting foreigners from working in the mines without a license. *Mitchell v. Hagood*, 6 Cal. 148.

43. The government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon those lands they have mined for gold, constructed canals, built saw mills, cultivated farms and practiced every mode of industry, has asserted no right of ownership to any of the mineral lands in the State. *Conger v. Weaver*, 6 Cal. 556.

44. The right, like digging gold, is a franchise, and the attending circumstances raise the presumption of a grant from the sovereign of the privilege, and every one who wishes to attain it has license from the State to do so; provided, that the prior rights of others are not infringed upon. *Ib.* 558.

45. The act of May 3d, 1852, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands in the State. *Nims v. Johnson*, 7 Cal. 113.

46. The current and spirit of the legis-

## Mineral Lands.

lation of the State and federal government, taken in connection with the history and known circumstances of the country, the conclusion is irresistible, that the mines are occupied and worked, with the clear assent and encouragement of both the federal and State governments. *Merced Mining Co. v. Fremont*, 7 Cal. 326.

47. In an action by a company of miners to recover possession of a mining claim and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damages sought to be recovered. *Packer v. Heaton*, 9 Cal. 571.

48. A party cannot, under pretense of holding land in exclusive occupancy as a town lot, take up and enclose twelve acres of mineral land, in a mining district, as against persons who subsequently enter upon the land in good faith for the purpose of digging gold therein, and who, in such operations, do no injury for the comfortable use of the premises as a residence, or for the carrying on of any mechanical or commercial business. *Martin v. Browner*, 11 Cal. 14.

49. In an action of ejectment to recover an undivided interest in a mining claim, it is not necessary to make parties defendant in such action, who are in possession of such claim, holding other undivided interests, and who claim no right to the interest sued for. *Waring v. Crow*, 11 Cal. 371.

50. Mining claims are real estate, within the code defining the venue of civil actions. *Watts v. White*, 13 Cal. 324.

51. Upon questions as to the occupancy of public mineral land, it seems that a transfer of the occupant's right of possession may as well be by simple agreement as by deed, the vendee taking possession. *Jackson v. Feather River and Gibsonville Water Co.*, 14 Cal. 22.

52. From an early period of our State's jurisprudence we have regarded claims to public mineral lands as titles. *Merritt v. Judd*, 14 Cal. 64.

53. A license to work the mines implies a permission to extract and remove the mineral. Such license from an indi-

vidual owner can be created only by writing, and from the general government only by act of Congress. But Congress has adopted no specific action on the subject, and has left that matter to be controlled by its previous general legislation respecting the public domain. The supposed license from the general government, consists in its simple forbearance. *Boggs v. Merced Mining Co.*, 14 Cal. 374.

54. If the forbearance of the government were entitled to any consideration, as a legal objection to the assertion of the title of the government, it could only be so in those cases where it has been accompanied with such knowledge on its part, of the working of the mines and the removal of the mineral, as to have induced investigation and action, had this been intended or desired. Such knowledge must be affirmatively shown by those who assert a license from forbearance. *Ib.* 375.

55. The presumption of a grant from the government of mines, water privileges and the like, is to the first appropriator; but such a presumption can have no place for consideration against the superior proprietor. *Boggs v. Merced Mining Co.*, 14 Cal. 375; *Henshaw v. Clark*, 14 Cal. 464.

56. The United States, like any other proprietor, can only exercise their rights to the mineral on private property, in subordination to such rules and regulations as the local sovereign may prescribe. *Boggs v. Merced Mining Co.*, 14 Cal. 376.

57. The general course of legislation in this State, authorizes the inference of a license from her to the miner to enter upon lands and remove the gold, so far as the State has any right; but this license is restricted to the public lands. *Ib.* 376.

58. The possession of agricultural land is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 14 Cal. 388.

59. How far the right of miners to go upon public mineral lands in possession of another, for the purpose of mining, must be modified to secure any rights of such possessor, reserved. *Ib.*

60. Neither the act of 1858, as to the

## Mineral Lands.

location of seminary land, nor the act of Congress donating it, allows mineral land to be located. *Ib.*

61. Miners have a right to enter upon public mineral land, in the occupancy of others, for agricultural purposes, and to use the land and water for the extraction of gold—the use being reasonable, necessary to the business of mining, and with just regard to the rights of agriculturist. And this, whether the land is inclosed, or taken up under the possessory act. *Clark v. Duval*, 15 Cal. 88.

62. The right so to enter and mine, carries with it the right to whatever is indispensable for the exercise of this mining privilege—as the use of the land, and such elements of the freehold or inheritance as water. *Ib.*

63. When a party enters upon mineral land for the purpose of mining, he cannot be presumed to be a trespasser; for if the land be not private property, he has the right to enter upon it for that purpose; and until it be shown that the title has passed from the government, the statutory presumption that it is the public land, applies. *Smith v. Doe*, 15 Cal. 105.

64. Mere entry and possession give no right to the exclusive enjoyment of any given quantity of public mineral lands of the State. *Ib.*

65. In ejectment for mineral lands, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings, because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Ib.*

66. The allegation of possession is too broad to defeat the rights of a person who has, in good faith, located upon public mineral land for the purpose of mining. *Ib.*

67. As a general rule, the public mineral lands of the State are open to the occupation of every person who, in good faith, chooses to enter upon them for the purpose of mining. *Ib.* 106.

68. But this rule has its limitations, to be fixed by the facts of each particular case. Certain possessory rights, and rights of property in the mining region, though not founded on a valid legal title, will be protected against the miner—as valuable permanent improvements, such as houses, orchards, vineyards, growing crops, etc. *Ib.*

69. In ejectment for an interest in a mining claim, the answer being a general denial, defendant cannot defeat the action by showing the claim to be partnership property. Any rights defendant may have in the premises, growing out of the partnership, must be asserted in equity, particularly as the legal title in this case is in the plaintiff. *Lowe v. Alexander*, 15 Cal. 302.

70. Where, in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title. And where plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the court below to refuse a new trial, the motion for which was based on affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiffs' case but for this surprise. *Eagan v. Delaney*, 16 Cal. 87.

71. The act of April 25th, 1855, for the protection of growing crops and improvements in the mining districts of this State, so far as it purports to give a right of en-

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try upon the mineral lands of this State, in cases where no such right existed anterior to its passage, is invalid. *Gillan v. Hutchinson*, 16 Cal. 155.

72. This act of 1855 seems to proceed upon the idea of an absolute and unconditional right in the miner to enter upon the possessions of another for mining purposes, and the intention of the act was to limit this supposed right, and not to give a right of entry in cases where no such right previously existed. Miners have no such absolute and unconditional right. The true rule is laid down in *Smith v. Doe*, 15 Cal. 100. *Gillan v. Hutchinson*, 16 Cal. 155.

73. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privileges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from the government to the first appropriator. The presumption, though of no avail against the government, is held absolute in such controversies. *Coryell v. Cain*, 16 Cal. 573.

See LAND.

### 1. Rights of Miners.

74. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the court ordered a reduction of the dam, so as to prevent the overflow, or if necessary an entire abatement. *Ramsay v. Chandler*, 3 Cal. 93.

75. The obstruction of the water in a ravine is common injury to many at work upon the ravine, who had by the necessary implication of the laws of the State which relate to mines and miners, a species of property in their mining grounds which they had a right to protect by peaceably abating the nuisance. *Stiles v. Laird*, 5 Cal. 122.

76. Rights of miners are to be protected in the possession of their selected localities, and the rights of those who by prior appropriation have taken the waters from their natural beds, and by costly works to supply the necessities of gold diggers, and without which the most important interest

in the mineral region would remain undeveloped. *Irwin v. Phillips*, 5 Cal. 146.

77. A miner has no right to dig or work within the enclosure surrounding a dwelling house and other improvements of another. *Burdge v. Underwood*, 6 Cal. 46.

78. A prior locator of a mining claim, on the bank of a stream, has the right to the use of the bed of the stream for the purpose of fluming or working his claim; and any subsequent erection, dam or embankment which will turn the water back upon such claim, or hinder it from being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent on such obstructions. *Sims v. Smith*, 7 Cal. 149.

79. Under existing legislation, the owner of a mining claim has, in practical effect, a good vested title to the property, and should be so treated until his title is divested, by the exercise of the higher right of his superior proprietor. His right to protect the property, for the time being, is as full and perfect as if he were the tenant for years, or for life, of his superior proprietor. As his lease is of the mine, he is entitled to all the remedies, for its protection, that he could claim if he were the owner, against all the world, except the true owner. *Merced Mining Co. v. Fremont*, 7 Cal. 320.

80. A writ of injunction will lie, to restrain trespass, in entering upon a mining claim, and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy at law. *Ib.* 322.

81. Where the plaintiff sued for an injury to his mining claim, by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown, other than that which the law would presume from the breaking of the ditch: held, that the rights of the parties were acquired at the dates of their respective locations, and the rule of "coming to a nuisance" may be applied. *Tenney v. Miners' Ditch Co.*, 7 Cal. 339.

82. There is no doubt that ditch owners would be responsible for wanton injuries



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or gross negligence, but they are not liable for a mere accidental injury, where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch. *Ib.* 340.

83. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. *Bear River and Auburn W. and M. Co. v. New York Mining Co.*, 8 Cal. 333.

84. Where a place of deposit for tailings is necessary for the working of a mine, there can be no doubt of the miner's right to appropriate such ground as may be necessary for this purpose; provided, he does not interfere with preëxisting rights. *Jones v. Jackson*, 9 Cal. 244.

85. The pay dirt and tailings of a miner, which are the productions of his labor, are his property. *Ib.*

86. If a miner allows his tailings to mingle with those of other miners, this would not give a stranger a right to the mixed mass; and where tailings are allowed to flow upon the land of another, he is entitled to them. *Ib.* 245.

87. One party may locate ground in the mineral districts for fluming, and another party, at the same or a different time, may locate the same ground for mining purposes; the two locations being for different purposes will not conflict. *O'Keiffe v. Cunningham*, 9 Cal. 590.

88. A party may take up a claim for mining purposes that has been and still is used as a place of deposit for tailings by another, and his mining right may be subject to this prior right of deposit; but this claim of the miner will not be subject to those who come after him. *Ib.* 591.

89. Plaintiff owned certain mining claims and quartz leads on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiffs' claims and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: held, that the action was premature, and that the demurrer to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of ac-

tion, was properly sustained. *Harvey v. Chilton*, 11 Cal. 120.

90. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendant's dam and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears Union Water Co.*, 12 Cal. 558.

91. Miners have no right to enter upon private land and subject it to such uses as may be necessary to extract the precious metals which it contains. *Henshaw v. Clark*, 14 Cal. 464.

92. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream above and adjoining the claims of plaintiffs, defendants' claim being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs' claims, and through this flume a large quantity of tailings was deposited on plaintiffs' claims, to their great damage. The flume was constructed for the purpose of working defendants' claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The court instructed the jury, that the person first locating a claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to claims subsequently located: held, that the instruction was wrong; that the defendants were not entitled, as matter of strict legal right, to an easement upon plaintiffs' claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person may have a right of way by necessity over the land of another, does not apply to this case; and further, that this court does not recognize the doctrine that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by

## Rights of Miners.—Notice of Claim.—Mining Rules.

any local custom or regulation, its existence should have been averred and proved. *Esmond v. Chew*, 15 Cal. 142.

93. Each person mining in the same stream is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness in the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Ib.*

## 2. Notice of Claim.

94. A misdescription in the notice of the claimant to a quartz lead, posted up near the premises, in pursuance of the requirement of the mining laws in the district in which the lead is situated, and where the lead is underground and undeveloped, will not vitiate the claim. *Johnson v. Parks*, 10 Cal. 448.

95. The question as to the necessity of recording mining claims, reserved. *Partidge v. McKinney*, 13 Cal. 159.

96. A copy of a notice posted on a mining claim to show its extent is not admissible in evidence, if the notice itself be attainable. Such evidence is secondary, and is admissible only upon the terms which control its introduction in other cases. *Lombardo v. Ferguson*, 15 Cal. 373.

## III. MINING RULES.

97. Actual possession of a portion of a mining claim, according to the custom of miners, in a given locality in the Yuba river, extends by construction to the limits of the claim held in accordance with such customs. *Hicks v. Bell*, 3 Cal. 224.

98. The code permits evidence of the customs established in mining claims, which implies a permission on the part of the State to the miner to seek wherever he choose in the mines for the precious

metals, and extends to him whatever right the State might have to the mineral when found. *Mc Clintock v. Bryden*, 5 Cal. 100.

99. Mining laws, when introduced in evidence, are to be construed by the court, and the question whether by virtue of such laws a forfeiture had accrued is a question of law, and cannot, therefore, be properly submitted to a jury. *Fairbanks v. Woodhouse*, 6 Cal. 435.

100. In absence of mining regulations, the fact that a party has located a claim bounded by another raises no implication that the last located claim corresponds in size, or in the direction of its lines, with the former. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

101. Where the regulations of a mining locality require that every claim shall be worked two days in every ten: held, that the efforts of the owners of a claim to procure machinery for working the claim are by fair intendment to be considered as work done on the claim. *Packer v. Heaton*, 9 Cal. 570.

102. Where a party's rights to a mining claim are fixed by the rules of property, which are a part of the general law of the land, they cannot be divested by any mere neighborhood custom or regulation. *Waring v. Crow*, 11 Cal. 372.

103. Where the original records of mining claims of a certain district have been destroyed by fire, and the miners, by a resolution subsequently passed, required the claims to be recorded anew in a new book, such book may be admitted as evidence in the trial of an ejectment case for a mining claim, to show that the rules of vicinage had been complied with. *Mc Garrity v. Byington*, 12 Cal. 430.

104. The right to a mining claim vests by the taking according with local rules, and in the absence of any custom or local regulation, the right of property once attached in a mining claim does not depend upon mere diligence in working such claim. *Mc Garrity v. Byington*, 12 Cal. 431; *Dutch Flat Mining Co. v. Mooney*, 12 Cal. 535.

105. The failure to comply with any one mining regulation is not a forfeiture of title. It would be enough to hold the forfeiture as a result of noncompliance with such of them as make a noncompliance a cause of forfeiture. *Mc Garrity v. Byington*, 12 Cal. 431.

## Mining Rules.—Taxation of Mines and Miners.

106. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any rights that plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claim in dispute prior to the defendant's entry, is insufficient in not setting forth the rules, customs, etc. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

107. The first locator of a quartz lode is not confined simply to the solid quartz actually embodied in the bed rock, but is entitled to the loose quartz rock and decomposed material which were once a part of the lode, and are now detached, so far as the general formation of the ledge can be traced. *Brown v. '49 and '56 Quartz Mining Co.*, 15 Cal. 160.

108. The right of the quartz miner comes from his appropriation, and whenever his claim is defined there is no reason in the nature of things why the appropriation may not as well take effect upon quartz in a decomposed state as any other sort, or why the condition to which natural causes may have reduced the rock should give character to the title of the locator. *Ib.* 160.

109. The only question of fact in this case being, whether the quartz rock—parted or not from its original connection—was a portion of the same quartz lode or claim taken up by defendant, it was not important whether the rock was upon or beneath the surface, or what its condition, provided it were a part of such lode or claim. *Ib.* 161.

110. In cases of this kind, the custom of miners is entitled to great, if not controlling weight. *Ib.*

111. Under certain circumstances, proof of the custom in other districts may be proper—at least, this court is not satisfied to the contrary. But in this case, the admission of such testimony, if error, was immaterial, as the case was tried by the court, and the judgment placed on independent ground, upon which it can stand. *Ib.*

112. In suit for mining claims, the court permitted defendants to introduce in evidence the mining rules of the district, though adopted after the rights of plaintiff had attached: held, that admitting plaintiffs' rights could not be affected by such

rules, still, as defendants claim under them, they were competent evidence to determine the nature and extent of defendants' claim—the effect of such rules upon pre-existing rights being sufficiently guarded by instructions of the court. *Roach v. Gray*, 16 Cal. 384.

See CUSTOM.

## IV. TAXATION OF MINES AND MINERS.

113. The State can levy a poll tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, and there is nothing in the constitution of the United States which deprives this State of the power of imposing it. *People v. Naglee*, 1 Cal. 238.

114. Where the State passed a law taxing foreign miners until such time as Congress shall by law assume the regulation of the mines, it is not contradictory or repugnant to the power of Congress. *Ib.* 240.

115. Aliens cannot be said to have any property to enjoy in the mineral public lands by which the constitution of the State would guarantee them against taxation for working or extracting the metals therefrom. *Ib.* 252.

116. A tax upon aliens for working the public lands and extracting therefrom the precious metals does not require any exaction; the alien may pay or not, depending upon his option whether he will or will not engage in mining operations, and becomes a license fee. *Ib.* 253.

117. When a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines, which were the partnership property: held, that the employer, and not the partnership, was liable for the tax. *Meyer v. Larkin*, 3 Cal. 405.

118. There is no force in the objection that the value of a mining claim which depends upon the amount of the precious metals it contains, must necessarily be left to conjecture. The universal standard of value is the amount of money which can be realized by a sale of the property, and this will apply as well to mining claims as other lands. *State of California v. Moore*, 12 Cal. 71.

119. The Legislature having expressly

exempted mining claims from the operation of the revenue act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *State of California v. Moore*, 12 Cal. 72; *Hart v. Plum*, 14 Cal. 154.

120. Money invested in the purchase and opening of mining claims, is not within the provisions of that portion of the revenue act which provides for the levy of a tax on "all capital loaned, invested or employed in any trade, commerce or business whatsoever." *State of California v. Moore*, 12 Cal. 72.

121. The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property, *State of California v. Moore*, 12 Cal. 69; *Hart v. Plum*, 14 Cal. 154.

See TAXATION.

See WATER COURSES.

### MISDEMEANOR.

1. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and that no jurisdiction can be conferred by the statute in these cases. *People v. Applegate*, 5 Cal. 296; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

2. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 16 Cal. 188.

See CRIMES AND CRIMINAL LAW.

### MISJOINDER.

1. Misjoinder of parties can be corrected by amendment under the code. *Heath v. Lent*, 1 Cal. 142.

2. It seems that in law as in equity, the court may add to and strike out parties, and render a judgment against some defendants and in favor of others. *Rowe v. Chandler*, 1 Cal. 172.

3. A defendant may demur if there is a misjoinder, for the words "defects of parties" in the code mean a defect in the complaint by reason of having either too many or too few parties. *Ib.* 174.

4. If there is a misjoinder of parties, the objection should be taken by answer or demurrer, or it is waived. *Rowe v. Chandler*, 1 Cal. 175; *Warner v. Wilson*, 4 Cal. 313; *Jacks v. Cooke*, 6 Cal. 164; *Mott v. Smith*, 16 Cal. 557.

5. Where four persons were sued as co-defendants on a joint contract, and the plaintiffs adduced no evidence to establish the joint liability of all, and a motion for a nonsuit was made on this ground but refused by the court, and judgment was rendered against all the defendants jointly: held, that the judgment was erroneous, and that the plaintiffs might have discontinued the suit as against those not shown to be liable, and have proceeded to judgment against those whose liability was established, upon such terms and conditions as should appear to be just. *Acquittal v. Crowell*, 1 Cal. 192.

6. Where it is clear that two or more defendants are not jointly liable, a joint judgment against both cannot be sustained, although each may be severally liable: so held, in an action by a lessor against two subtenants of his leasee, when it appeared that the subtenants did not occupy any portion of the premises jointly. *Pierce v. Minturn*, 1 Cal. 472.

7. The misjoinder of two persons as codefendants who have no joint interest in the subject matter of the suit and are under no joint liability, will, unless the mistake be corrected in the court below, be error. *Sterling v. Hanson*, 1 Cal. 480.

8. A defendant cannot object to the misjoinder of a plaintiff, and after forcing him to be omitted in the amendment object to the nonjoinder. *Powell v. Ross*, 4 Cal. 198.



## Missions.—Mistake.

9. The objection to the misjoinder of a defendant must be taken in the court below; it cannot be taken in the appellate court for the first time. *Sands v. Pfeiffer*, 10 Cal. 265.

10. Where T. & C. executed a joint lease to L. of certain premises, and it was specified in the lease that twenty dollars rent should be paid to T. and twenty dollars to C., and on breach of the terms of the lease on the part of the lessee, T. and C., the lessors, brought a joint suit to recover restitution of the premises and damages for their detention: held, that there was no misjoinder of parties plaintiff. *Treat v. Liddell*, 10 Cal. 303.

11. A question of misjoinder or want of common interest in the subject of the suit should, if it appeared by the plaintiff's evidence, have been taken by motion for nonsuit, or upon instructions. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

See ACTIONS, JOINDER OF, MISJOINDER.

## MISSIONS.

1. It seems that in the year 1833 the property of the missions in California was confiscated by the government, except limited portions reserved for religious purposes, and that in carrying into execution this law of confiscation, the officers of the Mexican government took possession of the lands and property of the Mission Dolores, except a small portion reserved. *Santillan v. Moses*, 1 Cal. 94.

2. According to all the Spanish and Mexican authorities, the missions were political establishments, and in no manner connected with the church. *Nobili v. Redman*, 6 Cal. 342.

3. The mission establishments arose directly from the action and authority of the government of the country; laws and regulations were made for them by its legislative authority without referring to or consulting the authority of the church. *Ib.*

4. Where land within the limits of the pueblo of San Francisco, and also within the limits of the old mission, was granted to an individual by the governor and departmental assembly in 1839-40, before

the "mission" had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown v. City of San Francisco*, 16 Cal. 457.

See ALCALDE, GRANT, LAND, PUEBLO.

## MISTAKE.

1. Courts of equity will set aside awards for fraud, mistake or accident. An award may be set aside for a mistake of law when it appears on the face of the award. *Muldrow v. Norris*, 2 Cal. 77; *Tyson v. Wells*, 2 Cal. 130; *Peachy v. Ritchie*, 4 Cal. 207.

2. Where, in the settlement of a partnership, a mistake occurs, and both parties were ignorant, or had equal knowledge of, or equal opportunities of knowing the mistake, and there had been no fraud or concealment, equity will not correct the mistake. *Bell v. Mehen*, 2 Cal. 159.

3. Delivery to a wrong person by mistake or by gross imposition, will not discharge his responsibility to the owner for the value of the goods. *Adams v. Blankenstein*, 2 Cal. 418.

4. No alteration or erasure will defeat the recovery upon a bond, when the same was made to correct a mistake, unless it materially affects the rights or condition of the obligor, or is the result of a fraudulent intent to effect the same object. *Turner v. Billagram*, 2 Cal. 522.

5. If money be paid by mistake of law and not of fact, the court cannot relieve the party. *Smith v. McDougal*, 2 Cal. 587.

6. A slight error in the title of a cause, where there is no prior suit pending between the same parties, will not invalidate a notice. *Mills v. Dunlap*, 3 Cal. 96.

7. Where the summons was headed with the words "district court," but was issued out of the county court, under the county court seal, and tested by the judge of the county court, it was held good as a writ of the county court. *Crane v. Brannan*, 3 Cal. 195.

8. Where, in a contract, a mistake occa-

## Mistake.

sions loss, it must be suffered by him who made it. *Burgoyne v. Middleton*, 4 Cal. 66; *McGee v. Stone*, 9 Cal. 607.

9. A mistake by the omission of the words "to pay to" will not invalidate the obligation of an appeal bond. *Billings v. Roadhouse*, 5 Cal. 71.

10. A garnishee should be allowed to amend his answer wherever it appears that he has committed a mistake or fallen into an error which could not reasonably have been avoided. *Smith v. Brown*, 5 Cal. 119.

11. A mere clerical error in the judgment, not affecting the appellant, can be corrected, and is not ground for reversal. *Anderson v. Parker*, 6 Cal. 201.

12. Mistake as well as fraud, in any representation of fact material to the contract, furnishes a sufficient ground to set it aside, and declare it a nullity. *Alvarez v. Brannan*, 7 Cal. 510.

13. A mistake in the date of the judgment, as stated in the notice of the appeal, which is served on respondent, was not material, and the notice is sufficient. *Sherman v. Rolberg*, 9 Cal. 18.

14. A mistaken advice of counsel to his client not to prepare for trial, is no ground for a continuance. *Musgrove v. Perkins*, 9 Cal. 212.

15. Accounts stated may be opened and the whole account taken de novo for gross mistake in some cases. *Branger v. Chevalier*, 9 Cal. 361.

16. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

17. Where one of two innocent parties must suffer, he who committed the mistake must bear the loss. *McGee v. Stone*, 9 Cal. 607.

18. Where a notary did not faithfully perform his duty, in taking an acknowledgment, but was guilty of gross and culpable negligence, by a mistake made therein, he is responsible to the party injured for the damages resulting from this negligence. *Fogarty v. Finlay*, 10 Cal. 245.

19. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading, and subsequently went to trial; after the close of the plaintiff's evidence, his counsel then for the first time brought the mistake to the notice of the court, by moving for judg-

ment by default, which motion the court sustained, and refused to allow defendant then to verify his answer: held, that the court erred, and should have allowed the defendant to have verified his answer. *Arrington v. Tupper*, 10 Cal. 464.

20. A mistake in the date of a sheriff's return may be corrected at any time. *Ritter v. Scannell*, 11 Cal. 249.

21. After taking an acknowledgment, and making and delivering his return, the functions of a notary cease, and he is discharged from authority, and cannot alter or amend his certificate where there is a mistake. *Bours v. Zachariah*, 11 Cal. 297.

22. The omissions of the words "be sold," in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect the judgment. *Moore v. Semple*, 11 Cal. 361.

23. Equity will relieve against mistake, as well as fraud, in a deed or contract in writing, and parol evidence is admissible to show the mistake; but where it appears upon the face of the instrument itself, courts will correct the mistake without evidence aliunde. *Wagenblast v. Washburn*, 12 Cal. 212.

24. A judgment will not be set aside on the application of a creditor of the judgment debtor, upon the ground that the judgment was taken for more than was actually due upon the note, when it appears that a mistake of a few cents only was made in calculating the interest due upon the note. *Ziel v. Dukes*, 12 Cal. 482.

25. A slight mistake in the computation of interest, the date being given, is no evidence of fraud. *Scales v. Scott*, 13 Cal. 78.

26. The authority of an attorney, who appears, will be presumed, and his action will bind the party, unless in cases of fraud or insolvency of the attorney. Nor will such action be reviewed on the ground of mistake, unless the mistake be unmixed with any fault or negligence of either the party or his attorney. *Holmes v. Rogers*, 13 Cal. 201.

27. There is no error in permitting the mistake in the recital of the bond, as to the amount for which the attachment issued, to be explained and corrected by parol evidence. *Palmer v. Vance*, 13 Cal. 556.

28. Where judgment is entered, against "the defendants," some of whom were

## Mistake.

not sued, though their names appeared as defendants, by a mistake of the clerk in entitling the cause, the error may be corrected in the supreme court, or the court below, on motion. *Browner v. Davis*, 15 Cal. 11.

29. Warrants drawn by the controller of State, delivered to the payees thereof, and by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of the defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not liable in this form of action. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *State of California v. Wells*, 15 Cal. 343.

30. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *City of San Francisco v. Argenti*, 16 Cal. 282.

31. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument, dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments, and at the

different times, in said agreement and certificate set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates for his indebtedness in installments, at two, four, six and eight months from that date: held, that defendant is liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff having taken certificates, dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. Plaintiff is not entitled to relief on the ground of mistake, which was of law, and not of fact. *Gross v. Parrott*, 16 Cal. 145.

32. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently, D. and M. conveyed to defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided one-third—one-half of E.'s interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose—making D. alone party—get judgment for the amount due, and a decree directing a sale of all the interest D. had at date of mortgage. At the sale, plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree, and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property—a partition being impossible without prejudice—and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the date of his mortgage to them; and that the sheriff stated such interest was offered for sale: held, that plaintiff cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that

## Mistake.

their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Goodenow v. Ewer*, 16 Cal. 470.

33. Held, also, that upon proper application in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing in E. and others interested, as parties. *Ib.*

34. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief sought will not operate to the prejudice of the just rights of others. *Goodenow v. Ewer*, 16 Cal. 470; *Boggs v. Hargrave*, 16 Cal. 565.

35. The nature and extent of the relief in such cases, are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such, courts of equity seldom relieve. *Goodenow v. Ewer*, 16 Cal. 470.

36. In this case relief cannot be granted, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure suit. And further, this action is not brought directly for relief from the sale,

but for a sale of the property, an account as incident to a partition, and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Ib.* 471.

37. Where a purchaser at a sale under a decree, in a foreclosure suit, directing the sale of the premises—which decree was void, because the grantee of the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: held, that the action does not lie—the purchaser being aware, at the time of his bid, that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud. *Goodenow v. Ewer*, 16 Cal. 471; *Boggs v. Hargrave*, 16 Cal. 565.

38. The purchaser in such case makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made party to the foreclosure suit. From such mistake no relief can be granted in an action at law. *Goodenow v. Ewer*, 16 Cal. 471; *Boggs v. Hargrave*, 16 Cal. 565.

39. Plaintiff must seek relief from the consequences of the invalidity of the decree, by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the court in that suit, as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case may justify. Upon his application, the court may direct the sale to be set aside and the satisfaction to be canceled, and authorizes a supplemental bill, for a resale of the premises, to be filed and conducted in the names of the complainants in that suit, for the plaintiff's benefit, and direct that the grantee of the mortgagor, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties, and mete out exact justice. *Goodenow v. Ewer*, 16 Cal. 471.

40. Equity will not, in an independent action, relieve from mistakes of law, unless accompanied with special circumstances, such as misrepresentation, undue influence or misplaced confidence. *Ib.*



## MONEY HAD AND RECEIVED.

1. In an action for money had and received by a consignor, the amount of goods sold on credit by the consignee, having no authority so to sell, can be recovered; such sale must be taken as made for cash, and to the vendor belongs the demand created by the sale against the vendee, and the vendee is liable to the plaintiff for money had and received. *Johnson v. Totten*, 3 Cal. 347.

2. A count in a complaint for money had and received, which does not allege a demand, is bad. *Reina v. Cross*, 6 Cal. 31.

3. If parties were tenants in common, and the defendant sold chattels held in common and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and an action for goods, wares and merchandise sold and delivered will not entitle him to a judgment. *Williams v. Chadbourne*, 6 Cal. 561.

4. A complaint alleging that the defendant collected and received certain money, as the agent or attorney in fact of the plaintiff, and had embezzled and converted the money to his own use, and praying that he be adjudged guilty of a fraud and for judgment and execution against his person and property, is insufficient in this disjunctive form to sustain a verdict convicting the defendant of fraud. *Porter v. Hermann*, 8 Cal. 623.

5. Where money is paid upon compulsion, the law raises an obligation to refund, and the form of the action is for money had and received to the plaintiffs' use. The words "had and received to the plaintiffs' use," are put as the consideration upon which to support the assumpsit, on the part of the defendant. *McMillan v. Richards*, 9 Cal. 418.

6. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared pro rata, and afterwards prosecuted both claims to judgment in his own name, bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable to an action for money had and received, or in indebitatus assumpsit. *Herrick v. Hodges*, 13 Cal. 433.

7. An action for money had and received to the use of plaintiff lies whenever the defendant has in his hands money of plaintiff's, which in equity and conscience he has no right to retain; and this, whether there be or not any contract or privity between the parties. *Kreutz v. Livingston*, 15 Cal. 347.

8. Defendants were the holders of a mortgage, executed by the Yreka Water Co. and B. to them, to secure advances made and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: held, that the action lies; that defendants are in possession of money which in equity and conscience they are bound to pay over. *Id.*

9. Held, further, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and retain money which they would not otherwise have received. *Id.*

10. Taxes not properly due and paid under protest may be recovered back by suit against the tax collector. *Falkner v. Hunt*, 1 Cal. 170.

11. In this case, the city having discharged the street assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Argenti v. City of San Francisco*, 16 Cal. 282.

12. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability, as upon implied contracts, has no ap-

## Money had and Received.—Mortgage in general.

plication to cases of this character. *Ib.*

13. That doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

14. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner from the like general obligation. *Ib.*

15. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. *Ib.*

16. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her or be under her control. *Ib.* 283.

17. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Ib.*

18. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city from the existence of which any liability to pay for the same can be inferred. The general doctrine, that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders,

and only indirectly to the city at large. *Ib.*

19. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities for the use of money, or other property which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.*

20. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Ib.* 284.

## MORTGAGE.

- I. In general.
- II. Foreclosure.
  1. Parties.
  2. Decree.
- III. Upon the Homestead.
- IV. Chattel Mortgage.
- V. Mortgage of a Vessel.
- VI. Notes secured by a Mortgage.
- VII. Assignment of a Mortgage.
- VIII. Lease of Mortgaged Property.
- IX. Writ of Assistance.

## I. IN GENERAL.

1. A party having knowledge of the existence of a prior mortgage who then takes a second mortgage on the premises, has no right to complain that it was not recorded. *Woodworth v. Guzman*, 1 Cal. 205.

2. There was no officer in San Francisco who, according to the Mexican law, was authorized to record mortgages, and, unless there was, a mortgagee was not bound by the rule of notice to subsequent incumbrances. *Ib.*

3. Where statutes are in force requiring mortgages to be recorded, if a subsequent mortgagee has notice of a prior unrecorded mortgage, he takes his lien subsequent to that of the first mortgage. *Ib.*

4. Equity will, as against a mortgagor, correct a mistake in the description of the mortgaged premises as a matter of course,

## In general.

and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Ib.*

5. The particular form of words is necessary to constitute a mortgage more than any other contract. *Woodworth v. Guzman*, 1 Cal. 205; *De Leon v. Higuera*, 15 Cal. 496.

6. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power the mortgagor becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor and he may redeem. *Benham v. Rowe*, 2 Cal. 407.

7. Where the complaint does not charge the mortgagee with negligence and improper conduct in leasing the mortgaged premises, the court cannot charge the jury thereupon, though evidence may have been admitted on that point. *Ib.*

8. Where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, the sale must stand. *Ib.* 408.

9. But where such sale was not made in cash, but for currency of less value, the mortgagor is clearly chargeable with the highest market value of the lot sold, to be credited to the account of the mortgagor. *Ib.*

10. If the mortgagor acts in bad faith towards the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Ib.*

11. When a mortgagee takes possession of the mortgaged premises, his care and trouble are bestowed for the furtherance and protection of his own interests, and he can ask no compensation for his services. *Ib.*

12. A stipulation that a party should be protected for his advance of money to be expended in building upon a mortgaged lot, by the mortgagee, is a promise to repay the money so expended out of the mortgaged premises, and is binding on the assignee of the mortgage with notice. *Godfrey v. Caldwell*, 2 Cal. 492.

13. Mortgages at the present day are considered as mere securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee. *Ib.*

14. A mortgage made prior to the passage of the act concerning conveyances, was not recorded in accordance with the provisions of the forty-first section of the said act: held, that it lost its priority as against a subsequent purchaser, without notice. *Call v. Hastings*, 3 Cal. 184.

15. The purchaser of a mortgage is subrogated to the rights of a mortgagee. *Johnston v. Dopkins*, 3 Cal. 395.

16. If the mortgagor stood by and saw the mortgagee sell the property in fee without interposing, and a knowledge of this could be brought home to the mortgagor's subvendees, he, and those claiming under him, would be estopped from asserting title. *Ferguson v. Miller*, 4 Cal. 102.

17. A conveyance of real estate conditioned to be void on the payment of a given sum of money on a given day, otherwise to remain in full force and virtue, is a mortgage, and not a conditional sale. *Ib.*

18. It is necessary to record a mortgage to give notice only to "subsequent purchasers or mortgagees without notice"; no mention is made of liens, hence it follows that a mechanic's lien will not precede an unrecorded mortgage of prior date.\* *Rose v. Munie*, 4 Cal. 173.

19. A defendant in a foreclosure suit cannot object that his wife also joined in the execution of the mortgage, but is not made a codefendant. *Powell v. Ross*, 4 Cal. 198.

20. In an action of ejectment, brought by a purchaser at Sheriff's sale under a decree of foreclosure, and sale of mortgaged premises, to recover the same against the mortgagor in possession, the mortgagor is estopped from setting up title in another as a defense to the action. *Redman v. Bellamy*, 4 Cal. 250.

21. Where a party, to enforce a claim for the balance of the purchase money paid, instead of resorting to his lien in equity, commenced an action at law, for the recovery of money, and sold the land on execution subject to a mortgage, the purchaser to enforce the subrogation to any equitable lien, must file his bill to that effect, but cannot set up his right in an action to enjoin the mortgagee from foreclosing his mortgage thereupon. *Allen v. Phelps*, 4 Cal. 259.

\*The Act of 1855, p. 156, provided that mortgages must be recorded to have precedence over liens.

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22. An action will not lie on the mere recital in a mortgage of the existence of a debt. *Shafer v. Bear River and Auburn W. & M. Co.*, 4 Cal. 295.

23. A conveyed land to B, and allowed part of the purchase money to remain unpaid; B afterwards sold part of the land to C, who had no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A obtained a judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: it was held that the purchaser at sheriff's sale did not acquire title to the mortgage debt due from C to D. *Bryan v. Sharp*, 4 Cal. 349.

24. Plaintiff purchased at sheriff's sale under foreclosure of a mortgage, property for twenty dollars, worth three thousand dollars, with a rental of fifty dollars per month. The defendant purchased the property under another mortgage for two thousand dollars, and the plaintiff being in possession, filed his bill to cancel the defendant's deed and remove the cloud from his title: held, that to entitle the party to this relief, it must appear that his purchase was fair, just and reasonable, and founded upon an adequate consideration, as a court of equity will not use its powers to complete a speculation which is already too fortunate to obtain its favorable regard. *Dunlap v. Kelsey*, 5 Cal. 181.

25. A mortgage upon record operates as constructive notice to all parties, and the purchaser thereof cannot be charged with constructive notice of anything subsequent to the mortgage except its assignment or satisfaction duly entered of record. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336.

26. Treating a mortgage as a mere security for the purchase money, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt. *Dillon v. Byrne*, 5 Cal. 457.

27. Where land is chargeable for the purchase money, that charge could not be evaded by the execution of any new mortgage designed to secure the debt. *Id.*

28. A married woman has no power to execute a mortgage to secure the payment of a promissory note given by her as a femme covert. *Simpers v. Sloan*, 5 Cal. 458.

29. Where a mortgage is executed si-

multaneously with a conveyance of the land, it is considered in law as one act, and no prior lien on the general property can be prior to the mortgage. *Guy v. Carriere*, 5 Cal. 512.

30. The entering a discharge of the mortgage by the mortgagee does not of itself discharge the debt, but only the security. *Sherwood v. Dunbar*, 6 Cal. 54; *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 402.

31. In an action of foreclosure, where the complainant has a copy of the mortgage annexed to which it refers: held, that a correct description of the land in the mortgage is sufficient for the purposes of the suit. *Emeric v. Tams*, 6 Cal. 156.

32. Mortgages and liens of record form no exception to the rule prescribed by section one hundred and thirty-six of the act to regulate the estates of deceased persons; and the claims secured by them must have been presented to the executor or administrator, and rejected by him, before an action can be maintained on them. *Ellisen v. Halleck*, 6 Cal. 393; *Falkner v. Folsom*, 6 Cal. 412; *Hentsch v. Porter*, 10 Cal. 560.

33. A mortgagee in possession has a legal title against the whole world, subject to the rights of the mortgagor; therefore, when he mortgaged the property and subsequently erected a building on it, for the cost of which a mechanic's lien was filed, the holder of the lien cannot object to the legality of the mortgage in the face of which he contracted. *Ferguson v. Miller*, 6 Cal. 404.

34. A mortgage debt due by the estate of a deceased person stands in the same position as any other debt, and its allowance by the executor and probate judge gives to the claim all the virtues and properties which a judgment against executors can have under our system. *Falkner v. Folsom*, 6 Cal. 412.

35. The sale of the equity of redemption of mortgaged premises, and the assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 616.

36. Where the plaintiff filed his bill to foreclose a mortgage executed by defendants, who admit the demand but ask that



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a certain sum be retained in the hands of the court to answer a judgment against defendants, to the satisfaction of which they claim that the plaintiff is proportionately liable as a former partner of defendants, although he was not served with process in the case: held, that it was error to retain such sum in the hands of the court. *Bell v. Walsh*, 7 Cal. 87.

37. Where the owner of a lot contracted for the erection of a house thereon, and agreed to pay certain sums of money as the work progressed, and on its completion to convey a certain other lot, for which purpose R. releases the mortgage on the lot; and during the work the owner of the lot on which the building was being erected mortgaged it to R., and subsequently on its completion, by agreement with the builders, gave his note for \$10,000 instead of the lot he was to convey, and the builders filed a notice of lien, and assigned note and lien to plaintiff: held, that so much of the claim as represented the value of the lot which was to have been conveyed must be postponed to the mortgage. *Soule v. Dawes*, 7 Cal. 576.

38. A deed and mortgage being simultaneous, are but parts of the same transaction. *Lassen v. Vance*, 8 Cal. 275.

39. He who takes a second conveyance or mortgage with actual notice of the first, deliberately aids and abets the fraudulent grantor or mortgagor, in the attempted commission of a fraud, and should justly suffer the consequences. *Mitchell v. Steelman*, 8 Cal. 376.

40. Where A mortgaged a lot of land for five hundred dollars, and afterwards conveyed the same to B, a femme sole, in trust for her children, and A then married B, and the two together then borrowed an additional sum, and executed a joint mortgage for the whole amount to the assignee of the first mortgage, and the note of the first debt was surrendered, though the mortgage was not canceled, and the debt was again increased, and the last mortgage canceled, and a new one for the increased amount executed by A and B: held, that the holder of the last note and mortgage was entitled to a judgment thereon, and to a decree of foreclosure and sale for the amount of the first note and mortgage. *Birrell v. Schie*, 9 Cal. 107.

41. Possession by the mortgagee cannot abridge, enlarge, or otherwise affect his in-

terest, nor convert that which was previously a security into a seizin of the freehold. *Nagle v. Macy*, 9 Cal. 429.

42. A mortgagee who is also a trustee is as strictly bound to fulfill his trust faithfully as he would be were he not a creditor, but acting for the benefit of another cestui que trust. *Gunter v. Janes*, 9 Cal. 658.

43. A mortgage is a security for a debt, and of course the relation of creditor and debtor must exist between its different parties. *Hickox v. Lowe*, 10 Cal. 206.

44. If a debt continued after the execution of the conveyance, the instrument is a mortgage; if on the other hand the debt was extinguished by the conveyance, the agreement to reconvey must be regarded as an independent contract, in no respect affecting the absolute character of the original instrument. *Ib.* 207.

45. Where there is doubt on this point, courts of equity lean in favor of the right of redemption, and construe instruments as constituting a mortgage, rather than a conditional sale. *Ib.* 207.

46. It is not necessary to constitute a mortgage, that it should appear upon the face of the papers that there was any personal obligation on the part of the mortgagor to pay the amount of the principal and interest. Such obligation would only enable the mortgagee to look to the mortgagor for any deficiency remaining after the application of the proceeds of sale of the premises to the payment of the sum secured. *Ib.* 200.

47. A conveyance, and an attendant agreement for a reconveyance upon the payment of the amount of the consideration and interest, do not of themselves in the absence of other circumstances create a mortgage, but only a defeasible purchase, which should be narrowly watched, but it may be made the means of converting what was in fact intended as security into an absolute purchase. *Ib.*

48. Slight circumstances will determine the transaction to be one of mortgage when that can be done without violence to the understanding of the parties. *Ib.*

49. Where a mortgaged debt has been lost by the negligence of the notary, the measure of damages is the amount of the debt and interest to be secured by the mortgage. *Fogarty v. Finlay*, 10 Cal. 246.

50. Where a debtor who was at the

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time insolvent, executed a mortgage of all his property and effects to certain specified creditors, to secure his indebtedness to them and to protect them from liabilities incurred by their endorsement of his paper: held, that the mortgage was not an assignment either within the letter or spirit of the insolvent act, and did not create a trust for the use of the mortgagor, prohibited by the statute of frauds. *Dana v. Standfords*, 10 Cal. 277.

51. A note and mortgage executed by thirteen partners in a joint enterprise to three of them, is equivalent to a note and mortgage executed by the whole to the three for an amount less by the proportion of the number of three to the whole; that is, to three-thirteenths of the sum therein mentioned, and may be enforced in equity in like manner as if so executed. *McDowell v. Jacobs*, 10 Cal. 389.

52. Though a mortgage in contravention of law is void, it is not perceived that this fact invalidates the debt it was intended to secure. *Shaver v. Bear River and Auburn W. & M. Co.*, 10 Cal. 402.

53. Where the vendee's agent, in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May v. Borel*, 12 Cal. 91.

54. No presumption arises of a gift or advancement to the wife from the fact that a note and mortgage were taken in the name of both. *Meyer v. Kinzer*, 12 Cal. 255.

55. A party in possession of public land, claiming title to it, must be presumed to be the owner of it, and can mortgage it. When another party enters under, and in privity with the title of the mortgagor, he will not be allowed to defeat the mortgage upon the ground that the same was not executed in pursuance of the statute concerning chattel mortgages. *Houseman v. Chase*, 12 Cal. 291.

56. A vendor's lien does not exist in this State where a mortgage security is taken for the purchase money. *Hunt v. Waterman*, 12 Cal. 305.

57. The fact that such mortgage is defective, does not revive the lien, as it is the intention of the vendor which controls. *Ib.*

58. The fact that two or more persons join in the execution of a mortgage of

lands, does not raise a presumption that the estate mortgaged is joint property, and a judgment cannot be entered against all when only one is served. *Bowen v. May*, 12 Cal. 351.

59. A mortgage on public land, or the improvements thereon, is not void because it does not follow the provisions of the chattel mortgage act. That act gives a new remedy, but does not take away the old. *Haffley v. Maier*, 13 Cal. 14.

60. The mortgagor having mortgaged the land as his own property is estopped, as are his privies in estate, from saying it is public land. *Ib.*

61. In suit on a note and mortgage, where creditors of the defendant intervened, alleging the note and mortgage to be fraudulent as against them, the intervenors cannot prevent a judgment for plaintiff against defendant. The most they can claim is protection against the enforcement of the judgment to their prejudice. *Horn v. Volcano Water Co.*, 13 Cal. 69.

62. Subsequent creditors cannot complain that the note and mortgage of a common debtor were executed without consideration. *Ib.* 71.

63. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes by operation of law trustee of the surplus for the mortgagor. *Pierce v. Robinson*, 13 Cal. 120.

64. Parol evidence is admissible in equity to show that a deed absolute upon its face was intended as a mortgage, and that the restriction of the evidence to cases of fraud, accident or mistake in the creation of the instrument, is unsound in principle and unsupported by authority. *Pierce v. Robinson*, 13 Cal. 125; overruling *Lee v. Evans*, 8 Cal. 434, and *Low v. Henry*, 9 Cal. 548.

65. The Uncle Sam Mining Company execute a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact in trust to secure F., who had as security for R. signed with him a joint and several note to D., for money loaned by him to R. The money was for the company. R. assigns this mortgage to F. to secure him against his liability on the note, delivering the mortgage at the same time to F. who

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retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstances of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., as surety, was a sufficient consideration for the assignment, and that such an assignment is not a mortgage of a mortgage. *Hall v. Redding*, 13 Cal. 219.

66. Mere indefiniteness of the description in the mortgage is no objection to the enforcement of the mortgage as it is written, whatever the effect of the sale under such a description would be. *Tryon v. Sutton*, 13 Cal. 491; *Whitney v. Buckman*, 13 Cal. 538.

67. Where a mortgagee released a mortgage made by two parties, and took a new mortgage made by one to whom the other had meanwhile sold, the new mortgage being for a less sum by five hundred dollars, paid at the time, and bearing a different rate of interest, it will require clear evidence of fraud to induce a court of equity to interfere, and give the mortgage priority over intervening liens. *Dingman v. Randall*, 13 Cal. 513.

68. If a mortgage under seal expressly declares and recites an indebtedness, that is sufficient evidence of the indebtedness in a foreclosure suit. No law requires any note, bond or the like, in addition to such a mortgage. *Whitney v. Buckman*, 13 Cal. 539.

69. The right to a preëmption in public land is not assignable, but may be mortgaged; and if the mortgagee gets no title through the mortgage, this is not an objection to be raised by the man who makes it. *Id.*

70. Where husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer v. Rhein*, 13 Cal. 649.

71. At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee to have the title on compli-

ance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclose. *Merritt v. Judd*, 14 Cal. 73.

72. In a suit to enforce a mechanic's lien on a ditch, a mortgagor of the ditch subsequent to the lien has no absolute right of intervention. And where the suit had been pending some time, and the application to intervene was made just as plaintiff was taking judgment, the application was properly refused. *Hocker v. Kelley*, 14 Cal. 165.

73. For extra work on a building by the contractor, in pursuance of a general provision in the contract for extra work, at the will of the owner, there may be a lien on the property, as against a mortgage, given by the owner before the extra work was commenced, provided the work was done with the knowledge of the mortgagee and without objection from him. *Soule v. Dawes*, 14 Cal. 250.

74. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction, and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, is not a mortgage requiring a judicial foreclosure and sale. *Koch v. Briggs*, 14 Cal. 262.

75. In mortgages there exists the right to foreclose, after condition broken, and the right of redemption from forfeiture. These two rights are mutual and reciprocal. Where one cannot be enforced, the existence of the other is denied; and when either is wanting, the instrument, whatever its resemblance in other respects, is not a mortgage. *Id.* 263.

76. In mortgages, the form of the contract is one of conveyance, while in truth the contract is only one of security, and equity gives effect to the intention of the parties. *Id.*

77. A tender of the money due on a bond and mortgage, after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage. *Perre v. Castro*, 14 Cal. 528.

78. In considering the operation of a mortgage upon subsequently acquired

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title, it is immaterial whether it be regarded as a conveyance of a conditional estate, as at common law, or as creating a new lien or incumbrance, as by the law of this State. *Clark v. Baker*, 14 Cal. 632; *Clark v. Boyreau*, 14 Cal. 636.

79. In this State, a mortgagee of a term in possession is not liable as assignee upon the covenants of the lease. *Johnson v. Sherman*, 15 Cal. 292.

80. A mortgage is a mere security, and does not vest in the mortgagee any estate in the land, either before or after condition broken. Payment after default operates to discharge the lien equally with payment at the maturity of the debt. *Ib.* 293.

81. Nor does possession under the mortgage affect the nature of the mortgagee's interest; it does not change the relation of debtor and creditor, or impair the estate of the mortgagor, but leaves the rights and interests of the parties exactly as they existed previously. *Ib.*

82. Possession taken by the consent of the owner, or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. *Ib.*

83. The law of England and New York upon these points stated. Parol evidence is admissible to show that a conveyance or assignment, absolute on its face, was intended as a mortgage. *Ib.* 291.

84. A tract of land was held by several tenants in common, and on partition, a certain portion was set apart and quit-claimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quit-claimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; and even if he held the premises conveyed by H. to him as security for the endorsement of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 307.

85. Defendants were the holders of a mortgage, executed by the Yreka Water

Co. and B. to them, to secure advances made, and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use: held, that the action lies; that defendants are in possession of money which in equity and conscience they are bound to pay over. *Kreutz v. Livingston*, 15 Cal. 347.

86. Held, further, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it, and retain money which they would not otherwise have received. *Ib.*

87. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that the defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked the plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many more thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed from H. and wife; that all this was a fraud on plaintiff; that O'D., in taking said deed, acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to be declared such trustee, and execute a deed of the property to plaintiff; that on account of a



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defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that said trust be declared, that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then the plaintiff have judgment against H. and wife on said notes, that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken, that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *DeLeon v. Higuera*, 15 Cal. 495.

88. Held, further, that O'D. cannot set up either the invalidity of the mortgages given by H. and wife—who release errors—or the title acquired by him from them, and that he holds property in trust for plaintiff. *Ib.* 495.

89. The notes and mortgages in this case were properly admitted in evidence, against the objections of O'D., as showing the history of the transaction, and his connection with the property, as also the consideration of the last mortgage, which was given as security for money then loaned, and for the money previously loaned, and secured by three previous mortgages on the same land. *Ib.* 496.

90. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, cannot object to defects in the registry thereof. *Ib.* 496.

91. A mortgage describing the land as "the rancho of her property, in the place known by the names of 'Laguna de los Palos Colorados,' or 'Santa Clara,' in Contra

Costa county," and stating the land to be the half league the mortgagor acquired from the grant to her first husband, Juan Bernal, which grant is before the United States commission for confirmation, is not void for uncertainty in description. *Ib.*

92. No particular words are necessary to create a mortgage. The words, "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient. *Ib.*

93. The property of the wife may be mortgaged by joint deed of herself and husband for the debt of the husband. *Ib.*

94. Query: whether in a foreclosure suit in the seventh district as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco, before the judge of the seventh district, under a stipulation, and without exception as to the place of trial, and afterwards assign that fact as error. *Ib.* 495.

95. R. & Co., defendants, had two mechanics' liens upon certain property, one filed October, 30th, 1854, the other filed December 8th, 1854, against defendant, V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, that R. & Co. and V. had a right to rescind the arrangement made to extend the lien, such extension having been made under misapprehension, the debt being legal and just, and plaintiff having acquired no rights which it would be inequitable to disturb; that such rescission is no evidence of fraud. *Gamble v. Voll*, 15 Cal. 510.

96. The fact that judgment on the liens in this case included a charge of interest at two per cent. given on a prior extension of the lien, which interest is over and

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above the original contract price for the articles for which the lien was claimed, is not of itself conclusive proof of fraud in the judgment, but such interest cannot be charged on the premises as against plaintiff. *Ib.*

97. As subsequent mortgagee, plaintiff would have a right, in a proper case, to redeem the premises from the sale under the judgment on the liens, by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lien holder. *Ib.*

98. Where a mortgage is given to secure a debt, it is not of the essence of the deed whether the debt be evidenced by one form of contract or another. All that a court of equity desires to know is, what is the debt really intended to be secured. *Blankman v. Vallejo*, 15 Cal. 644.

99. In a foreclosure suit on bond and mortgage, the fact that the bond offered in proof on the trial does not answer the description of the bond as recited in the mortgage, is matter of identity merely, and not properly matter of variance—the bond offered answering to the description given in the complaint. *Ib.*

100. In this case, as the bond in the complaint answers to the description of the bond offered in evidence, and as the complaint avers that the mortgage was given to secure this bond—the denials in the answer being literal and conjunctive—the execution of the bond and mortgage was held to be admitted by the answer, as also that the mortgage was given to secure the debt evidenced by the bond. *Ib.*

101. Although an answer denies the delivery of a bond and mortgage, still their possession by plaintiff is evidence of delivery. *Ib.*

102. A mortgage is not personal property within the revenue act of 1856, nor liable, as such, to taxation. *Falkner v. Hunt*, 16 Cal. 171.

103. An assessment thus: "Mortgages (Marysville) \$100,000," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that the mortgage was held for a given amount does not make the mortgage subject to taxation as for so much money. *Ib.* 172.

104. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt, the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, as such, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. *Ib.* 171.

105. An assessment thus: "Personal property—mortgages (Marysville) \$100,000," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. *Ib.* 172.

106. Prima facie, a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures cannot be taxed without a more particular description than the general designation, "personal property." *Ib.*

107. Under this act, a lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts, etc. *Ib.*

108. A mere stranger, who voluntarily pays money, due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and in the absence of fraud, accident or mistake of fact, have the mortgage reinstated, and himself substituted in the place of the mortgagee. Cases cited as to whether and when payment of money due on a mortgage operates as a discharge or as an assignment of the mortgage. *Guy v. Du Uprey*, 16 Cal. 198.

109. The wife cannot mortgage her separate real estate unless her husband unite in the conveyance in the mode prescribed by our statute—at least, as to property acquired after the passage of the statutes; and these statutes, when operating in futuro, are constitutional. *Harrison v. Brown*, 16 Cal. 290.

110. The act of February 14th, 1855, makes an exception in case the husband

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be not, and for one year next preceding the execution of the conveyance of the wife has not been, bona fide residing in State. *Ib.*

111. But the fact that the husband abandons his wife, or suffers her to act as a femme sole, and take care of herself, does not give her a right to mortgage either his or her separate property—whatever may be the effect of such acts of the husband in rendering her personally liable for her contracts. *Ib.* 291.

112. A mortgagee in possession of personal property has such a title that a felonious taking of the property by the mortgagor would be larceny. *People v. Stone*, 16 Cal. 371.

113. At common law a mortgage was regarded as a conveyance of a conditional estate, and upon breach of its condition the estate became absolute; but courts of equity, to relieve from the hardships of this rule, gave to the mortgagor a right to redeem upon payment, within a reasonable time, of the debt secured. *Goodenow v. Ewer*, 16 Cal. 466.

114. In this State, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken, but is regarded as a mere security, operating upon the property as a lien or incumbrance only. *Ib.* 467.

## II. FORECLOSURE.

115. The defendant bought of plaintiff land, and gave a mortgage to secure the payment of the purchase money, and on the foreclosure pleaded a want of consideration: it was held, he was estopped in his defense by the terms of the mortgage. *Tartar v. Hall*, 3 Cal. 266.

116. If the plaintiff claims under a conveyance shown to be a mortgage, it is not new matter for the defendant to show by the same witness that the mortgage had been satisfied. *Chenery v. Palmer*, 5 Cal. 132.

117. The usual and best method of proceeding in cases of foreclosure is to appoint a master, to find and report an amount due, and then exceptions may be filed to the report upon which the judgment of the chancellor is given, and this

may afterwards be assigned as error. *Guy v. Middleton*, 5 Cal. 417.

118. It is no error for the chancellor to make the calculations himself; but when he has done so, a mistake in calculation must be brought to his notice in some form analogous to that of an exception to a master's report. *Ib.*

119. Actions for the foreclosure of mortgages must be tried in the county in which the subject of the action or some part thereof is situated. *Vallejo v. Randall*, 5 Cal. 462; contra *Watts v. White*, 13 Cal. 324.

120. He who has the right to the note has undoubtedly the right to foreclose the mortgage, though not made to himself. *Ord v. McKee*, 5 Cal. 516.

121. A copy of a mortgage is not admissible in evidence when the absence of the original is not accounted for. *Ib.*

122. Where a new note on the same terms between the same parties for the same sum and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring v. Hill*, 6 Cal. 18.

123. In a suit to foreclose a mortgage it is competent for the defendants to introduce in evidence a subsequent written agreement of the parties, by which an assignment of the rents of the mortgaged premises, until full payment of the mortgage debt is made by the mortgagor and accepted by the mortgagee. *Angier v. Masterson*, 6 Cal. 62.

124. In a foreclosure suit the plaintiff has no right to have a receiver of rents and profits of the mortgaged property appointed pending the litigation. *Guy v. Ide*, 6 Cal. 101.

125. Where the plaintiff being the owner of an undivided one-half of a tract of land, mortgaged his interest therein to A, and subsequently with his cotenant conveyed the land to B and C, two-thirds to one and one-third to the other, by two separate deeds, in each of which is set forth the agreement of the grantees to assume the payment of the mortgage; and after the mortgage fell due the plaintiff filed his bill against B and C, to compel a foreclosure and payment: held, that the case was one of chancery jurisdiction, and that it was not necessary for plaintiff first to pay the mortgage before bringing his action. *Abell v. Coons*, 7 Cal. 109.

## Foreclosure.

126. Where a judgment is rendered against A and his sureties, and A and a portion of his sureties, in order to secure a portion of said judgment, mortgage their property, subsequent to which an execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and is afterwards voluntarily released: held, that no action can be maintained on the mortgage, for the levy satisfying the judgment, the mortgage as an incident thereto must also be thereby satisfied. *People v. Chisholm*, 8 Cal. 30.

127. Where the party brought separate action, first at law on the notes, and then in equity for a foreclosure, before the adoption of the rule consolidating these actions: held, that he be allowed both his legal and equitable remedies, on payment of the costs of the latter suit. *Walker v. Sedgwick*, 8 Cal. 403.

128. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding, and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. *Belloc v. Rogers*, 9 Cal. 129.

129. At common law a mortgage vested the legal title in the mortgagee, subject to be defeated by the performance of the condition subsequent, but this theory is entirely changed by our system, and the legal title is with the mortgagor subject to be divested by a foreclosure and sale. *Belloc v. Rogers*, 9 Cal. 125; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428.

130. A executed a note and mortgage to B; subsequently A and B entered into partnership in the livery business; A was to furnish the stable, hay and grain, and board B; and B was to attend to the stable; the profits to be equally divided, and the share of A was to be applied in discharge of the note. B received the sum of three hundred and ninety-six dollars as share of the profits of the business, and then after maturity assigned the note and mortgage to C. C brought suit against A for the whole amount; A plead payment and set-off: held, that A was entitled to the credit of the payment. *Mount v. Chapman*, 9 Cal. 296.

131. The owner of the mortgage in this State, can in no case become the own-

er of the mortgaged premises except by purchase upon sale under judicial decree consummated by conveyance. *McMillan v. Richards*, 9 Cal. 411.

132. A mortgagor after the sale of the mortgaged premises under a decree in a suit to foreclose the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property in its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands v. Pfeiffer*, 10 Cal. 265.

133. In an action of foreclosure of a mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness, whose wife is a sister and heir of the deceased, is incompetent upon the ground of interest. *Lisman v. Early*, 12 Cal. 283.

134. S. and B., in 1854, execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him, and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant, claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown v. Winter*, 14 Cal. 34.

135. Assuming that by the recital, defendant became bound to pay plaintiff's mortgage debt, still he had a right to pay it by a sale and purchase under the first mortgage. *Ib.*

136. Under a decree of foreclosure and sale, H. had come into possession of the mortgaged premises. Subsequently, on appeal to the supreme court, the decree was reversed, with direction that the sale under it be set aside, that defendants in the suit be restored to the property sold,



## Foreclosure.

and that the court below should proceed to dispose of the case in pursuance of the principles of the opinion. The court below, on filing the remittitur, entered a decree setting aside said sale, restoring defendants to possession, directing plaintiff to deliver up possession; awarding a writ of restitution, in case of refusal, vacating the credit given on the decree of foreclosure—the plaintiff having bought in the property—and ordering an account of the rents and profits of the premises while in the hands of H., with an injunction pending the account: held, that the order of the court below for an account of the rents and profits was right; that the general direction by this court to the court below, to proceed in pursuance of the principles of the opinion of this court, was mere formality, neither giving authority, nor limiting the powers of the court below; that without such direction that court could only act in subordination to the principles declared by this court; that the question of rents and profits being left open by this court, indicated that it was to be passed upon by the court below; that there is no distinction as to the right to have the corpus of the property restored on reversal of the decree under which it was sold, and the restoring of the rents and profits received from its use; and that the restitution of both is essential to making the party whole. *Raun v. Reynolds*, 15 Cal. 468.

137. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Ib.* 469.

138. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable in estimating the rents and profits of a water ditch—involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc. This is

in its nature an equity proceeding—at least, to be disposed of according to equity practice. *Ib.* 470.

139. The party so in possession, under sheriff's sale, is in no better position than if it be entered directly under the mortgage, to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though the sale was not set aside until after the receipt of the rents and profits, still, when it was set aside, the order took effect upon the relations of the parties as they existed before the sale—the mortgagors and the mortgagee have the same rights they had before. *Ib.* 471.

140. The foreclosure in this case did not merge the mortgage—at least, for all the purposes of this question as to accounting for the rents and profits. H. or his assignee was as much mortgagee after the decree as before. The reversal of the decree would not affect the mortgage, and if H. had entered into possession after the decree, but before any sale, he would have been bound to account for what he had received as mortgagee. Possibly the lien of the mortgage might have been destroyed by the judgment, but the mortgage was not destroyed, nor the relations of the parties as mortgagor and mortgagee. *Ib.*

141. Where plaintiff has two mortgages on the same property—the property being indivisible—and one of the mortgages is not due, he may nevertheless file his bill, and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then defendant cannot defeat the action as to this mortgage by tendering the money due on the first mortgage, after the maturity of the second. The jurisdiction of the court over the subject matter having attached, the court should close the controversy by settling all things involved in the litigation. *Hawkins v. Hill*, 15 Cal. 500.

142. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far at least as

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the owner of the estate is concerned. *Goodenow v. Ewer*, 16 Cal. 468.

143. The mortgagee can here in no case become the owner of the mortgaged premises, except by purchase upon a sale under judicial decree, consummated by conveyance. *Ib.*

144. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right, by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. *Ib.*

145. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot under any circumstances be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. *Ib.*

146. What is meant by sheriff's deeds, made on sales under decrees in foreclosure suits, taking effect by relation from the date of the mortgage, explained. *Ib.* 469.

147. D. and M. are owners each of one undivided one-half of certain real estate. D. executes a mortgage to plaintiffs upon his undivided half, which was recorded on the same day. Subsequently D. and M. conveyed to defendant, E., an undivided one-third of the entire property—making D., M. and E. each owners of one undivided third—one-half of E's interest being subject to the mortgage to plaintiffs. Plaintiffs foreclose—making D. alone party—get judgment for the amount due, and a decree directing a sale of all the interest D. had at date of mortgage. At the sale plaintiffs become the purchasers for the full amount of their judgment, costs, etc., and in due time receive a sheriff's deed, no redemption being made. Meantime, but subsequent to the decree and before the sheriff's deed, E. purchases the remaining interest of D. and M. Plaintiffs sue for the sale of the property—a partition being impossible without prejudice—

and for an account from the tenant in possession; and ask to be reimbursed from the proceeds of the sale the one-third of the amount bid by them at the sale under their decree of foreclosure, on the ground that the decree was invalid as to the one-sixth interest conveyed to E.; and that plaintiffs believed, at the time of their bid, they were acquiring a title to all the interest D. had at the date of his mortgage to them; and that the sheriff stated such interest was offered for sale: held, that the bid of plaintiffs, being for the full amount of their judgment, satisfied it; and that the effect of this satisfaction was to discharge the undivided one-sixth held by E. from the lien of the mortgage. *Ib.* 470.

148. Held, also, that plaintiffs cannot be reimbursed in the amount bid, even though they acted under a mistake as to the effect of the decree and sale thereunder; that their mistake was one of law, against which courts of equity seldom relieve in an independent action—the weight of authority in the United States being not to relieve, unless the mistake be accompanied with special circumstances, such as misrepresentation, undue influence, or misplaced confidence. *Ib.*

149. Held, also, that upon proper application, in the original foreclosure suit, the court would have released the plaintiffs from the purchase, set the sale aside, and opened the decree, and allowed them to file a supplemental complaint, bringing in E. and others interested, as parties. *Ib.*

### 1. Parties.

150. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of summons and before judgment, asks for a decree of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers*, 9 Cal. 125.

151. A decree of discharge under the insolvent act from the payment of a note secured by mortgage, does not release the lien of the mortgage. A person claiming an interest in the mortgaged premises subsequent to the mortgage, is a proper party to the foreclosure suit, but cannot be sub-

## Parties.

jected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 267.

152. All persons interested in the premises prior to the suit brought to foreclose a mortgage or to enforce a mechanic's lien, whether purchasers, liens, devisees, remainder men, reversioners or incumbrancers, must be made parties, otherwise their rights will not be affected. Persons who acquire interests by conveyance or incumbrance, after suit brought, need not be made parties. *Whitney v. Higgins*, 10 Cal. 552.

153. The general rule of courts of equity in foreclosure suits is, that all persons materially interested should be made parties in order that complete justice may be done and multiplicity of suits avoided. *Montgomery v. Tutt*, 11 Cal. 314.

154. Subsequent incumbrancers are not, however, indispensable parties to a foreclosure suit. If not made parties their rights cannot be affected; and they are not bound by the decree. *Ib.* 315.

155. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security, and may be enforced by each creditor as in case of a separate mortgage. But where other parties are interested in the property, the court will require them to be brought in before ordering a sale or foreclosure. *Tyler v. Yreka Water Co.*, 14 Cal. 217.

156. Where, in such case, bill avers the other mortgagees are no longer interested, and they are not parties, demurrer for defect of parties does not lie. *Ib.*

157. A owes B a debt; to secure it A and C jointly mortgage to B a piece of land owned by them in common. Subsequently, A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C, and buys in the whole land, not making D a party. The time for statutory redemption having expired, B. gets a sheriff's deed: held, that D, as subsequent mortgagee, may redeem A's, but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to a foreclosure. *Kirkham v. Dupont*, 14 Cal. 563.

158. The redemption money for A's interest would be the amount of B's mortgage debt, with interest, less one-half of the purchase money of the whole tract,

sold as the land of A and C under the foreclosure sale. *Ib.* 566.

159. A subsequent purchaser of land mortgaged is a proper, if not necessary party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon v. Higuera*, 15 Cal. 495.

160. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of Wemple v. Pender, and has not yet a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 Cal. 106.

161. Plaintiff, on obtaining his sheriff's deed, can then institute the necessary proceedings to enforce his rights, and the purchaser at the sheriff's sale under Wemple's decree will occupy no better position than Wemple himself. But so long as Pender has any interest in the property, plaintiff cannot, in advance of his own title, or of the extinction of Pender's, come into equity to enjoin the sale. *Ib.*

162. A mortgagor, when he has not disposed of his interest, is a necessary party to a suit for a foreclosure and sale, under our law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree ac-

## Parties.—Decrees.

quires no title. *Goodenow v. Ewer*, 16 Cal. 468.

163. It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale. Under such decree, the purchaser takes the title which the mortgagor possessed, whatever it may have been, at the execution of the mortgage. *Ib.* 469.

164. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs v. Hargrave*, 16 Cal. 563.

165. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Ib.* 564.

166. Only those who are beneficially interested in the claim secured on the estate mortgaged, are necessary parties to the foreclosure of a mortgage. *McDermott v. Burke*, 16 Cal. 590.

See PARTIES.

## 2. Decree.

167. Where a mortgage was given to secure an indebtedness for which promissory notes were held, with an understanding that the notes were to be given up, and the personal responsibility canceled on a foreclosure of mortgage, the mortgagee was held not to be entitled to a personal judgment for any balance unpaid after a sale of the property. *Moore v. Reynolds*, 1 Cal. 352.

168. A mortgagee is entitled to a personal judgment against the mortgagor for the balance remaining unpaid after the sale of the premises. *Ib.* 353.

169. Under the two hundred and twenty-ninth section of the Practice Act, a subsequent judgment creditor having a lien has a right to redeem real estate sold by

foreclosure of a previous mortgage in the hands of the purchaser. *Kent v. Laffan*, 2 Cal. 596.

170. Where a mortgage covers two lots, and the mortgagor conveys one with covenants of warranty, the purchaser would be entitled to be reimbursed by the mortgagor on the warranty, if the lot is subjected to the mortgage: held, therefore, that the mortgagor could not complain that the decree of foreclosure ordered the sale of the unconveyed lot for the payment of the mortgage, and if the mortgagee has no notice of those transactions he could have all the lots subjected to his mortgage. *Cheever v. Fair*, 5 Cal. 338.

171. A mortgage allowed costs of foreclosure, including counsel fees not exceeding five per cent. of the amount due: held, that the limitation of five per cent. applied to counsel fees alone, and did not include other costs. *Gronfier v. Minturn*, 5 Cal. 492.

172. Production of the original note and mortgage, and proof of service of summons, is sufficient to justify a decree of foreclosure on default. *Harlan v. Smith*, 6 Cal. 174.

173. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land being sold subject to redemption in six months. *Ib.*

174. A decree of foreclosure cannot be impeached, collaterally, because entered prematurely. The remedy is by a direct proceeding in the action. *Alderson v. Bell*, 9 Cal. 321; *Nagle v. Macy*, 9 Cal. 429.

175. In a foreclosure suit, judgment may be rendered for the amount found due upon the personal obligation to secure which the mortgage is executed. *Rollins v. Forbes*, 10 Cal. 300.

176. In a suit on a promissory note and mortgage, the court may give a general judgment for the amount due on the note, and at the same time a decree of foreclosure of the mortgaged premises. *Rowe v. Table Mountain W. Co.*, 10 Cal. 444.

177. Where a mechanic's lien attached on certain premises January 18th, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such



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suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrance of the mechanic's lien was not affected by the decree and the proceedings thereunder; and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Whitney v. Higgins*, 10 Cal. 551.

178. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties, on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignors to institute suit on the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into court, to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

179. In a foreclosure suit, where judgment is taken by default, the decree can give no relief beyond that which is demanded in the bill. *Raun v. Reynolds*, 11 Cal. 19.

180. Where proceedings in a foreclosure suit were delayed by agreement, in consideration of the execution of a second mortgage on other property, in which third parties joined as additional security, and subsequently plaintiff filed a supplemental bill setting up the second mortgage, and asking a sale of the premises described in both mortgages, judgment was taken by default for the debt, and the court decreed a foreclosure of the several mortgages and a sale of the property conveyed, and directed that the property described in the mortgage executed by Reynolds should be first offered for sale, but that no bid should be received for a less sum than the full amount of judgment and costs. If this sum was not bid, then the whole property included in the two mortgages was to be sold together: held, that the decree was erroneous. *Ib.* 20.

181. The omission of the words "be sold," in a judgment of foreclosure, after the description of the premises, is a mere clerical error, which will not affect

the judgment. *Moore v. Semple*, 11 Cal. 361.

182. In this State, parties are at liberty to adopt, in the foreclosure of mortgages, the course pursued under the old chancery system, and take a decree adjudging the amount due upon the personal obligation of the mortgagor, and directing a sale of the premises, and the application of the proceeds to its payment; and apply after sale for the ascertainment of any deficiency, and execution for the same; or they may take a formal judgment for the amount due in the first instance. *Rowland v. Leiby*, 14 Cal. 157.

183. In a foreclosure suit the decree will not apportion the debt among the several cotenants of the land, who acquired undivided interests therein at the same time, and subsequent to the execution of the mortgage. *Perre v. Castro*, 14 Cal. 531.

184. Where plaintiffs obtained a decree in a foreclosure suit against husband and wife, the mortgage being executed by them, and the decree being in the usual form, for the amount due, sale of the premises, application of the proceeds, and execution against the property of the husband for any deficiency, and after the entry of the decree the husband died: held, that the plaintiffs were entitled to an order of sale upon the decree, notwithstanding the death of the husband, but not to execution for any deficiency. *Cowell v. Buckelew*, 14 Cal. 641.

185. Where, in a foreclosure suit, the judgment is in the usual form—ascertaining the amount due, directing a sale of the mortgaged premises, application of the proceeds to the payment of the debts, providing for the recovery of any deficiency, and authorizing execution for the same—such judgment does not become a lien on the real estate of the debtor from the time it is docketed. *Chapin v. Broder*, 16 Cal. 421.

186. Section two hundred and forty-six of the Practice Act authorizes, in foreclosure suits, a personal judgment against the mortgagor, in addition to the relief usually granted; and such personal judgment, when docketed, becomes a lien. But the mere contingent provision for execution, in case of deficiency, etc., does not amount to a personal judgment, and to such provision no effect can be given as

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a judgment lien, until the amount of the deficiency to be recovered has been ascertained and fixed. *Ib.*

187. In this latter case, the limitation upon the lien does not commence to run until the deficiency be ascertained, and an execution can be issued therefor. *Ib.*

188. The decree in a foreclosure suit, under the old equity system, usually directed the mortgagor to assert his right by payment of the principal sum due, interests and costs, within a designated period, or be barred of his equity. The decree operated directly upon the property, and its effect was to restore the same, upon payment, to the mortgagor; or to vest, upon failure of payment, an absolute title in the mortgagee. To give any efficiency to the decree, it was essential that the owner of the equity should be brought before the court; and he was an indispensable party to a valid foreclosure. *Goode-now v. Ewer*, 16 Cal. 467.

189. Courts of equity are ever ready to grant relief from sales made upon their decrees, where there has been irregularity in the proceedings, rendering the title defective, as well when the purchaser or parties interested have been misled by a mistake of law as to the operation of the decree, as when they have been misled by a mistake of fact as to the condition of the property, or the estate sold, provided application be made to them in the suits in which such decrees are entered, within a reasonable time, and the relief will not operate to the prejudice of the just rights of others. *Ib.* 470.

190. The nature and extent of the relief in such cases are matters resting very much in the sound discretion of the court. As a general rule, the purchaser will be released and a resale ordered, or such new or additional proceedings directed as may obviate the objections arising from those originally taken, when the consequences of the mistake are such that it would be inequitable, either to the purchaser or to the parties, to allow the sale to stand. But when relief is sought in one action from a purchase made upon a mistake of law as to the effect of a decree rendered in another action, it seems that the ordinary rules as to mistakes of law should apply, and from such, courts of equity seldom relieve. *Ib.*

191. In this case relief cannot be grant-

ed, as no special circumstances are shown, and no excuse offered for neglecting to apply for relief in the original foreclosure suit. And further, this action is not brought directly for relief from the sale, but for a sale of the property, an account as incident to a partition, and distribution of the proceeds among the owners, tenants in common thereof; and D., the mortgagor, is not made a party. *Ib.* 471.

192. The rights of plaintiffs to proceeds arising from the sale must be limited by the extent of the interest they acquired in the premises under their conveyance—that is, to one-third; and from this one-third, their proportionate share of the costs and expenses of the action and subsequent proceedings must be deducted. *Ib.* 472.

193. The doctrine of *caveat emptor* applies only to sales made upon valid judgments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to the title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment; and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 564.

194. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A. in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A is essential; and when present, the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes the risk. To that extent the doctrine of *caveat emptor* applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specifically subject to sale, whatever it may be worth, a purchaser is entitled to receive; it is for that interest he makes his bid and pays his money. *Ib.*

## Decree.—Upon the Homestead.

195. A purchaser, under a decree of this character may petition to be released from his purchase, or that the sale be set aside, where it has been subsequently discovered that the court rendering the decree had not acquired jurisdiction of the subject matter; or of persons having interests in the property; or for other reasons, that the estate directed to be sold would not pass. *Ib.* 565.

196. Where a purchaser at a sale under a decree in a foreclosure suit, directing the sale of the premises—which decree, was void because the grantee of the mortgagor was not made party—brought suit against the mortgagees to recover back the money paid them on his bid: held, that the action does not lie, the purchaser being aware at the time of his bid that the mortgagor had sold the premises before the institution of the foreclosure suit, and there being no fraud. *Ib.*

197. The purchaser in such case makes a mistake of law as to the effect of the decree when the grantee of the mortgagor is not made party to the foreclosure suit. From such mistake no relief can be granted in an action at law. *Ib.*

198. Plaintiff must seek relief from the consequences of the invalidity of the decree, by proceedings in the foreclosure suit. By his act of purchase he has submitted himself to the jurisdiction of the court in that suit, as to all matters connected with the sale, and is entitled to apply for such relief as the facts of the case may justify. Upon his application, that court may direct the sale to be set aside and the satisfaction to be canceled, and authorize a supplemental bill for a resale of the premises to be filed and conducted in the name of the complainants in that suit, for the plaintiff's benefit, and direct that the grantee of the mortgagor, and any other persons interested in the premises, be brought in as parties; or it may make such other and different order in the matter as will protect the rights of all parties, and mete out exact justice. *Ib.* 566.

See JUDGMENT, REDEMPTION.

### III. UPON THE HOMESTEAD.

199. Treating the mortgage as a mere security for the purchase money of a

homestead, it is evident that the debt could not be lost by the acceptance of a new mortgage intended to supply the old one and secure the same debt.\* *Dillon v. Byrne*, 5 Cal. 457; *Carr v. Caldwell*, 10 Cal. 385.

200. B bought premises and executed a note for part payment, which was afterwards transferred to plaintiff, who then loaned an additional sum and took his note and a new mortgage on the same lot and another lot, and canceled the first mortgage. In a suit to foreclose the mortgage, B's wife intervened and claimed the premises as a homestead: held, that the land was liable for the remainder of the purchase money, no matter to what purpose it might be devoted. *Dillon v. Byrne*, 5 Cal. 457; *Birrell v. Shie*, 9 Cal. 107; *Carr v. Caldwell*, 10 Cal. 385; *Swift v. Kraemer*, 13 Cal. 530.

201. Where an action is brought to foreclose a mortgage upon property claimed as a homestead, the wife of the mortgagor is a necessary party to the adjustment of the controversy, and should be allowed to intervene. *Sargent v. Wilson*, 5 Cal. 507.

202. Where a married man, whose wife never resided in this State, purchased a lot of land and resided upon it, which he then mortgaged, his wife not joining therein, and subsequently his wife came to this State and resided with him on the mortgaged premises: held, that the character of homestead was never impressed upon the premises until the actual residence of the family thereon, and therefore the homestead exemption cannot be sustained against the mortgage. *Cary v. Tice*, 6 Cal. 630; *Rix v. McHenry*, 7 Cal. 91; *Benedict v. Bunnell*, 7 Cal. 246.

203. A, a married man, mortgaged the homestead to B without the concurrence of his wife, and A and his wife subsequently mortgaged to C, and B and C both foreclosed their mortgages, neither making the other a party; whereupon C filed a

\*The homestead act was passed in 1851, statutes p. 296. In 1854, the opinion in *Taylor v. Hargous*, 4 Cal. 273, held that there could be no abandonment or mortgage of the homestead, except by the joint act of husband and wife. This decision was repeatedly affirmed until 1869, when the court, in *Gee v. Moore*, 14 Cal. 478, reversed all previous cases, and held that there could be an abandonment or mortgage without the concurrence of the wife, which latter decision has been adhered to in several later cases. In 1860, statutes, p. 311, the act has been amended so as to require a registry of the homestead, and an abandonment must be by deed acknowledged and recorded after execution by husband and wife, and there can be no mortgage on the homestead.

## Upon the Homestead.

bill against B to set aside the decree of foreclosure of the latter, alleging that the homestead premises did not exceed in value \$5,000: held, that C could urge the same objections to the mortgage of B that A and his wife could; that B's decree was a cloud upon the title, and impaired the security, and that C was entitled to have it set aside. *Dorsey v. McFarland*, 7 Cal. 346; *Van Reynegom v. Revalk*, 8 Cal. 76.

204. A mortgage of the homestead signed by the husband alone is absolutely void, where its value does not exceed \$5,000. When the husband ceases to be the head of the family the right to the homestead also ceases. *Revalk v. Kraemer*, 8 Cal. 74; *Van Reynegom v. Revalk*, 8 Cal. 76; *Cook v. Klink*, 8 Cal. 353; *Moss v. Warner*, 10 Cal. 298; *Lies v. De Diablar*, 12 Cal. 329.

205. Where, after judgment of foreclosure had been taken in an action against the husband solely, on a mortgage on the homestead premises executed by him alone, the husband and wife joined in a mortgage to a third party: held, that the foreclosure bound no one as to the homestead, and that the second mortgage was absolute as against the homestead. *Van Reynegom v. Revalk*, 8 Cal. 76.

206. Where A, who is a married man, is occupying premises as the tenant of B, and concludes to purchase the same, and to do so borrows the whole of the purchase money from C, and to secure the payment thereof to C mortgages the premises to him, but the wife does not sign the mortgage: held, that the homestead right was subject to the mortgage. *Lassen v. Vance*, 8 Cal. 274.

207. The homestead right is not affected by the foreclosure of a mortgage signed by the husband alone. *Cook v. Klink*, 8 Cal. 353.

208. In the action to foreclose a mortgage against a husband who sets up the right of homestead, the court should order the wife of defendant to be brought in as a party, as no decision of the question of homestead can be conclusive, either upon the husband or wife, unless both are parties. *Marks v. Marsh*, 9 Cal. 97.

209. The wife is a proper party defendant in a suit to foreclose a mortgage executed upon premises claimed as a homestead. If not made such a party, she may intervene, or, by permission of the court,

be allowed to file a separate answer, the plaintiff having the liberty to amend his complaint if any matters are set up in the answer which he might wish to anticipate by further allegation. *Moss v. Warner*, 10 Cal. 297.

210. Where commissioners were appointed by the court to select and set apart as a homestead a portion of the tract of land mortgaged, such portion to be of the value of \$5,000, in form as compact as possible, including the place where the dwelling house is situated, and to report their action to the court; and the commissioners acting under oath made the selection and the report was approved: held, that the proceeding was proper. *Ib.* 298.

211. V, a married man, purchased a lot of land of G, and gave a mortgage on the lot to G for the purchase money; G subsequently obtained a decree of foreclosure of the mortgaged premises. On the day advertised for the sale, and just before the sale was to take place, V borrowed of C money for the purpose of paying off the mortgage and decree, and agreed to give C a mortgage on the premises to secure the money so loaned; V paid off the decree and G's mortgage was satisfied. Within a few minutes thereafter V gave a mortgage to C on the premises in accordance with the agreement. V's wife did not join in the mortgage. At the time of C's loan, and the execution of the mortgage therefor, the premises were occupied by V and his wife as a homestead; V died soon after, and his wife claimed the premises as a homestead: held, that C's mortgage took the place of G's, and was and is a valid lien on the premises to the extent of the money applied to the satisfaction of G's mortgage. *Carr v. Caldwell*, 10 Cal. 385.

212. When a mortgage is given as security for the purchase money of the mortgaged premises, no homestead can be carved out of the property so as to impair the rights of the mortgagee. *Montgomery v. Tutt*, 11 Cal. 193.

213. A mortgage of the homestead of the family executed by the husband only is void. To make such mortgage valid the wife should join with the husband in the execution of it. *Lies v. De Diablar*, 12 Cal. 329.

214. An order of the probate court setting apart property as a homestead will



## Upon the Homestead.—Chattel Mortgage.

not defeat a mortgage which has properly vested as a lien upon the property, where the mortgagor was not a party to such proceedings. *Ib.* 330.

215. In a mortgage of the homestead, the premises need not be described as the homestead. *Pfeiffer v. Riehn*, 13 Cal. 649.

216. Action to recover certain real estate as the homestead of plaintiffs. Complaint avers that plaintiff K. alone executed to C. his note, and a mortgage on the property in question to secure its payment. C. foreclosed, making K. and his wife, and also several persons holding subsequent mortgages, parties. K. and wife made default, but the other defendants answered, asking for a sale of the property and a decree settling all priorities, etc. The court ordered a sale of the property, and that, in case of insufficiency of the proceeds to satisfy all the mortgages, they be paid in a certain order—C.'s mortgage being last: held, that plaintiffs cannot recover without showing that these subsequent mortgages were invalid and insufficient to pass the title, because the complaint avers the sale to have been made under them as well as under the mortgage to C. *Klink v. Cohen*, 15 Cal. 201.

217. Under the Act of 1851, prior to its amendment in 1860, mortgages upon the homestead, executed by the husband alone, were not absolutely void, but were invalid only to the extent required for the protection of the husband and wife in the enjoyment of their homestead rights. *Bowman v. Norton*, 16 Cal. 217.

218. Where, under the Act of 1851, both husband and wife unite in a conveyance of the homestead, the homestead rights are relinquished, and persons to whom the husband alone had mortgaged the homestead previous to such conveyance may enforce their mortgages against the property in the hands of the grantee. *Ib.* 218.

219. The Act of 1860 materially changes the provisions of the Act of 1851, and renders any mortgage hereafter of the homestead, except to secure or pay the purchase money, invalid for any purpose whatever. *Ib.*

See HOMESTEAD.

## IV. CHATTEL MORTGAGE.

220. A chattel mortgage, which stipulates for the enjoyment of the possession of property by the mortgagors until breach of the conditions, is invalid by the statute of frauds against third parties. *Meyer v. Gorham*, 5 Cal. 324.

221. If the mortgagee took immediate and actual possession of the property, in the absence of any contract concurrent or subsequent in the mortgage, conferring any greater authority than that contained in the mortgage, he cannot claim by virtue of such possession, because the covenants of the mortgage show that he was not entitled to the possession. *Ib.*

222. A party who purchases at sheriff's sale, stock of an incorporation, knowing that the certificates of such stock have been previously mortgaged, is chargeable with notice of the fact, and takes subject to the claim of the mortgagee. *Weston v. Bear River and Auburn W. & M. Co.*, 6 Cal. 429.

223. H. has a mortgage on chattels executed by M., in whose possession by the terms of the mortgage they were to remain. Upon default in paying interest or principal the mortgagor was to surrender possession. H. attaches M. for interest due and for other debts, and levies on the chattels in M.'s hands. The constable agrees with H. to hold the property for him both on the attachment and the mortgage, and M. consents. H. exercises some control over the property. The defendant, as sheriff, now levies on the property at the suit of R. v. M., takes possession from the constable and pays the attachment of H. H. sues the sheriff in replevin, and offers on the trial to prove that the attachment and judgment in R. v. M. are false, fraudulent and collusive: held, that the court below erred in rejecting the evidence; that on default of paying interest, it was M.'s duty to give up possession; that his assent to the possession of H. after the constable's levy was sufficient to entitle H. to the property, subject only to his own attachment. *Hackett v. Manlove*, 14 Cal. 89.

224. A mortgage of chattels, the possession remaining in the mortgagor, is good against all persons, except subsequent purchasers, and bona fide creditors. *Ib.*

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 Chattel Mortgage.—Mortgage of a Vessel.
 

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225. A sheriff in such case has no better rights than the creditor he represents, and the creditor is not one of the two classes in whose favor a mortgage unaccompanied by possession is void, to wit: bona fide creditors, or subsequent purchasers. *Ib.* 90.

226. Where, from an instrument transferring shares of stock as security for a note, and from other circumstances, the transaction is clearly a loan, a clause of foreclosure on nonpayment, or a provision that the mortgagee may take the property for the debt, does not make the instrument any the less a mortgage. *Smith v. '49 & '56 Quartz Mining Co.*, 14 Cal. 246.

227. A mortgagee of stock in such a case does not get an absolute title to the stock by the mere default of payment of the mortgage debt. *Ib.* 247.

228. The rule, under our statute, as to the delivery of possession of the mortgaged personal property, is not more strict than that held by the English and United States courts under the statute of fraud. *Chaffin v. Doub*, 14 Cal. 386.

229. A mortgage is a security for a debt, and cannot exist independently of the relation of debtor and creditor between the parties. *People v. Irwin*, 14 Cal. 435.

230. If it were shown that the consideration for the conveyance was a pre-existing debt, these provisions would afford very strong evidence that the debt had not been extinguished, and that the conveyance was intended as a mortgage to secure its payment. *Ib.* 436.

231. A mortgage on its face given to secure a promissory note, is prima facie given in good faith, and to secure a "just indebtedness," within the first section of the chattel mortgage act of 1857. *Ede v. Johnson*, 15 Cal. 57.

232. Under that act, "a residence" stated to be "in Sierra county, California," is sufficiently stated. And an "occupation" stated as that of "late merchant, of Pine Grove," etc., is sufficient. *Ib.*

233. The object of this provision in the statute is identification. It is not an indispensable requisite to the validity of the mortgage, which would be valid if it stated the parties to have no occupation or profession. *Ib.*

234. So where the mortgage is conditioned to pay a note "according to the

tenor and conditions thereof," and the note is recited as a certain promissory note for the payment of the sum of \$3,500 on the sixth day of June, A. D. 1858, at said Pine Grove, with interest at the rate of two per cent. a month, from date till paid," the statute is complied with as to "setting out the sum to be secured, the rate of interest to be paid, and when payable." *Ib.*

235. Under the chattel mortgage act of 1857, a mortgage of shares of stock in an incorporated company is valid without a transfer on the books of the company, as is required by the corporation act of 1853, relative to pledges of stock by delivery of the certificates. The act of 1853 has no effect on the act of 1857. *Ib.* 58.

236. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock: held, that the judgment was wrong so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

See PLEDGE.

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 V. MORTGAGE OF A VESSEL.
 

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237. In order to maintain that a mortgage on a vessel is void as to creditors, because not properly registered, it is absolutely necessary to show that the vessel in controversy was a "vessel of the United States," within the meaning of the registration acts of Congress, at the time of her seizure; and to do this it is necessary to show affirmatively every incident which entitles her to that privilege, or to show as much as would under those acts entitle her to a new register. *Davidson v. Gorham*, 6 Cal. 347.

238. Where a new owner under such sale mortgaged the vessel still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: held, that the mortgage was good against attaching creditors of the new owner, who lev-

## Mortgage of a Vessel.—Notes secured by a Mortgage.

ied immediately on her arrival, neither party taking the requisite steps to obtain a new registry, as the vessel had lost her national character, and was not therefore subject to the provisions of the law requiring the registry of sales and mortgages. *Ib.* 348.

239. To make a mortgage valid on a seagoing vessel, the act of Congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property depends in the contemplation of each act, solely and exclusively upon that which it alone prescribes. *Mitchell v. Steelman*, 8 Cal. 370.

240. Where A, the owner of a seagoing vessel, executes to B a mortgage thereon, which is recorded in the custom house of the home port, B commences suit to foreclose the mortgage, and makes C a party defendant thereto, on the ground that he has purchased the vessel subject to the lien of plaintiff's mortgage, C in his defense avers that the mortgage was void under our statute of frauds, and that he now held the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of the mortgage was a sufficient notice thereof to C. *Ib.*

241. To require a mortgagee in all cases to take possession of the vessel, is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel who is a part owner could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. *Ib.* 374.

See ADMIRALTY.

## VI. NOTES SECURED BY A MORTGAGE.

242. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with the full effect of a regular assignment. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336; *Bennett v. Taylor*, 5 Cal. 502; *Ord v. McKee*, 5 Cal. 516; *Bennett v. Solomon*, 6 Cal. 138; *Phelan v. Olney*, 6 Cal. 483; *Belloc v. Rogers*, 9 Cal. 125; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Hickox v. Lowe*, 10 Cal. 206; *Koch v. Briggs*, 14 Cal. 263.

243. A note was executed to O. as the agent of M., and the mortgage to secure the note was made to M. O., under a contract with M., was entitled to one-half of the note: held, that O., having a right to the note, had a right to foreclose the mortgage. *Ord v. McKee*, 5 Cal. 516.

344. Where a new note, on the same terms, between the same parties, for the same sum, and of the same date, is given as a substitute for a previous note secured by mortgage, the owner is entitled to a foreclosure on the new note. *Spring v. Hill*, 6 Cal. 18.

245. The endorsement and delivery of one of two notes secured by a mortgage carries with it a pro rata portion of the security. *Phelan v. Olney*, 6 Cal. 483.

246. The purchaser of one of two notes secured by a mortgage, and the assignee of the mortgage itself, takes the assignment with the notice of the equity of the holder of the other notes, as he is informed by the deed itself that it was given as security for two notes of equal amount, neither of which was due. *Ib.*

247. The holders of two notes secured by one mortgage stand in the same relation to the mortgaged premises until a discharge of the mortgage and acceptance of a different security. This discharge by one, though void as to the other, is valid as to the maker, and divests any lien which he had by virtue of said mortgage. *Ib.*

248. The discharge by a decree under the insolvent act from the payment of the note, did not release the lien of the mortgage executed to secure its payment. *Luning v. Brady*, 10 Cal. 267.

249. The averment in the complaint, that the plaintiff is the owner of the note and mortgage in suit, is sufficient answer to a demurrer, on the ground that it does not appear by the complaint that the plaintiff is the holder of the note. *Rollins v. Forbes*, 10 Cal. 300.

250. A note executed by the whole of the associates in a joint enterprise to three of them, the plaintiffs below, is equivalent, we think, to a note and mortgage executed by the defendants to the plaintiffs for an amount less, by the proportion of the number of plaintiffs to the defendants, and may be enforced in equity in like manner as if so executed. *McDowell v. Jacobs*, 10 Cal. 389.

251. In a suit on a promissory note and

mortgage, the court may give a general judgment for the amount due on the note, and at the same time a decree of foreclosure of the mortgaged premises. *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

252. A corporation may bind itself by a note and mortgage made by its president and secretary, and signed by them in their official capacity as such. *Ib.*

253. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignees to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

254. Where a husband and wife execute a note and mortgage, the note is good as to the husband, even if void as to the wife; and the property is bound by the mortgage, independent of the note of the wife. *Pfeiffer v. Riehn*, 13 Cal. 649.

255. Because a mortgage given to secure the payment of several notes falling due at different times provides for payment at times or in modes different from the notes, it is no objection to suit on the notes at maturity. The mortgage is not a part of the contract of indebtedness. *Robinson v. Smith*, 14 Cal. 98.

256. The fact that the purchaser of a note saw the mortgage and note, was no notice to him of any valid defense to the note. *Ib.* 100.

257. Where in a mortgage to secure the purchase money of land for which notes were given, falling due at different times, the condition was—"provided that previous to the dates of said payments, it shall have been decided by competent authority that the title to said land is fully vested in the party of the second part, and the party of the first part is given full and peaceable possession," the holder of one of the notes transferred before maturity may sue on it at maturity, although the title to the land has not been settled and peaceable possession not given. *Ib.* 100.

258. Where a mortgage is conditioned to pay a note "according to the tenor and conditions thereof," and the note is recited

as a "certain promissory note for the payment of the sum of \$3,500 on the sixth day of June, A. D. 1858, at the said Pine Grove, with interest at the rate of two per cent. per month from date till paid," the statute is complied with as to setting out the sum to be secured, the rate of interest to be paid, and when payable. *Ede v. Johnson*, 15 Cal. 57,

259. At one time, seven shares of stock in a company are pledged by defendant to plaintiff as security for a note of defendant then executed. At another time, twenty more shares are pledged as security for another note of defendant then executed. In suit on the notes, and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock, and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong, so far as it ordered a sale of the stock in gross, and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

## VII. ASSIGNMENT OF A MORTGAGE.

260. The purchaser of a mortgage cannot be charged with constructive notice of anything subsequent to the mortgage, except its assignment or satisfaction, duly entered of record; and a deed from the mortgagee to a third party, for a conveyance of the mortgaged premises, does not operate as an assignment of the mortgage. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336.

261. Where a party cancels a mortgage, and executes a new one, the last mortgagees are, in equity, assignees of the debt paid, and will be subrogated to the rights of the assignors; for in equity the substance of the transaction would be an assignment of the old mortgage, in consideration of the money advanced. *Dillon v. Byrne*, 5 Cal. 456; *Birrell v. Schie*, 9 Cal. 107; *Carr v. Caldwell*, 10 Cal. 385; *Swift v. Kraemer*, 13 Cal. 530.

262. A mortgage is a mere incident to the debt which it secures, and follows the transfer of the note with full effect of a regular assignment. *Peters v. Jamestown Bridge Co.*, 5 Cal. 336; *Bennett v. Taylor*, 5 Cal. 502; *Ord v. McKee*, 5 Cal. 516;



## Assignment of a Mortgage.—Lease of Mortgaged Property.

*Bennett v. Solomon*, 6 Cal. 138; *Phelan v. Olney*, 6 Cal. 483; *Belloc v. Rogers*, 9 Cal. 125; *McMillan v. Richards*, 9 Cal. 411; *Nagle v. Macy*, 9 Cal. 428; *Hickox v. Lowe*, 10 Cal. 206; *Koch v. Briggs*, 14 Cal. 263.

263. Where two notes are secured by a mortgage, and a purchaser of the second note takes therewith an assignment of the mortgage, he takes with notice of the equity of the holder of the first note, as he was informed of the existence by the mortgage itself. *Phelan v. Olney*, 6 Cal. 483.

264. When the holder of the second note and assignee of the mortgage entered a discharge of the mortgage, and took a new security, the discharge was valid as to him, and divested his lien under the mortgage, though void as to the holder of the first note. *Ib.*

265. An assignment operating by its terms as a present and effectual change of ownership in the subject matter, the title is supposed, in law, to remain divested, until it be affirmatively shown that the condition of defeasance has happened. It is not unlike a chattel mortgage, which conveys the thing mortgaged, with power of use until the money secured is paid; and until payment is proven, all the right of the mortgagor to the mortgaged property passes to the mortgagee. *Myers v. South Feather W. Co.*, 10 Cal. 583.

266. Where an assignment of a note and mortgage has been made to the plaintiffs, to indemnify them as sureties on a bail bond for the assignor, and where suit is then proceeding on such bond, it is proper for them, as such assignees, to institute suit on the note and mortgage; and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

267. R. assigned a mortgage to F., made by a company to secure him as guarantor, delivering the mortgage at the same time to F., who retained it a few minutes, and returned it to R., to receive the interest from the company as his agent. The note guaranteed is unpaid. R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could

reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., as guarantor, was a sufficient consideration for the assignment; and that such assignment is not a mortgage of a mortgage. *Hall v. Redding*, 13 Cal. 219.

268. A married woman cannot make an assignment of a mortgage without the concurrence of her husband. *Tryon v. Sutton*, 13 Cal. 493.

## VIII. LEASE OF MORTGAGED PROPERTY.

269. Where plaintiff leased a lot to B. for ten years, at a monthly rent, with a clause that the improvements were mortgaged as a security for the rent: held, that it was a mortgage and might be foreclosed on the nonpayment of the first month's rent. *Barroilhet v. Battelle*, 7 Cal. 452.

270. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Ib.* 454.

271. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: held, that the purchaser, under the mortgage sale, can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 596.

272. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee at the time has actual or constructive notice of the mortgage. *McDermott v. Burke*, 16 Cal. 589.

273. The interest of the lessee, in such case, depends for its duration—except as limited by the terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

## Lease of Mortgaged Property.—Writ of Assistance.—Motion.

274. There is no privity of contract or estate between the purchaser upon the decree of sale on foreclosure and the tenant of the mortgagor. The purchaser may treat the tenant as an occupant without right, and maintain ejectment for the premises—except where the purchaser is precluded by his acts or declarations from thus treating him. *Ib.*

275. The purchaser cannot, for want of privity, count upon the lease, and sue for the rent or the value of the use and occupation. The relation between the purchaser and tenant is that of owner and trespasser, until some agreement, expressed or implied, is made between them with reference to the occupation. The tenant is not bound to attorn to the purchaser, nor is the latter bound to accept the attornment if offered, unless the acts and declarations of the purchaser, anterior to the purchase, qualify the subsequent relation of the parties, or the rights springing from it. *Ib.*

276. There are cases where the purchaser on a sale under a decree of foreclosure would be estopped from treating the tenant of the mortgagor as a trespasser; as, for instance, when the lease was taken upon the encouragement of the mortgagee, and the purchaser was cognizant of the fact at the time of his purchase. *Ib.*

277. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

278. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

279. But the tenant has no such absolute right, from the mere fact of his ten-

ancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

## IX. WRIT OF ASSISTANCE.

280. A writ of assistance will lie to put a party purchaser in possession of land under a decree of foreclosure of a mortgage. *Wolf v. Fleischacker*, 5 Cal. 244; *Montgomery v. Tutt*, 11 Cal. 191; *Reynolds v. Harris*, 14 Cal. 677.

281. In our system, the order to deliver possession should be first made, unless a direction to that effect is made in the decree; and if upon its service that is disregarded, the court can at once direct the writ of assistance to issue. *Montgomery v. Tutt*, 11 Cal. 193.

282. Prima facie, plaintiff in a foreclosure suit is entitled, after sale of the premises and sheriff's deed to him, to a writ of assistance as against the mortgagor, and those entering under him subsequent to the decree, if they refuse to surrender possession. *Skinner v. Beatty*, 16 Cal. 157.

283. Where in such case a writ of assistance is granted, and the mortgagor and his wife move to set it aside on the ground that they had moved upon and occupied the mortgaged premises as a homestead before the execution of the mortgage by the husband, and continually ever since, and it appears that the mortgage was given for the purchase money of the premises, the motion must be denied, even though the wife was not a party to the foreclosure. *Ib.* 158.

284. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Ib.*

## MOTION.

1. The court should not entertain a motion to strike a paper from the files of the court on the ground of its being there by fraud or deception, unless copies of the

## Motion.—Municipal Corporation.

affidavit to be used on the motion and notice of the same be given to the opposite party. *Stevens v. Ross*, 1 Cal. 96.

2. An order is the judgment or conclusion of the court or judge upon any motion or proceeding. *Gilman v. Contra Costa County*, 8 Cal. 57.

3. A party who appears and contests a motion in the court below, cannot object, on appeal, that he had no notice of the motion. *Reynolds v. Harris*, 14 Cal. 677.

4. There is no statute of limitations against certain motions, and appellants may show that in consequence of various obstacles not within their control, there was no unreasonable delay in making the motion. *Ib.* 678.

5. The failure to prosecute a motion for a new trial is an abandonment of the motion. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Cal. 303; *Green v. Doane*, 15 Cal. 304.

6. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Dobbins v. Dollarhide*, 15 Cal. 375.

7. If a writ of assistance be improperly issued or executed, the court granting it can, on summary motion, set aside the writ or the service, and restore the possession. *Skinner v. Beatty*, 16 Cal. 158.

## MUNICIPAL CORPORATION.

1. Municipal corporations, unless specially authorized, have no power to make the public, of which they were the representatives, liable to make compensation for the property which they should see fit to destroy for the purpose of staying the ravages of a destructive conflagration. *Dunbar v. City of San Francisco*, 1 Cal. 357; *Correas v. City of San Francisco*, 1 Cal. 452.

2. Where a municipal corporation, so far as she had any rights in a franchise,

had by her own voluntary acts parted with them, any attempt on her part to resume them, by depriving the public of the easement or denying to purchasers of lots the right of way, except on payment of wharfage, etc., is clearly illegal. *Breed v. Cunningham*, 2 Cal. 368.

3. The power of a corporation to sell does not include an authority to create a new department of city government, to divert the revenues from the legitimate source, and place them in hands neither chosen by or responsible to the corporation, nor does it include the power to make a deed of trust with power to the trustees to sell the trust estate as they may deem advisable. *Smith v. Morse*, 2 Cal. 538.

4. Defendants were owners of a private railroad, constructed by them, and run with machinery, under a license from the city councils, through certain streets of San Francisco. The plaintiff claimed damages for injuries done to himself, his horse and wagon, in a collision with the railroad cars, charging the defendants with negligence: held, that where the streets of a city are diverted from their ordinary and legitimate uses, by special license to a private person, for his own benefit, and in the pursuit of a business which involves constant risk and danger, he is bound, in the exercise of such right, to use extraordinary care. *Wilson v. Cunningham*, 3 Cal. 243.

5. The right to fit up a building for city or public purposes, and provide suitable accommodations for the transactions of the business of the city, is a necessary incident to the administration of every municipal government. *People v. Harris*, 4 Cal. 9.

6. Where a municipality have the right to erect, repair and regulate wharves and the rate of wharfage, and the banks of the river, in front of the city, are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation. *City of Sacramento v. Steamer New World*, 4 Cal. 43.

7. The words "public improvements," when applied to a municipal corporation, must be taken in a limited sense as applying to those improvements which are the proper subject of police and municipal regulations, and cannot be extended to subjects foreign to the object of the incorporation and beyond its territorial limits. *Low v. City of Marysville*, 5 Cal. 215.

## Municipal Corporation.

8. The distinction between a grant to a person and a municipal corporation, as to denouncement for forfeiture, is very apparent. On the one hand, government has agreed that denouncement shall be the result of nonperformance; on the other hand, a corporation has delegated to it certain powers of government, and it is only in reference to those delegated powers that it will be regarded as a government. *Touchard v. Touchard*, 5 Cal. 307.

9. If a private natural person can grant lands upon conditions subsequent, and upon their nonperformance resume their ownership, a municipal corporation can do the like. *Ib.*

10. The thirty-second section of the charter of 1855 of the city of San Francisco was designed as a check upon the city government under that charter, leaving the previous indebtedness to stand as a matter the legislature could not interfere with. *Soule v. McKibbin*, 6 Cal. 142.

11. The act of March 27th, 1850, conferring upon the county courts the power of incorporating towns, is unconstitutional. *People v. Town of Nevada*, 6 Cal. 144; *Colton v. Rossi*, 9 Cal. 599.

12. Where a city ordinance authorizes the making of a contract by certain committees, on behalf of the city, "subject to confirmation by the common council of said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co. v. City of San Francisco*, 6 Cal. 191.

13. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as, for the time, render them impassable or dangerous. *James v. City of San Francisco*, 6 Cal. 530.

14. There is no constitutional inhibition against incorporating a portion of the inhabitants of a city as a county, or creating a county out of the territory of a city. *People v. Hill*, 7 Cal. 103; *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

15. Under the charter of the city of San José, an ordinance abolishing the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officers. *Wilson v. City of San Jose*, 7 Cal. 276.

16. A municipal corporation, from the

nature of the ends intended to be accomplished by its creation, is a compound being, acting in different capacities. *Holland v. City of San Francisco*, 7 Cal. 377.

17. Where, in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract, which the court refused to allow: held, not to be error, as the change in the contract could only be by ordinance. *City of Sacramento v. Kirk*, 7 Cal. 420.

18. Where a municipal corporation has the power to perform an act, and in the execution thereof, the prescribed form is not followed, it has the power to subsequently ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Lucas v. City of San Francisco*, 7 Cal. 469.

19. A municipal corporation, outside of its governmental capacity, is in many respects to be regarded the same as a private corporation, and its officers and agents through whom it acts must be presumed to know the contract it enters into, the purchases it makes, and the property it uses. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 469.

20. The proposition that a municipal corporation can incur no liabilities otherwise than by ordinance, is not, in its full extent, tenable. Under some circumstances, a municipal corporation may become liable by implication. *Ib.*

21. The provisions of the charter of Sacramento, authorizing the improvement of the streets and the mode and manner of assessment, are not in conflict with the thirteenth section of the eleventh article of the constitution. *Burnett v. City of Sacramento*, 12 Cal. 83.

22. There is no difference in respect to the political and geographical divisions of the State between a municipal corporation and a county. They are both the subjects of its political dominion. *Pattison v. Supervisors of Yuba County*, 3 Cal. 184.

23. The legislature may authorize a municipal corporation to pay claims invalid in law, but equitable and just in themselves, subject to the constitutional provision of equality and uniformity. *People v. Burr*, 13 Cal. 349.

24. The powers of a municipal corporation are subject to be increased, restricted



or repealed, at the will of the legislature, according to the varying exigencies of the State; vested rights acquired thereunder, as under all laws, only remaining unaffected. *Ib.* 349.

25. Even if a municipal charter provides for a city attorney to attend to the business of the city, yet other counsel may be employed when necessary, especially if the legal business is abroad. *Smith v. City of Sacramento*, 13 Cal. 533.

26. The ayuntamiento of San Francisco, in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land, in conformity with the survey of the town, as near as possible to the location of certain other lots which plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed a lot to plaintiff, which had been previously granted by the town to one Gerke: held, that an action for the breach of covenants of the warranty in this deed will not lie against the city. *Findla v. City of San Francisco*, 13 Cal. 535.

27. A general grant of the exclusive privilege of wharfage is wholly void, as exceeding the powers of a corporation, and it has the right to come into equity to remove this impediment from the free and beneficial exercise of its corporate functions and property. *City of Oakland v. Carpentier*, 13 Cal. 549.

28. The city of San Francisco holds the municipal lands of the pueblo not legally disposed of by grant or concession, and her title is wholly unaffected by sheriff's sales under execution against her, so far as these sales touch or affect the aforesaid pueblo lands. *Hart v. Burnett*, 15 Cal. 616.

29. The municipal lands to which the city of San Francisco succeeded were held in trust for the public use of that city, and were not either under the old government or new, the subject of seizure or sale under execution. *Ib.*

30. The people of a county are not a corporation, nor can they sue or be sued. *People v. Myers*, 15 Cal. 34.

31. A county is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. *Ib.*

32. The agents of the corporation can sell or dispose of this property of the corporation, only in the way and according

to the order of the legislature; and therefore the legislature may, by law operating immediately upon the subject, dispose of this property or give effect to any previous disposition or attempted disposition of it. *Payne v. Treadwell*, 16 Cal. 233.

33. The power to improve the streets necessarily included the authority to enter into a contract for that purpose, and it would be absurd to say that the city could not bind itself by a contract which it was legally authorized to make. It is certain that such a contract could not be treated as the contract of the property holders, and an action maintained upon it as against them. Their liability was exclusively to the city, and the manner of its enforcement was pointed out by the charter. *Argenti v. City of San Francisco*, 16 Cal. 263.

34. As to the contracts of corporations, the rule is, that where the question is one of capacity or authority to contract, arising either on a question of regularity of organization, or of power conferred by the charter, a party who has had the benefit of the contract cannot, in an action founded upon it, contest its validity. And this rule applies with equal force to all corporations, public or private. *Ib.* 264.

35. Contracts of corporations, whether public or private, stand on the same footing with the contracts of natural persons, and depend on the same circumstances for their validity and effect. The doctrine of ratification and estoppel is as applicable to corporations as to individuals, and the former are bound by the acts of their agents in the same manner, and to the same extent, as the latter. *Ib.* 265.

36. As a rule, the powers of corporations, municipal or others, must be exercised in the mode pointed out by the charter. But even a want of authority is not, in all cases, a sufficient test of the exemption of the corporation from liability in matters of contract. An executory contract, made without authority, cannot be enforced; but where the contract has been executed, and the corporation has received the benefit of it, the law interposes an estoppel, and will not permit the validity of the contract to be questioned. *Ib.* 273.

37. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made

## Municipal Corporation.

valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him, on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.

38. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and they would not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 276.

39. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund, and no other. *Argenti v. City of San Francisco*, 16 Cal. 276; *Martin v. City of San Francisco*, 16 Cal. 286.

40. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other

property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Argenti v. City of San Francisco*, 16 Cal. 284.

41. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of all the members elected to each board. On the fifth of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of city ordinances as ordinance number four hundred and eighty-one. At the time the ordinance was presented to the board of assistant aldermen, there was a vacancy in the board, occasioned by resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance, and three against it: held, that the ordinance not having received a majority of the entire board—of the constituent number—was never passed, but was in fact rejected. *McCracken v. City of San Francisco*, 16 Cal. 618.

42. The alleged ordinance number four hundred and eighty-one authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction, to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale, the common council passed an ordinance, designated in the official book as ordinance number four hundred and ninety-three, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance number four hundred and eighty-one, and the appropriation of a portion of the proceeds of the sale, did not constitute an adoption and

## Municipal Corporation.

approval of what had been previously done, or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

43. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of the property in one way only, to wit: by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. The mode of selling the property having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

44. The only way in which the common council could give validity to a sale, was by passing a law directing it. Ordinance number four hundred and ninety-three does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance number four hundred and eighty-one. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

45. The land directed by the terms of ordinance number four hundred and eighty-one to be sold, was set apart and dedicated as a public dock by an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

46. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city

property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city. *Ib.* 621.

47. *Holland v. The City of San Francisco*, 7 Cal. 361, distinguishable from this case is in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance number four hundred and ninety-three recognized and adopted ordinance number four hundred and eighty-one, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

48. Admitting that ordinance number four hundred and ninety-three did adopt and pass number four hundred and eighty-one, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

49. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Ib.* 623.

50. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Ib.*

51. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Ib.* 624.

52. Ordinance number five hundred and five of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance num-

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ber four hundred and eighty-one, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance number four hundred and eighty-one, because appropriating the proceeds of the sale. It assumes that ordinance number four hundred and eighty-one was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance number four hundred and eighty-one had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

53. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

54. The city of San Francisco is not estopped from denying the sale made under ordinance number four hundred and eighty-one, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance number four hundred and ninety-three, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance number four hundred and ninety-three, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council.

They acted, in passing ordinance number four hundred and ninety-three, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

55. The doctrine of estoppel, as laid down in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 280, controls the question here. *Ib.*

56. Even if the city would be estopped from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.*

57. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Ib.* 627.

58. The fifth section of article three of the charter of 1851 of the city of San Francisco, as to the city's not incurring debts beyond \$50,000, under certain circumstances, is directory, and is not a limitation of the power of the common council as to the amount of debts and liabilities to be incurred. *Ib.* 628.

59. This section of the charter refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys, not to justify the detention of the property of her citizens which she may have unlawfully obtained; and where, as in this case, plaintiff claims that the city has got his money without consideration—by mistake—and has appropriated it to municipal purposes, she is bound to refund; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all persons, whether natural or artificial. *Ib.* 630.

60. The restriction contained in the



fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts, or trespasses, or mistakes. *Ib.* 631.

61. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

See CORPORATION, ORDINANCE.

## MURDER.

1. The defendant was indicted for murder, tried, convicted of manslaughter only, and then obtained a new trial: held, that on the new trial upon the same or another indictment, he can plead the former conviction of manslaughter as an acquittal of the crime of murder, but may be convicted again of manslaughter. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

2. In an indictment for murder, it is sufficient to describe the deceased by the name by which he was commonly known. *People v. Freeland*, 6 Cal. 97; *People v. Kelly*, 6 Cal. 212.

3. A motion to set aside an indictment for murder on any ground which would have been good ground for challenge either to the panel or any individual grand juror, cannot be made in the district court when the defendant has been held to answer in the court of sessions before indictment. *People v. Freeland*, 6 Cal. 97.

4. To reduce the crime of murder, charged in the indictment, to manslaughter, a provocation must be established, ap-

parently sufficient to render the passion irresistible. *Ib.*

5. In an indictment for murder, an error in the middle name of the deceased is not material. *People v. Lockwood*, 6 Cal. 206.

6. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion, when expressed, was without qualification: held, that he was properly challenged by the prisoner, and should have been rejected. *People v. Williams*, 6 Cal. 207.

7. An indictment for murder, charging that the accused on or about a certain day did willfully, feloniously, and with malice aforethought, kill, murder, and put to death a certain person with a pistol and knife, without specifying further the facts and the manner, is bad. *People v. Aro*, 6 Cal. 209.

8. Murder is a conclusion of law, drawn from certain facts. *Ib.*

9. An indictment must contain a statement of the acts constituting the offense. *People v. Aro*, 6 Cal. 208; *People v. Hood*, 6 Cal. 238; *People v. Wallace*, 9 Cal. 31.

10. In an indictment for murder, the time of the death must be stated, so that it can be legally considered the consequence of the felony charged. *People v. Aro*, 6 Cal. 209; *People v. Lloyd*, 9 Cal. 56; *People v. Steventon*, 9 Cal. 275.

11. An indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment and within one year and a day before death ensued from the wound or assault. *People v. Kelly*, 6 Cal. 212.

12. Where the defendant was indicted and convicted of murder, and on appeal a new trial was ordered on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling of the grand jury, and subsequently a new indictment was found by a new grand jury, under which the prisoner was convicted: held, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not in jeopardy by the

## Municipal Corporation.

ber four hundred and eighty-one, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance number four hundred and eighty-one, because appropriating the proceeds of the sale. It assumes that ordinance number four hundred and eighty-one was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance number four hundred and eighty-one had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

53. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

54. The city of San Francisco is not estopped from denying the sale made under ordinance number four hundred and eighty-one, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance number four hundred and ninety-three, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance number four hundred and ninety-three, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council.

They acted, in passing ordinance number four hundred and ninety-three, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

55. The doctrine of estoppel, as laid down in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 280, controls the question here. *Ib.*

56. Even if the city would be estopped from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.*

57. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Ib.* 627.

58. The fifth section of article three of the charter of 1851 of the city of San Francisco, as to the city's not incurring debts beyond \$50,000, under certain circumstances, is directory, and is not a limitation of the power of the common council as to the amount of debts and liabilities to be incurred. *Ib.* 628.

59. This section of the charter refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys, not to justify the detention of the property of her citizens which she may have unlawfully obtained; and where, as in this case, plaintiff claims that the city has got his money without consideration—by mistake—and has appropriated it to municipal purposes, she is bound to refund; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all persons, whether natural or artificial. *Ib.* 630.

60. The restriction contained in the

fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts, or trespasses, or mistakes. *Ib.* 631.

61. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

See CORPORATION, ORDINANCE.

## MURDER.

1. The defendant was indicted for murder, tried, convicted of manslaughter only, and then obtained a new trial: held, that on the new trial upon the same or another indictment, he can plead the former conviction of manslaughter as an acquittal of the crime of murder, but may be convicted again of manslaughter. *People v. Gilmore*, 4 Cal. 376; *People v. Backus*, 5 Cal. 278.

2. In an indictment for murder, it is sufficient to describe the deceased by the name by which he was commonly known. *People v. Freeland*, 6 Cal. 97; *People v. Kelly*, 6 Cal. 212.

3. A motion to set aside an indictment for murder on any ground which would have been good ground for challenge either to the panel or any individual grand juror, cannot be made in the district court when the defendant has been held to answer in the court of sessions before indictment. *People v. Freeland*, 6 Cal. 97.

4. To reduce the crime of murder, charged in the indictment, to manslaughter, a provocation must be established, ap-

parently sufficient to render the passion irresistible. *Ib.*

5. In an indictment for murder, an error in the middle name of the deceased is not material. *People v. Lockwood*, 6 Cal. 206.

6. Where a juror in a trial for murder stated on his voir dire that he had expressed an opinion as to the guilt or innocence of the prisoner, and that such opinion, when expressed, was without qualification: held, that he was properly challenged by the prisoner, and should have been rejected. *People v. Williams*, 6 Cal. 207.

7. An indictment for murder, charging that the accused on or about a certain day did willfully, feloniously, and with malice aforethought, kill, murder, and put to death a certain person with a pistol and knife, without specifying further the facts and the manner, is bad. *People v. Aro*, 6 Cal. 209.

8. Murder is a conclusion of law, drawn from certain facts. *Ib.*

9. An indictment must contain a statement of the acts constituting the offense. *People v. Aro*, 6 Cal. 208; *People v. Hood*, 6 Cal. 238; *People v. Wallace*, 9 Cal. 31.

10. In an indictment for murder, the time of the death must be stated, so that it can be legally considered the consequence of the felony charged. *People v. Aro*, 6 Cal. 209; *People v. Lloyd*, 9 Cal. 56; *People v. Steventon*, 9 Cal. 275.

11. An indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment and within one year and a day before death ensued from the wound or assault. *People v. Kelly*, 6 Cal. 212.

12. Where the defendant was indicted and convicted of murder, and on appeal a new trial was ordered on the ground of objection to a juror, whereupon, on motion of the prosecution, the indictment was set aside on account of irregularities in the summoning and empanneling of the grand jury, and subsequently a new indictment was found by a new grand jury, under which the prisoner was convicted: held, that the second trial and conviction did not put the prisoner "twice in jeopardy for the same offense," as it is apparent that the prisoner was not in jeopardy by the

## Murder.

first trial, which had been held to be erroneous. *People v. March*, 6 Cal. 546.

13. The provision of the criminal code which empowers courts to set aside indictments on motion of the prosecution, is not limited to cases of defects in the instrument itself, and such a dismissal is no bar to a subsequent prosecution for the same offense amounting to a felony. *Ib.*

14. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction of every material allegation, and is therefore a conviction for murder. *Ib.*

15. On a trial for murder, evidence of a difficulty between the prisoner and other persons connected with the deceased on the same day, prior to the killing, and at which the deceased was not present, is admissible for the purpose of showing a conspiracy on the part of the prisoner and others against the deceased and others, and of connecting the two difficulties together. *People v. Stonecifer*, 6 Cal. 410.

16. The crime of murder is committed at the time when the fatal blow is struck. *People v. Gill*, 6 Cal. 638.

17. There can be no murder without malice, either expressed or implied. *People v. Moore*, 8 Cal. 93.

18. On a trial for murder, it is not error to instruct the jury that if the killing was the result of deliberation, no matter for how short a period, it would be murder in the first degree under our statute; where the evidence was sufficient to warrant the jury in finding the fact, that the killing was deliberate and premeditated. *Ib.*

19. On a trial for murder, weakness of mind, fear and excitement of the defendant, produced by the violence of the deceased, will not justify the homicide. *People v. Hawley*, 8 Cal. 391.

20. Mere words of reproach, without further cause or provocation, will not mitigate an intentional homicide committed with a deadly weapon, so as to reduce it to manslaughter. *People v. Butler*, 8 Cal. 441.

21. The facts necessary to constitute the crime of murder are, that a wound was inflicted with a felonious intent, that the wound was mortal, and that death ensued from the effects of the wound within a year and a day. *People v. Steventon*, 9 Cal. 275.

22. An indictment charging "murder

in the first degree" is good, as that offense includes the second degree and manslaughter. *People v. Dolan*, 9 Cal. 583.

23. The substantial facts necessary to constitute the crime charged must appear in the indictment with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge; but they need not be stated with the particularity required at common law. *Ib.*

24. Evidence of the dying declaration of a deceased person is admissible on a trial for murder. *People v. Glenn*, 10 Cal. 36.

25. In an indictment for murder it is not necessary that the indictment should specifically aver that the crime was "willful, deliberate and premeditated." It is sufficient to charge the crime in the words of the statute. *People v. Murray*, 10 Cal. 310.

26. An indictment for murder, which describes the weapons used by which death was produced, as a "loaded pistol," is sufficient, though it omits to state the manner in which the weapon was charged. *People v. Choiser*, 10 Cal. 311.

27. Where an indictment charged the defendants with the crime of murder, committed by them at a designated place and upon a designated day, by "shooting and wounding the deceased through the body, with a leaden bullet, discharged from a rifle, of which wound the deceased then and there died:" held, that it was not necessary to state in the indictment on what part of the body of the deceased the wound was inflicted, and that the indictment stated sufficiently that the wound was mortal. *People v. Judd*, 10 Cal. 314.

28. When an indictment for murder is used as a substitute for and in the place of an indictment for manslaughter, it must, where time is material, contain the averment as to time which would be essential in an indictment for manslaughter. *People v. Miller*, 12 Cal. 294.

29. There is no distinction between an indictment for murder, which, if good for manslaughter, shows on its face that the crime for manslaughter is barred, and an indictment for the special offense of manslaughter within the same statement as to time. *Ib.* 295.

30. On an indictment for murder, the verdict must state whether it be murder



## Murder.

in the first or second degree. *People v. Marquis*, 15 Cal. 38.

31. On an indictment for murder, the court of sessions is not bound to assign counsel for prisoner. *People v. Moice*, 15 Cal. 331.

32. Challenges to the panel of the grand jury, or to individual jurors, must be made at the empanneling of the jury; and on indictment for murder, transferred to the district court, the challenge cannot there be made. *Id.*

33. Indictment for murder. Plea, self-defense. Testimony conflicting as to facts occurring at the time of homicide. M., a witness for prosecution, testified that he was present August 24th, at a difficulty between defendant and deceased, in the course of which defendant discharged a double barreled shot gun at deceased, who fell forward; that immediately thereafter witness approached deceased, and saw lying on the ground about six feet forward of him, a pistol, which witness had previously seen in deceased's possession. Witness then detailed the circumstances immediately connected with the difficulty, in which he himself, armed with a pistol, took part with deceased against defendant; and then stated that the pistol he saw lying on the ground, deceased borrowed from C. some time before August 24th; that C. had given the pistol to deceased, who said he would clean it; and that he (witness) had often, since then, and before August 24th, seen the pistol in deceased's possession. Defendant's counsel then asked witness this question: "At the time C. gave the pistol to Sweeny, (deceased) was anything said by S. with reference to using the pistol against the defendant?" Objected to and ruled out as irrelevant and incompetent, unless evidence was produced tending to show that the thing said had come to the knowledge of defendant: held, that the court erred; that the evidence was admissible; that the declaration of deceased made at the time of procuring the weapon was part of the *res gestæ*, and illustrative of the transaction; that it showed the purpose for which the weapon was procured, and that this purpose was an item of proof upon the question, which of the two parties first assaulted—this being the point to which the testimony was offered. *People v. Arnold*, 15 Cal. 480.

34. The mere fact that one man threat-

ens to kill another does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused before they are admissible as evidence for him for any purpose—and then the effect and bearing of the testimony should be explained by the judge to the jury, before the case is finally submitted to them. *Id.*

35. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony to this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motives which prompted his action, and determining the character of the offense; that the ownership was part of the *res gestæ*, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People v. Costello*, 15 Cal. 353.

36. On the trial upon indictment for murder, the only witness for the prosecution who saw the transaction itself, testified in substance, that he and Tung Hoy met a large number of their countrymen, Chinese, six of whom took them out into the chapparal, tied him, and then one of the Chinese struck Tung Hoy on the head with a sword, another pierced him in the back, when he fell, and witness then escaped, and has never since seen him. The court instructed the jury that if the evidence of this witness were true, defendants were guilty of murder in the first degree: held, that the court erred; that such instruction assumed the homicide, which was not proven by the witness. *People v. Ah Fung*, 16 Cal. 138.

37. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only. *People v. Cornell*, 16 Cal. 188.

See CRIMES AND CRIMINAL LAW, FELONY, INDICTMENT, MANSLAUGHTER.

## Name.—Naturalization.

## NAME.

1. The code permits a party defendant whose name is unknown to be sued by any name. *Morgan v. Thrift*, 2 Cal. 563.

2. If an undertaking has to be executed by the plaintiff and is executed to the defendant by a wrong name, the latter has his remedy and may describe it as given to him, and may show that he was the party intended. *Ib.*

3. The defendant was sued and served by the name of George Mott, and judgment entered against him by the same name; afterwards, and without notice to defendant, the plaintiff, on his own motion, obtained an order from the court to amend the judgment, by altering the name from George to Gordon: it was held to be error. *McNally v. Mott*, 3 Cal. 235.

4. The use in a sale note of a given name for the goods sold is a warranty that they bear that name. *Flint v. Lyon*, 4 Cal. 20.

5. The fact that a Spanish name can be translated into English so as to mean nothing, does not alter or affect its potency as a name descriptive of a place. *Castro v. Gill*, 5 Cal. 42.

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7. In an indictment for murder, an error in the middle name of the deceased is not material. *People v. Lockwood*, 6 Cal. 206.

8. Where a defendant is sued as John —, service was returned upon James —, and judgment was rendered against J. —: held, to be in error, unless there was something in the record to show that the person served was the person sued. *Sutter v. Cox*, 6 Cal. 415.

9. The answer of the defendant waives the alleged error as to the change of parties, whereby the name of a defendant has been substituted for that of another without notice. *Smith v. Curtis*, 7 Cal. 587.

10. An objection was taken to the deposition of J. D. Marley in that he was described in the notice as Dick Marley, but it is obviated by the testimony of Marley that he was as well known by that as his proper name. *Jones v. Love*, 9 Cal. 71.

11. It is no ground of demurrer to a complaint, that the christian name of one of the plaintiffs does not appear. The court cannot judicially know that one of the plaintiffs had either a christian or heathen name, or that it is necessarily untrue that he has forgotten it if he had. *Nelson v. Highland*, 14 Cal. 75.

12. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on defendant by his proper name, as "John Doe alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 120.

13. The State prison contract was not defectively executed by the commissioners, from the fact that they signed it with their individual names, and not with the name of the State. The contract purports, in its body, to be between the State, acting by the commissioners, under the act of the 21st of March, 1856, of the one part, and Estell on the other, and is signed by the commissioners, with the affix of "board of State prison commissioners." The instrument does not purport to be the act of the commissioners alone, but the act of the State by them. The State, by them, makes the lease and contract, and it is with the State that the lessee enters into the covenants and agreements contained in the indenture. *State of California v. McCawley*, 15 Cal. 456.

## NATURALIZATION.

1. The power to naturalize is made a judicial power by act of Congress. *Ex parte Knowles*, 5 Cal. 301.

2. The provision of the constitution of the United States which gives Congress the power to establish "a uniform rule of naturalization" is construed to mean, that the rule when established shall be executed by the States. *Ib.*

3. Under the act of Congress of 1802, "every court of record in any individual State having common law jurisdiction and a seal, and clerk or prothonotary, shall be

considered as a district court within the meaning of this act," and such courts have power to naturalize. *Ib.*

4. The supreme court of this State, having exclusive appellate jurisdiction, has no power to naturalize. *Ib.* 302.

5. The legislature of California has by express enactment conferred jurisdiction on the district courts of this State to grant naturalization, according to the rules established by Congress. *Ib.* 306.

6. All other courts of this State being courts of inferior and limited powers, and although some are courts of record, yet having only statutory and not common law jurisdiction, they have no power to grant naturalization, and any attempt of the kind by them would be coram non judice and void. *Ib.*

7. The declaration of a grand juror, that he is a naturalized citizen, should be received by the court as prima facie true, and proof thereof, by actual production of the papers, is unnecessary. *People v. Roberts*, 6 Cal. 215.

See ALIEN, ELECTION.

## NEGLIGENCE.

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2. A vessel in the harbor of San Francisco, moored in the usual track of bay and river steamers, should set a light and keep a watch in a dark night, or she cannot recover damages for an injury sustained by being run into by a steamer, where there was neither gross negligence nor intentional wrong on the part of the steamer. The want of such watch and light is to be deemed negligence per se, and the court should instruct the jury in such case to find a verdict in favor of the defendant. *Innis v. Steamer Senator*, 1 Cal. 460.

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6. There is no doubt that ditch owners are responsible for wanton injury or gross negligence, but they are not liable for mere accidental injury where no negligence is shown, to a miner locating above the line subsequent to the construction of the ditch. *Tenney v. Miners' Ditch Co.*, 7 Cal. 340.

7. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento v. Kirk*, 7 Cal. 420.

8. A person who undertakes the erection of a building or other work for his own benefit is not responsible for injuries to third persons, occasioned by the negligence of a person or his servants who are actually engaged in executing the whole work under an independent contract. *Boswell v. Laird*, 8 Cal. 490.

9. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had neglected to sue in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

10. Where a notary did not faithfully perform his duty in taking an acknowledgment, but was guilty of gross and culpable negligence, by a mistake made therein, he is responsible to the party injured for the damages resulting from this negligence. *Fogarty v. Finlay*, 10 Cal. 245.

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## Negligence.

been known to him ; if he did not read it, he is equally guilty of negligence. *Ib.*

12. The question of negligence in the management of, and the degree of it, must necessarily depend, in a great measure, upon the surrounding facts, such as the existence and exposure of property below the dam, and the like ; for what under one state of facts would be prudence, might, under a different condition of things, be gross or even criminal negligence. *Hoffman v. Tuolumne County Water Co.*, 10 Cal. 416 ; *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 544.

13. An injunction will not be sustained to stay proceedings under a judgment obtained by neglect of a party or counsel, where, if the neglect were excusable, full relief might have been had on motion in the original action. *Borland v. Thornton*, 12 Cal. 445.

14. In an action against a railroad company, for running over a horse and killing him, the plaintiff has the right to prove the custom of the country, "to permit domestic animals to roam at large upon the unenclosed commons," where the defense is negligence on the part of the plaintiff, in allowing the horse to run at large. *Waters v. Moss*, 12 Cal. 538.

15. Gross negligence, but not the want of reasonable care on the part of another, can be set up in defense to an action for damages for the injuries thus suffered. *Fraler v. Sears Union Water Co.*, 12 Cal. 558.

16. To charge an attorney with negligence in failing to set up a defense based upon certain facts communicated to him by his client, he must show by evidence the existence of such facts, and they were susceptible of proof at the trial by the exercise of proper diligence on the part of his attorney. *Hastings v. Halleck*, 13 Cal. 209.

17. Where in a suit a question has been made and decided by the supreme court, counsel cannot be charged with negligence in acting upon that decision as the law of the case. *Ib.* 210.

18. Where one having a claim to collect agreed with another to take his claim against the common debtor and treat it as his own in any suit brought for the debt, costs and expenses to be shared pro rata, and afterwards prosecuted both claims to judgment in his own name, and in his own

name bought the property of the defendant on execution sale, and left it with an agent for sale, he is not liable to an action for money had and received or in indebitatus assumpsit. For gross negligence or bad faith, he would be responsible in a different form of action. *Herrick v. Hodges*, 13 Cal. 433.

19. Common carriers are liable for the slightest neglect. They are held to extraordinary diligence and care. And in case of injury, the presumption is prima facie, that it occurred by the negligence of the coachman. The onus probandi is on the proprietors to show no negligence, and that the injury was occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent. *Fairchild v. California Stage Co.*, 13 Cal. 601.

20. Skillful or unskillful and negligent conduct of a case is an important subject of inquiry in an action by an attorney for the value of his professional services ; anything which shows the services were not of the value claimed—as the nature of the suit conducted, its little difficulty, small amount, little skill requisite, absence of skill—is competent, under the issue of value. *Bridges v. Paige*, 13 Cal. 641.

21. A trial may result successfully and yet the attorney be guilty of negligence. His want of skill or neglect may put the client to great expense to redeem his mistakes. *Ib.* 642.

22. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed, among other things, to find specially as to the negligence of the captain or crew of the steamer, and they found generally for plaintiff, four hundred dollars damages ; and, also, that the steamer's spark-catcher was not sufficient to prevent sparks from communicating with the shore and endangering property ; the verdict was held good in the absence of any objection at the time of its rendition, that it was not responsive to the special direction. *Algier v. Steamer Maria*, 14 Cal. 171.

23. Probably the finding apart from the general verdict was a finding of negligence ; for an insufficient spark-catcher is hardly distinguishable from none at all ; and this is proof of negligence. *Ib.*

24. The fact that fire was communicated from the engine of defendant's cars

to plaintiff's grain, with proof that this result was not probable, from the ordinary working of the engine, is prima facie proof of negligence, sufficient to go to the jury. *Hall v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

25. To charge the officers of a corporation with a loss sustained by a stockholder in a diminution of the value of the stock, alleged to have been caused by their mismanagement, it would appear very clearly that the loss was occasioned by their gross negligence or willful misconduct. *Neall v. Hill*, 16 Cal. 151.

## NEGRO.

1. The arrest and commitment for deportation of fugitive slaves does not determine their slavery. It leaves that to future adjudication. *Ex parte Perkins*, 2 Cal. 438.

2. A statute is not ex post facto, and impairs no obligation which derives no right nor constitutes the refusal to return to servitude a crime, but simply provides for the deportation of slaves. *Ib.* 440.

3. If the slaveholder had authority to bring his slaves here under the constitution of the United States, the right could not be abridged or controlled until the admission of California as a State. *Ib.*

4. The constitution of the United States recognizes a property in the class of persons known as slaves, and the institution is a social and political one. *Ib.*

5. The civil and criminal codes exclude the negro, black and mulatto, as witnesses against or for a white person, and this is to designate the race as between white, black and Indian. *People v. Hall*, 4 Cal. 399; *Speer v. See Yup Co.*, 13 Cal. 73; *People v. Elyea*, 14 Cal. 146.

6. The indicium of color is not an infallible test of the competency of a witness under the act excluding black mulattoes and Indians from testifying for or against white persons. *People v. Elyea*, 14 Cal. 145.

7. The right of transit through each State with every species of property known to the constitution of the United

States and recognized by that paramount law is secured by that instrument to each citizen, and does not depend upon the uncertain and changeable ground of mere comity. *Ex parte Archy*, 9 Cal. 162.

8. The character of immigrant or traveler bringing with him a slave into this State must last so long as it is necessary, by the ordinary rules of travel, to accomplish a transit through the State. Nothing but accident or imperative necessity could excuse a greater delay. Something more than mere ease or convenience must intervene to save a forfeiture of property which he cannot hold as a citizen of the State through which he is passing. But visitors for health or pleasure stand in a position different from travelers on business, and are protected by the law of comity. *Ib.* 165.

9. It is the right of the judiciary, in the absence of legislation, to determine how far the policy and position of this State will justify the giving a temporary effect, within the limits of this State, to the laws and institutions of a sister State. To allow mere visitors to this State for pleasure or health to bring with them, as personal attendants, their own domestics, is not any violation of the end contemplated by the constitution of this State. *Ib.* 166.

10. The privileges extended to visitors cannot be extended to those who come for both business and pleasure. A mere visitor is one who comes only for pleasure or health, and engages in no business while here, and remains only for a reasonable time. If the party engage in any business, or employ his slave in any business, except as a personal attendant upon himself or family, then the character of visitor is lost, and his slave is entitled to freedom. *Ib.* 168.

See FUGITIVE SLAVES.

## NEW MATTER.

See ANSWER, XIII, 7.

In general. •

## NEW TRIAL.

- I. In general.
- II. Grounds of the Motion for New Trial.
  - 1. Insufficiency or Errors of Evidence.
  - 2. Newly Discovered Evidence.
  - 3. Conflicting Evidence.
  - 4. Surprise.
- III. When a New Trial is not necessary.
  - 1. In Equity Cases.
- IV. In Criminal Cases.
- V. Notice of Motion for New Trial.

## I. IN GENERAL.

1. A judgment was obtained in the court of first instance which was transferred to the district court. The defendant in that action filed his complaint against the plaintiff, the judgment creditor in the district court, alleging fraud in the recovery of that judgment, and praying to have the judgment set aside and a new trial had. The defendant answered the complaint and denied the allegation, and the court set aside the judgment and awarded a new trial: held, that this was a final judgment in the cause, and that the new trial awarded was to be had in the first action and not in the second. *Belt v. Davis*, 1 Cal. 139.

2. It is useless to put parties to the additional trouble and expense of a new trial, when we see clearly that after, perhaps, a protracted litigation, the result must be the same. *Tohler v. Folsom*, 1 Cal. 213; *Smith v. Compton*, 6 Cal. 26.

3. When a cause was appealed from, but the record showed no tangible point whereupon the judgment in the court below was rendered, the appellate court under the code of 1850\* has the power to grant a new trial, with instructions to the inferior court to require the parties to frame an issue upon regular pleadings. *Mena v. Leroy*, 1 Cal. 219.

4. Instead of remanding a cause for a new trial, where the judgment below is erroneous, this court will so modify it as finally to settle the controversy, when the rights of the parties appear from the record to be fully ascertained. *Persse v. Cole*, 1 Cal. 371.

5. The report of a referee should be taken advantage of by filing written objections to the entry of judgment thereon, or by a motion for a new trial, setting forth the grounds of the alleged error. *Porter v. Barling*, 2 Cal. 73.

6. If there be no exception in the report showing that the referee erred in part, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report, and an order granting a new trial will be reversed. *Tyson v. Wells*, 2 Cal. 130.

7. The power to grant or refuse new trials is one of legal discretion, and the abuse of it only will justify the appellate court in interfering with such order. *Drake v. Palmer*, 2 Cal. 181; *Cooke v. Stewart*, 2 Cal. 353; *Speck v. Hoyt*, 3 Cal. 420; *Watson v. McClay*, 4 Cal. 588; *Duell v. Bear River and Auburn W. and M. Co.*, 5 Cal. 86; *Hastings v. Steamer Uncle Sam*, 10 Cal. 341; *Hanson v. Barnhisel*, 11 Cal. 340; *Kimball v. Gearheart*, 12 Cal. 48; *Burnett v. Whitesides*, 15 Cal. 36; *Peters v. Foss*, 16 Cal. 358.

8. It is error to refuse a new trial where justice requires that the cause should be resubmitted. *Ross v. Austill*, 2 Cal. 192.

9. If the report of a referee contain sufficient on which to base a judgment, it is the duty of the court to enter judgment in accordance with the report as far as concerns the matter referred, and not entertain any objection thereto except on a motion for a new trial, when the report can be set aside. *Headley v. Reed*, 2 Cal. 324.

10. No power lies in a district court to set aside a judgment or grant a new trial after the expiration of the term. *Baldwin v. Kraemer*, 2 Cal. 583.

11. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made in statute time. *Heslep v. City of San Francisco*, 4 Cal. 2.

12. Errors in law, occurring in the court below, will be reviewed in the supreme court, although a new trial was not asked. *Brown v. Tolles*, 7 Cal. 399; *Rice v. Gashirie*, 13 Cal. 54.

13. A party should appeal, if aggrieved, from an order granting a new trial during the time allowed by the statute, and cannot, after taking his chances upon a second trial, rely on this fact as error. *Brown v. Tolles*, 7 Cal. 399.

\*This provision does not exist in the code of April 29th, 1851.



## In general.—Grounds of the Motion for New Trial.

14. The party in whose favor a judgment is rendered on a special verdict, must move for a new trial if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood v. Simpson*, 8 Cal. 108.

15. On appeal from a justice's court to a county court, on questions of law alone, if a new trial be ordered it should take place in the county court. *People v. Freelon*, 8 Cal. 518.

16. After appealing from a judgment alone, a party may appeal from an order overruling a motion for a new trial in the same case, provided the latter appeal is taken in time. *Marziou v. Pioche*, 8 Cal. 537.

17. A deposition of one of the defendants, introduced by plaintiff on trial, may be introduced by defendants in a new trial. *Turner v. McIlhaney*, 8 Cal. 579.

18. Where, pending a motion for a new trial in the district court, the defendants violate an injunction previously issued by said district court, the supreme court will issue a mandamus against the judge of such district court to compel him to issue his attachment for contempt. *Ortman v. Dixon*, 9 Cal. 24.

19. The appellate power of the supreme court over the county court could not be properly or efficiently exercised unless the power to grant a new trial existed in the county court. The county court certainly has power to grant a new trial. *Dickenson v. Van Horn*, 9 Cal. 211.

20. If any errors intervened on the trial of a cause, an order of the court below, granting a new trial, ought not to be disturbed. *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

21. Where an appeal is taken in the same notice, both from a final judgment and an order refusing a new trial, and it appears that sixty days from the entry of the order for a new trial have elapsed, the appeal, so far as the order is concerned, will on motion be dismissed. *Lower v. Knox*, 10 Cal. 481.

22. Where the facts show that the action of the court below approached nearly to an arbitrary exercise of its discretion, that action will not be reviewed unless there has been a motion for a new trial. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162.

23. Where the parties in the court below stipulated that a motion for a new trial should be denied, they cannot question in this court the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

24. The fact that instructions given by the court are lost or mislaid before a motion for new trial is heard is no ground to suspend the hearing of the motion or for a new trial. *Vischer v. Webster*, 13 Cal. 60.

25. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings v. Halleck*, 13 Cal. 207.

26. Where a party moves for a new trial and fails, he cannot, on the same facts, go into equity to enjoin the judgment rendered. *Collins v. Butler*, 14 Cal. 226.

27. On motion for new trial, it is irregular for the court to reverse its first judgment, and render a contrary one, without hearing or notice. *Mitchell v. Hackett*, 14 Cal. 667.

28. A party cannot appeal from an order overruling a motion for a new trial, when he fails to prosecute his motion before the district court, especially when the case involved complicated facts, and was not tried by the judge by whom the alleged errors were committed. The failure to prosecute in such a case is an abandonment of the motion. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Cal. 303; *Green v. Doane*, 15 Cal. 304.

29. The court below may refuse a new trial, even though both parties consent to it. Where a case has been once fully tried, parties have not an arbitrary discretion to renew the litigation. *Phelan v. Ruiz*, 15 Cal. 90.

## II. GROUNDS OF THE MOTION FOR NEW TRIAL.

30. Where from the record it appears highly probable that the judgment of the court below is founded neither upon law or equity, the supreme court should reverse the judgment or grant a new trial. *Reed v. Jourdain*, 1 Cal. 102.

## Grounds of the Motion for New Trial.

31. Where a judgment is rendered at 9 A. M. upon a summons citing defendant to answer at 10 A. M.: held, that the judgment is irregular, and a new trial will be ordered. *Parker v. Shephard*, 1 Cal. 132.

32. A new trial will not be granted where the evidence shows that a case cannot be made out, and it would consequently be a useless expense. *Suñol v. Hepburn*, 1 Cal. 285.

33. A new trial will be ordered, although a verdict may be excessive, if the court is satisfied that an improper charge was given to the jury, and the fact that it had no effect upon them does not clearly appear. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

34. Whether driving piles in a street extended into the bay of San Francisco is an obstruction to the free use of the street by the public, is a question for the jury to pass upon, and if not so submitted, a new trial will be granted. *City of San Francisco v. Clark*, 1 Cal. 386.

35. A new trial should not be granted on the affidavit of a jurymen, made after the verdict, and for the purpose of moving for a new trial, that he had formed and expressed an opinion before the trial. *People v. Baker*, 1 Cal. 405.

36. A new trial will be granted when the court is satisfied that the jury were misdirected in the charge, and that thereupon founded their verdict. *Gunter v. Geary*, 1 Cal. 468.

37. The whole charge to the jury should be taken together, and when considered, if it appear that the jury could not have been misled by it, a new trial will not be granted. *Carrington v. Pacific Mail S. S. Co.*, 1 Cal. 478.

38. A new trial will not be granted for an error by which the rights of the party were not prejudiced. *Kilburn v. Ritchie*, 2 Cal. 148.

39. The appellate court will not disturb the order of an inferior court in granting or refusing a new trial unless manifest error shall appear. *Bartlett v. Hogden*, 3 Cal. 58; *Watson v. McClay*, 4 Cal. 288.

40. A new trial will be ordered where there is such irregularity in the proceedings that the ends of justice will be better subserved. *Sannickson v. Brown*, 5 Cal. 58.

41. It is a proper exercise of power in a court to grant a new trial on the ground

of excessive damages, when the verdict is grossly inconsistent in its relation of the facts. *Potter v. Seale*, 5 Cal. 411.

42. A party cannot take his chances for a verdict on instructions given or refused without exception taken, and then after verdict except to the action of the court upon motion for a new trial. *Letter v. Putney*, 7 Cal. 423.

43. There having been no motion for a new trial, the supreme court cannot go behind the facts as found in the court below. *White v. Clark*, 8 Cal. 514; *Marziou v. Pioche*, 8 Cal. 537.

44. Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the judge. *Dickenson v. Van Horn*, 9 Cal. 211.

45. In a statement for a new trial, the evidence may be simply referred to, and need not be set out in the statement itself. *Ib.*

46. A failure to file a statement, setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the right to the motion. *Wing v. Owen*, 9 Cal. 247.

47. Where the statement embodied in the record is filed on a motion for a new trial, the appellate court will only examine the action of the court below in denying the motion, nor will it allow objections to an order entered in the court below by consent of parties. *Meerholz v. Sessions*, 9 Cal. 277; *Lower v. Knox*, 10 Cal. 481; *Brotherton v. Hart*, 11 Cal. 405.

48. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits; but the omission does not affect his right to raise the question as to errors apparent on the face of the record. *Branger v. Chevalier*, 9 Cal. 362.

49. Where the statement on motion for a new trial is not filed within the time prescribed by law, this court will only look to the judgment roll. *Lafferty v. Brownlee*, 11 Cal. 132.

50. Where there are no grounds or reasons stated on motions for nonsuit and new trial, and no exceptions taken to instructions of the court, errors cannot be assigned. *Holverstot v. Bugby*, 13 Cal. 44.

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 Grounds of the Motion for New Trial.—Insufficiency or Errors of Evidence.
 

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51. Where no motion for a new trial is made, the finding of facts by the court below is conclusive. *Rhine v. Bogardus*, 13 Cal. 74.

52. If, after verdict, no motion be made for a new trial, the supreme court will not review the testimony. *Liening v. Gould*, 13 Cal. 599.

53. Where instructions to the jury are not excepted to at the time they are given or refused, and a motion for new trial is made for error in giving and refusing such instructions, they cannot be considered on appeal from the order denying the motion. *Collier v. Corbett*, 15 Cal. 186.

54. Where a motion for a new trial is denied, and the record contains the statement used on such motion, but no statement on appeal from the judgment, this court can only examine the action of the court below in denying the motion—the judgment cannot be reviewed, except through the order made upon the motion, and from this order, no appeal having been taken, the case stands on the judgment roll. *Burdge v. Gold Hill and Bear River W. & M. Co.*, 15 Cal. 198.

55. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *McCartney v. Fitz Henry*, 16 Cal. 185.

### 1. Insufficiency or Errors of Evidence.

56. Unless the illegal testimony could have had no influence upon the verdict, and the presumption is that it did, a new trial should be granted. *Santillan v. Moses*, 1 Cal. 93.

57. A new trial will be granted if improper evidence went to the jury, and the court cannot clearly see that it had no effect or weight upon the jury. *Mateer v. Brown*, 1 Cal. 224.

58. A new trial will be ordered when, on account of the imperfections of the

record returned, the appellate court could not see the true state of facts given in evidence. *Moore v. Reynolds*, 1 Cal. 353.

59. Where improper evidence is submitted to the jury, under objection, a new trial will be granted on appeal unless the court can see that such evidence could not possibly have had an effect upon the jury prejudicial to the appellant. *Innis v. Steamer Senator*, 1 Cal. 462.

60. The appellate court will decline to review the facts of the case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith v. Phelps*, 2 Cal. 121; *Griswold v. Sharpe*, 2 Cal. 23; *Brown v. Graves*, 2 Cal. 119; *Ingraham v. Gildermeester*, 2 Cal. 484; *Whitman v. Sutter*, 3 Cal. 179; *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Cal. 108; *Marziou v. Pioche*, 8 Cal. 537; *Liening v. Gould*, 13 Cal. 599; *Duff v. Fisher*, 15 Cal. 380.

61. A new trial will be granted when the verdict is contrary to law and evidence. *People v. Martin*, 2 Cal. 484.

62. Where no motion for a new trial is made, the appellate court cannot examine the evidence to see whether it warrants the finding. *Covillaud v. Tanner*, 7 Cal. 39; *Brown v. Tolles*, 7 Cal. 399.

63. Where the verdict of the jury is clearly against the evidence, a new trial will be awarded. *Bagley v. Eaton*, 8 Cal. 164; *Potter v. Carney*, 8 Cal. 574.

64. When the evidence is not set out in a statement on appeal, the supreme court will presume that the court below had good reason for granting a new trial. *Dickenson v. Van Horn*, 9 Cal. 211.

65. Where the motion for new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 543.

66. Where there is some evidence to support a verdict, and a motion for a new trial is overruled, the supreme court will not interfere. *Baxter v. McKinlay*, 16 Cal. 76.

67. On motion for a new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, cannot disregard any

## Newly Discovered Evidence.—Conflicting Evidence.

portion of the evidence before the jury. The question as to the competency of the evidence cannot be raised on such motion. *McCloud v. O'Neal*, 16 Cal. 397.

## 2. Newly Discovered Evidence.

68. On motion for a new trial on the ground of newly discovered evidence, that evidence should be fully set forth or the motion will be denied. *Perry v. Cochran*, 1 Cal. 180.

69. A party ought not to rely upon his his own single and unsupported statement, on a motion for a new trial, of the newly discovered evidence, but should if possible procure the affidavits of the persons whose testimony he deems material, so that the court may be satisfied as to what facts he will testify. *Rogers v. Huie*, 1 Cal. 433.

70. An application for a new trial on the ground of newly discovered evidence must show affirmatively that the evidence is new, material and not cumulative; that the applicant has used due diligence in preparing his case for trial, and that the new evidence was discovered after the trial, and will be important, and tend to prove facts which were not distinctly in issue on the trial, or were not then known or investigated by proof. *Bartlett v. Hodgdon*, 3 Cal. 57; *Brooks v. Lyon*, 3 Cal. 114; *Burritt v. Gibson*, 3 Cal. 399.

71. Where the report of a referee disclosed doubt in his conclusions and acts, and before the report as made up was filed, the defendant applied for leave to introduce newly discovered evidence, which was refused from a doubt as to his power, though he reported to the court that such evidence, if given, would probably cause a different result; held, that a new trial should have been had. *Hoyt v. Saunders*, 4 Cal. 347.

72. A new trial on the ground of newly discovered evidence should not have been granted where such evidence is merely cumulative, and is that of a witness whose deposition was used on the trial, and particularly where the verdict shows he was not believed at first. *Gaven v. Dopman*, 5 Cal. 342.

73. In cases of conflicting testimony, newly discovered evidence merely cumu-

lative is no ground for a new trial. *Taylor v. California Stage Co.*, 6 Cal. 230.

74. A new trial will not be granted on the ground of newly discovered evidence which is merely cumulative and going to contradict the witnesses of the other party. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

75. It is not good ground for a new trial that the defendant discovered material testimony at too late a period to produce the same at the trial. It would, however, be good ground on which to base a motion for continuance. *Berry v. Metzler*, 7 Cal. 418.

76. A new trial will not be granted on the ground of newly discovered evidence, which is alleged to be a deed recorded in the county recorder's office a year before the trial, and a record of a judgment in the same court in which the cause was tried. *Weimer v. Lowery*, 11 Cal. 113.

77. On a motion for a new trial on the ground of newly discovered evidence, the affidavit of one of the defendants as to what an absent witness will testify is insufficient. It should be accompanied by an affidavit of the witness himself, or time should be applied to get it, or its absence accounted for. *Pilot Rock Creek Canal Co. v. Chapman*, 11 Cal. 162; *Jenny Lind Co. v. Bower*, 11 Cal. 199.

78. Motions for new trial on the ground of newly discovered evidence regarded with distrust and disfavor, and the strictest showing of diligence and all other facts necessary is required. This is especially true when the new testimony is to impeach a witness on the trial, or is merely cumulative. The party must show by his own affidavit that he did not know of this evidence, and could not by due diligence have obtained it; the affidavit of a witness is not sufficient. (In this case the party himself was present.) *Baker v. Joseph*, 16 Cal. 180.

## 3. Conflicting Evidence.

79. The verdict of a jury should not be disturbed and a new trial granted, when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Johnson v. Pendleton*, 1 Cal. 133; *Hoppe v. Robb*, 1 Cal. 373; *Vogan v. Barrier*, 1



## Surprise.

Cal. 187; *Dwinelle v. Henriquez*, 1 Cal. 389; *Griswold v. Sharpe*, 2 Cal. 23; *Taylor v. McKinlay*, 4 Cal. 104; *Duell v. Bear River and Auburn W. & M. Co.*, 5 Cal. 86; *Conroy v. Flint*, 5 Cal. 329; *White v. Todds' Valley Water Co.*, 8 Cal. 444; *Scannell v. Strahl*, 9 Cal. 177; *Weddle v. Stark*, 10 Cal. 303; *Bensley v. Atwill*, 12 Cal. 240; *Ritter v. Stock*, 12 Cal. 402; *Mc Garrity v. Byington*, 12 Cal. 432; *Visher v. Webster*, 13 Cal. 60; *Stevens v. Irwin*, 15 Cal. 504.

## 3. Surprise.

80. On a motion for a new trial on the ground of surprise at a trial, by the non-attendance of witnesses, the affidavit should show that reasonable diligence had been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly, the facts which the party expects to prove by the witnesses. *Rogers v. Huie*, 1 Cal. 432.

81. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks v. Lyon*, 3 Cal. 113.

82. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham v. McFarland*, 5 Cal. 138.

83. Surprise at the testimony of a witness called by the adverse party, is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor v. California Stage Co.* 6 Cal. 230.

84. The mistake of counsel as to the competency of a witness, is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

85. Surprise at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 526.

86. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a

new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

87. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not with the use of due diligence unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams v. Price*, 11 Cal. 213.

'88. A new trial will not be granted on the affidavit of the attorney of record, that he as well as his client and witnesses were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice of a day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 230.

89. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to plaintiff thereon in the sum, etc. The complaint then avers: Plaintiff further shows that after said note was executed, etc., \* \* \* defendant by virtue of \* \* \* proceedings in insolvency, etc., \* \* \* claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows that after said discharge as aforesaid, on or about \* \* \* defendant promised "the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith v. Richmond*, 15 Cal. 502.

90. Where in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his

## When a New Trial is not Necessary.—In Criminal Cases.

title as averred, at least in substance, and he cannot, against defendant's objection, recover on another and different title. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one so set up, it was error in the Court below to refuse a new trial, the motion for which was based on an affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan v. Delaney*, 16 Cal. 87.

## III. WHEN A NEW TRIAL IS NOT NECESSARY.

91. An appeal may be taken from a judgment of the district court without moving for a new trial.\* *Innis v. Steamer Senator*, 1 Cal. 459.

92. The granting a nonsuit on the facts, is a question of law, and if the proper exception be taken, may be reviewed on appeal without motion for a new trial. *Cravens v. Dewey*, 13 Cal. 42; *Darst v. Rush*, 14 Cal. 83.

93. For error of law excepted to, an appeal lies without motion for new trial. *Rice v. Gashirie*, 13 Cal. 55.

94. A special verdict settles the facts, and the court, by its judgment, pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for the purpose must be taken within the statutory time. *People v. Hill*, 16 Cal. 117.

## 1. In Equity Cases.

95. Where, in a court below, an erroneous judgment has been entered in favor of a plaintiff, on a report of a referee, and the court erroneously sets aside the report and grants a new trial, from which action of the court the plaintiff appeals, the supreme court in a chancery case will correct both errors at the same time. *Grayson v. Guild*, 4 Cal. 124.

96. Where, in chancery cases, certain issues of fact are submitted to, and deter-

mined by a jury, the granting of a new trial is entirely discretionary with the chancellor, and his action is not revisable. *Gray v. Eaton*, 5 Cal. 448.

97. In equity cases, although no motion for a new trial is made, the supreme court will not hold the finding of facts by the court below conclusive. *Dewey v. Bowman*, 8 Cal. 148.

98. An appeal lies from an order setting aside a final decree in equity, and granting a rehearing, as it is in effect granting a new trial. *Riddle v. Baker*, 13 Cal. 302.

99. A rule of the district court requiring a party on motion for new trial or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell v. McKune*, 14 Cal. 232.

100. A refusal to grant a new trial is no ground of error, particularly in an equity case where there may have been no necessity for a new trial, as upon application to the court upon the pleadings and facts before it, the proper decree might have been rendered, notwithstanding the verdict, or if refused, the error corrected by appeal. *Phelan v. Ruiz*, 15 Cal. 90.

## IV. IN CRIMINAL CASES.

101. In cases of felony the prisoner must be present during the whole of his trial, and where depositions are read to the jury during his absence, a new trial will be granted. *People v. Kohler*, 5 Cal. 72.

102. The supreme court will not review in criminal cases, an order refusing a new trial, moved on the ground that the verdict is against evidence, unless the record contains a statement setting forth all the material portions of the testimony. *People v. York*, 9 Cal. 422.

103. When it is manifest from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment and order a new trial. *People v. Acosta*, 10 Cal. 196.

104. In a criminal case, if the court below impose upon counsel against their

\* This decision was made under the code of 1850, which provision is repealed by the code of April 29, 1851.

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 Notice of Motion for New Trial.—Terms on Granting a New Trial.
 

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consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel, that the prisoner was deprived by the limitation of the opportunity of a full defense, for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

105. In criminal cases, on motion for a new trial, the prisoner may bring up any ruling of the court which denies him the benefit of a statutory privilege, as a written charge to the jury. *People v. Ah Fong*, 12 Cal. 348.

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 V. NOTICE OF MOTION FOR NEW TRIAL.

106. A motion for a new trial must be made within the time allowed by statute, unless there be circumstances which take the case out of the general rule. *Elliott v. Osborne*, 1 Cal. 396; *Dennison v. Smith*, 1 Cal. 437.

107. An injunction order restrains the acts of the party, but it does not stay the running of time, and the effect of it cannot be to postpone the statutory time required in giving notice of a motion for a new trial. *Elliott v. Osborne*, 1 Cal. 397.

108. A motion for a new trial, filed within the time allowed by law, stays the operation of the judgment, and preserves all rights until the same can be heard and determined, and is not affected by the adjournment of the court for the term. *Lurrey v. Wells*, 4 Cal. 106.

109. An appeal from an order granting a new trial, to be effectual, must be taken within the time allowed by statute. *Brown v. Tolles*, 7 Cal. 399.

110. A notice of motion for a new trial, unaccompanied by the affidavit required by statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 8 Cal. 510.

111. On a motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76.

112. A party failing to give notice in time, of his intention to move for a new trial, or file his statement in time, waives

his right to move for a new trial. *Caney v. Silverthorne*, 9 Cal. 68.

113. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all ground of error based on the affidavits. *Branger v. Chevalier*, 9 Cal. 362.

114. The granting of a nonsuit on the facts, is a question of law, and if the proper exceptions be taken, may be reviewed on appeal, without motion for a new trial. *Cravens v. Dewey*, 13 Cal. 42.

115. Notice of motion for new trial given one day before judgment rendered, and six days after filing the report of the referee to whom the case had been sent to find the facts, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of judgment, the notice was premature, and the proceedings on the motion void. *Mahoney v. Caperton*, 15 Cal. 314.

116. Moving for new trial does not of itself operate to extend the time for filing a statement on appeal from the judgment. And where judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Ib.*

117. On the rendition of a special verdict the trial is terminated, and notice of motion for new trial must be given within two days thereafter, or the proceedings based upon such notice will be disregarded. *People v. Hill*, 16 Cal. 117.

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 VI. TERMS ON GRANTING A NEW TRIAL.

118. When a new trial was to be had on payment of costs: held, that the acceptance of costs did not waive the right to appeal from the order granting a new trial. *Tyson v. Wells*, 1 Cal. 378.

119. Where, on appeal, the complaint is so radically defective, as not to authorize a judgment, a new trial may be granted, with leave to amend upon just terms. *Sterling v. Hanson*, 1 Cal. 480.

120. The court may impose terms in granting or refusing a new trial, and in the use of sound and admitted discre-

## Terms of a New Trial.—Nonjoinder.—Nonsuit.

tion, may require a remittitur of a portion of an excessive judgment, or grant a motion for a new trial. *Benedict v. Cozzens*, 4 Cal. 382.

121. The district courts have power to impose terms to the granting of new trials in proper cases and where a party complies with the terms imposed, and avails himself of the advantage of the order, he cannot afterwards question its correctness. *Battelle v. Connor*, 6 Cal. 141.

122. It is not error in the court below to refuse a new trial, provided the successful party will consent to a reduction of his judgment. *Chapin v. Bourne*, 8 Cal. 296.

123. The terms of a new trial are peculiarly within the discretion of the court, with the exercise of which, the appellate court will not interfere except upon a clear showing of abuse, or grossly unreasonable terms. *Rice v. Gashirie*, 13 Cal. 55.

For statement on new trial, see STATEMENT.

## NEWLY DISCOVERED EVIDENCE.

See EVIDENCE, XXI; NEW TRIAL, II, 2.

## NONJOINDER.

1. Where it appears by the plaintiff's testimony that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a co-plaintiff on such terms as may be just. *Acquital v. Crowell*, 1 Cal. 192.

2. If the plaintiff relies upon the contract made with several parties, they must be all joined in the action, unless there be an entirely new contract substituted, even when several parties have been treated as separate individuals in the transaction. *Mc Gilvery v. Morehead*, 3 Cal. 270.

3. A defendant cannot object to nonjoinder of another person as coplaintiff, after forcing the plaintiff to amend by omitting him. *Powell v. Ross*, 4 Cal. 198.

4. The objection that there is a nonjoinder of parties comes too late on appeal; it should have been taken advantage of by demurrer. *Beard v. Knox*, 5 Cal. 252.

5. Where the plaintiff had no knowledge until the trial, that a third party was a secret partner of the defendant, the nonjoinder of such third party cannot be objected to by the defendant. *Tomlinson v. Spencer*, 5 Cal. 293.

6. Where a defect of parties appears upon the face of the complaint, the objection must be taken advantage of by demurrer. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334.

7. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney v. Stark*, 8 Cal. 516.

See ACTIONS, JOINDER OF, MISJOINDER.

## NONSUIT.

1. Courts have the power to order the plaintiff to submit to a compulsory nonsuit. *Ringgold v. Haven*, 1 Cal. 115.

2. Where there is no evidence upon some material point necessary to be proven in order to sustain the complaint, equally as where there is no evidence at all upon any point, it becomes the duty of the court, upon the motion of the defendant, to order a nonsuit. *Ringgold v. Haven*, 1 Cal. 116; *Dalrymple v. Hanson*, 1 Cal. 127; *Mateer v. Brown*, 1 Cal. 222.

3. The complaint contained averments against defendants as common carriers, and the action was for damages done to merchandise in its transportation: held, it was indispensable for the plaintiff to prove that the defendants were common carriers, and that the goods were delivered to and received by them as such for the purpose of being transported for hire. *Ringgold v. Haven*, 1 Cal. 116.

4. Where defendant moved for nonsuit,



## Nonsuit.

and afterwards introduced evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded: held, that the defendant waived his motion and could not insist upon it, on appeal. *Ringgold v. Haven*, 1 Cal. 117; *Smith v. Compton*, 6 Cal. 26; *Winans v. Hardenbergh*, 8 Cal. 293; *Perkins v. Thornburgh*, 10 Cal. 190.

5. Where it appears by the plaintiff's testimony that there is a nonjoinder of persons who should have been made plaintiffs, and a motion for a nonsuit is made on this ground, the court may permit an amendment by adding the name of a coplaintiff on such terms as may be just. *Acquital v. Crowell*, 1 Cal. 192.

6. A party making a motion for a nonsuit on one ground, impliedly waives all others and cannot avail himself of a different position on appeal from that assumed in the court below. *Mateer v. Brown*, 1 Cal. 222.

7. If the evidence given by the plaintiff would not authorize a jury to find a verdict for him, or if the court would set it aside if so found, as contrary to evidence, in such case it is the duty of the court to grant a nonsuit. *Ib.*

8. If the statement does not explicitly state the particular ground of granting the nonsuit, yet if it be a necessary inference from what is disclosed, it is sufficient for the action of the appellate court, and it will be reversed if erroneous. *Morgan v. Thrift*, 2 Cal. 563.

9. Where the plaintiff fails to appear and prosecute his suit and the defendant moves a nonsuit, the court has no alternative but to grant it. *Peralta v. Mariea*, 3 Cal. 187.

10. Where the evidence and the reasonable presumption tend to establish the fact in controversy, a nonsuit is improper. The case should be given to the jury. *DeRo v. Cordes*, 4 Cal. 119.

11. Where an action was decided by the supreme court, and judgment reversed upon the ground that defendants erroneously were not allowed to show the unsoundness of the article sued for, a nonsuit would not be proper on the second trial, if the defendants claimed the value for so much of the article delivered before the contract was rescinded. *Ruiz v. Norton*, 4 Cal. 361.

12. Costs, by way of indemnity, ought

not to be taxed in case of a nonsuit. *Rice v. Leonard*, 5 Cal. 61.

13. Where one party to an action is misled by the act of the other, whereby a nonsuit is taken, justice demands a new trial should be granted. *Pinkham v. McFarland*, 5 Cal. 138.

14. The liability of a guarantor on a promissory note is strictly that of an endorser, and unless there is proof of notice of protest, a nonsuit will be granted. *Pierce v. Kennedy*, 5 Cal. 139.

15. In an action against a ferryman, it was no error to allow the plaintiff to introduce the ferry license, after a motion for nonsuit, as this is a matter within the discretion of the court. *May v. Hanson*, 5 Cal. 365.

16. A court may in its discretion allow a plaintiff, after defendants have closed their case, and before the case is submitted, to supply an omission in the testimony occasioned by mistake or inadvertence, nor is such action any ground of reversal, unless it appear that injustice has been done by an abuse of discretion. *Priest v. Union Canal Co.*, 6 Cal. 171.

17. An appeal does not lie in favor of the plaintiff in an action, from a judgment of nonsuit, entered on his own motion. *Imley v. Beard*, 6 Cal. 666.

18. Mere surprise at the evidence given by the witnesses of the defendant, is not sufficient ground for granting the plaintiff a new trial. He should submit to a nonsuit, and not take his chances for a verdict. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

19. After the motion for a nonsuit, the court may upon terms allow an amendment of the complaint, if it would not operate as a surprise upon the defendant, but if this is not done the plaintiff cannot recover. *Farmer v. Cram*, 7 Cal. 136.

20. A failure on the part of a plaintiff to make out his case, and error in the court in refusing to instruct the jury as in case of nonsuit, can be cured by the testimony of the defense. *Winans v. Hardenbergh*, 8 Cal. 293.

21. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 270.

22. Where a motion is made for a nonsuit, without stating the grounds upon

## Nonsuit.—Notary Public.

which it is made, it is not error to overrule the motion. *Kiler v. Kimball*, 10 Cal. 268.

23. The grounds of a motion for a nonsuit must appear in the record, otherwise this court will not consider such motion. *Mc Garrity v. Byington*, 12 Cal. 429.

24. The granting of a nonsuit on the facts is a question of law, and if the proper exceptions be taken may be reviewed on appeal without motion for new trial. *Cravens v. Dewey*, 13 Cal. 42; *Darst v. Rush*, 14 Cal. 83.

25. Nonsuit is not proper where there is any evidence tending to prove the case. *Cravens v. Dewey*, 13 Cal. 42.

26. Where no grounds or reasons are stated on motion for nonsuit and new trial, and no exceptions taken to instructions of the court, errors cannot be assigned. *Holverstot v. Bugby*, 13 Cal. 44.

27. As a nonsuit determines nothing, the plaintiff may proceed and under better proof, if he can procure it, try his case anew. *Wilson v. Corbier*, 13 Cal. 168.

28. The question of misjoinder or want of common interest in the subject of the suit, should, if it appeared by the plaintiff's evidence, have been taken advantage of by motion for nonsuit or upon instructions. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

29. Plaintiff has a right to take a nonsuit at any time before the jury retires, there being no counter claim, nor is he bound to tender costs before nonsuit. *Hancock Ditch Co. v. Bradford*, 13 Cal. 637.

30. Where plaintiffs having excepted to the ruling of the court, excluding certain evidence, take, in consequence of such ruling, a nonsuit, with leave to move to set it aside, they do not waive any of their rights as to the exception taken. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 549.

31. In ejectment upon a disclaimer of possession or interest in the property, a judgment for plaintiff cannot be entered. When such disclaimer is relied upon, the only proper judgment is one of nonsuit. *Noe v. Card*, 14 Cal. 609.

32. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession

of the agent is the possession of the principal, who can maintain forcible and unlawful entry and detainer against such third persons, whether the agent had any written authority or not; and where proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that, therefore, his possession was not sufficiently proven. *Minturn v. Burr*, 16 Cal. 109.

33. It cannot be assigned for error in the supreme court, that the court below refused a nonsuit because of no demand made before suit, unless that ground of nonsuit was taken below. *Baker v. Joseph*, 16 Cal. 180.

34. Where, in ejectment, plaintiffs, husband and wife, introduced in evidence a patent to one Johnson, covering the premises, a deed from Johnson to one Robinson, and a deed from Robinson to the wife, reciting, as its consideration, one hundred dollars, proved defendant to be in possession and rested, and defendant moved for a nonsuit, on the ground that the evidence had not established any joint seizin or right of possession in plaintiffs, but had affirmatively established that there was no such joint seizin or right: held, that the nonsuit was properly denied; that the monied consideration recited in the deed to the wife raises the presumption that the property was common property, the entire management and control of which, with the absolute right of possession and disposition, were vested in the husband. *Mott v. Smith*, 16 Cal. 557.

## NOTARY PUBLIC.

1. A certificate of a notary public that an affidavit was sworn to or affirmed and subscribed before him is regular, although his seal is not affixed. *Mills v. Dunlap*, 3 Cal. 97.

2. A notary public has no authority under the statutes of this State, to take depositions of witnesses in any action

## Notary Public.

pending within his own county; that power is delegated to commissioners.\* *McCann v. Beach*, 2 Cal. 33.

3. By the fifth section of the act concerning notaries public, notes are made protestable, and by the tenth section the protest of a notary is expressly made evidence of demand and nonpayment, of notes as well as of bills. *Connolly v. Goodwin*, 5 Cal. 221.

4. An instrument not under seal, is not the character of security which is required by the statute to be given by the notaries public. *Van de Castele v. Cornwall*, 5 Cal. 426.

5. The governor of this State cannot remove from office a notary duly commissioned before his full term of office has expired. *People v. Jewett*, 6 Cal. 291.

6. A condition in a notary's bond that he shall well and truly discharge the duties of his office according to law, is the only proper condition to be inserted in his bond. *Tevis v. Randall*, 6 Cal. 635.

7. It is the duty of a notary public to give notice of protest to the endorsers of a promissory note protested by him. He is allowed by law a fee for so doing, and the recital of "notice given," in the protest, is made evidence of the fact. *Ib.*

8. The whole object of the record of a notary was to preserve in a permanent form the evidence of the protest, and notice by which the liabilities of parties had become fixed; and it could never have been intended that a certified copy of one-half of the record should be evidence, and not of the other half. *McFarland v. Pico*, 8 Cal. 635.

9. The statute of 1853 provides that a certificate from a notary's record shall be prima facie evidence of the facts therein contained. *Ib.* 636.

10. Where the condition of the bond of a notary public is that he will "well and truly perform and discharge the duties of a notary public, according to law": held, that this clause embraces every act which he is authorized or required by law to do by virtue of his office. *Fogarty v. Finlay*, 10 Cal. 244.

11. Where a notary did not faithfully perform his duty, but was guilty of gross and culpable negligence, he is responsible

to the party injured for the damages resulting from his negligence. *Ib.* 245.

12. The purpose of a certificate of acknowledgment is to entitle the deed to be recorded and to be admitted in evidence without further proof. *Ib.*

13. If the notary read the certificate before signing it, an omission must have been known to him; if he did not read it, he is equally guilty of negligence. *Ib.*

14. A notary holds himself out to the world as a person competent to perform the business connected with the office, and he contracts with those who employ him that he will perform such duty with integrity, diligence and skill. *Ib.*

15. A party employing a notary is not obliged to determine upon the validity or legality of his acts. *Ib.* 246.

16. Where a mortgaged debt has been lost by such negligence of the notary, the measure of damages is the amount of the debt and interest to be secured by the mortgage. *Ib.*

17. The certificate of acknowledgment of a notary public to a deed is not an act in pais, which he may exercise by virtue of his office at any time while in office. *Bours v. Zachariah*, 11 Cal. 292.

18. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority. *Ib.* 293.

19. A notary derives his power to take and certify acknowledgments to deeds from the statute. He acts as under a special commission for that particular case—clothed with limited statutory power. He is to take an acknowledgment and certify it as part of the same transaction. After taking the acknowledgment and making and delivering the return, his functions cease, and he is discharged from all further authority and cannot alter or amend his certificate. *Ib.* 297.

20. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie v. Neville*, 14 Cal. 409.

21. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 22, 1852, is good under the statute then in force. *Stark v. Barrett*, 15 Cal. 372.

22. Notice left by a notary at the residence of the endorser of a note—he being

\* This power is delegated to notaries in the civil code of April 29, 1851.

## Notary Public.—Notice.

absent at the time—describing the note, stating that it was protested by him for nonpayment, and that the holder looked to the endorser for payment, but not signed by any one, nor indicating in any way from whom it proceeded, is insufficient to charge the endorser. *Klockenbaum v. Pierson*, 16 Cal. 376.

23. Such notice having been so left on Saturday, the day the note matured, the record shows that on Monday, in a conversation between the endorser and the notary, "something was said about the note," and that the notary informed the endorser that plaintiff was "its owner and holder": held, that as a verbal notice, this conversation was insufficient; that a notice must inform the endorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. *Ib.* 377.

24. Where a deed has attached to it certificates of acknowledgment, made at the Hawaiian Islands; the one by a person who describes himself, in the body of the certificate, as "the principal notary public" of the islands, and affixes to his signature a similar designation of his official character, with his notarial seal; and the other by a person who describes himself, in the body of the certificate, as "the vice consul of the United States of America, at Honolulu, Hawaiian Islands," and affixes to his signature the designation of his official character as "U. S. vice consul," and the consular seal: held, that the execution of the deed was prima facie sufficiently proved to be admitted in evidence against the objection that the persons before whom the acknowledgments purported to have been made were not shown to be the officers they represent themselves to be, and were not authorized to take the acknowledgments. *Mott v. Smith*, 16 Cal. 552.

25. The general designation, in the fourth section of the act of April 16th, 1850, as to conveyances, of any notary public, or any consul of the United States, embraces notaries and consuls of every grade—whether principal or inferior notary, or consul general or vice consul. *Ib.*

26. The certificate of a notary public or United States consul, of acknowledgment of a deed, is prima facie evidence of the official character of the person by whom it is given. *Ib.*

## NOTICE.

1. A decision of the supreme court will be opened for failure of the appellant to appear if he had not actual notice, although a formal statutory notice is not necessary. *Lighstone v. Laurencel*, 2 Cal. 106.

2. A slight error in the title of a cause where there is no prior suit pending between the parties, will not invalidate a notice. *Mills v. Dunlap*, 3 Cal. 96.

3. The substitution of papers or pleadings is always within the discretion of the court, and no notice of the motion to apply for it need be given when the notice can be of no use. *Benedict v. Cozzens*, 4 Cal. 382.

4. Where the object of a notice of appeal is accomplished it is immaterial whether the notice be given or not; and where both parties appear, no notice whatever is necessary to be shown. *McLeran v. Shartzer*, 5 Cal. 70.

5. A judgment of dismissal in the county court, upon the ground that it did not appear that the defendants had notice of the trial in the court below, is erroneous and will be set aside. *Coyle v. Baldwin*, 5 Cal. 75.

6. Where a party changes his attorneys in an action, and there is no regular substitution of attorneys as pointed out by statute, notices may be served on the attorneys of record. *Grant v. White*, 6 Cal. 55.

7. Notice of appeal from the judgment of a justice of the peace may be served on the attorney of the adverse party. *Welton v. Garibaldi*, 6 Cal. 246; *Coulter v. Stark*, 7 Cal. 245.

8. Where the plaintiff in ejectment claimed under a subsequent deed from the grantor in the above instrument, and the defendants held under the grantees named therein: held, that the record of said instrument in the county recorder's office, made June 20th, 1850, imparted no notice to the plaintiff who purchased July 9th, 1855; the registration of executory contracts not being authorized or made notice by statute. *Mesick v. Sunderland*, 6 Cal. 315.

9. Transcripts used on appeal in the supreme court must show that a notice of the appeal has been duly served upon



## Notice.—Notice to Quit.—Nuisance.

the other side. *Franklin v. Reiner*, 8 Cal. 340; *Hildreth v. Gwindon*, 10 Cal. 491.

10. The filing of a notice of appeal must precede the filing of the undertaking on appeal. *Buckholder v. Byers*, 10 Cal. 481.

11. The sufficiency of a notice to the adverse party to produce on trial a certain paper in his possession, is a question of discretion in the court trying the case. *Burke v. Table Mountain Water Co.*, 12 Cal. 407.

12. When the statute speaks of notice of motion, it means written notice, or notice in open court of which a minute is made by the court. *Borland v. Thornton*, 12 Cal. 448.

13. Where a rule of the district court requires three days written notice of exceptions to depositions, if they are returned and filed with the court that length of time before trial, and such notice is not given on a first trial, the depositions may be admitted on a second trial, though it took place the day after the first trial. The party was in default in not giving the notice before the first trial. *Myers v. Casey*, 14 Cal. 543.

14. Where the court makes an order requiring plaintiff to appear at a certain time and show cause why a judgment in his favor should not be set aside, and it does not appear that a copy of the order was served on plaintiff or his attorney, or that any notice was given of the time at which the matter was to be heard; it is error for the court to set aside the judgment, and its order to that effect will be reversed on appeal. *Vallejo v. Green*, 16 Cal. 161.

For notice of appeal see APPEAL, X.

For notice of protest see BILLS OF EXCHANGE, III.

See also PROTEST, REGISTRATION.

## NOTICE TO QUIT.

1. A mere naked trespasser without consideration under a mere permission and which has been revoked, is entitled to

notice to quit or demand of possession before suit. *Godwin v. Stebbins*, 2 Cal. 105.

2. Notice to quit is not necessary where the relation of landlord and tenant does not exist. *Kilburn v. Ritchie*, 2 Cal. 148.

3. An objection to the sufficiency of a notice to quit should be first raised at nisi prius and not on appeal. *Castro v. Gill*, 5 Cal. 42.

4. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment which was paid. January 8th, 1859, plaintiff served on defendant notice to quit on the ground of forfeiture for non-payment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title and his own relation of tenant: held, that, plaintiff is entitled to recover; that the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

See EJECTMENT, LANDLORD AND TENANT, LEASE, RENT.

## NUISANCE.

1. Any one has a right to abate a common nuisance which is an injury to the whole community, without regard to the question whether it is an immediate obstruction or injury to him. A private nuisance is one which only injures a particular individual or class of individuals, and can be abated only by him who suffers from it. *Gunter v. Geary*, 1 Cal. 466.

2. The fact whether a structure was a public nuisance is a question not for the court but for the jury to decide. *Ib.*

## Nuisance.

3. It is a public nuisance to erect a house in the highway. *Ib.* 468.

4. A house on fire, or those in its immediate vicinity which serve to communicate the flames, is a nuisance which it is lawful to abate, and the private rights of the individual yield to considerations of general convenience and the interest of society. *Surocco v. Geary*, 3 Cal. 73.

5. The constitutional provision which requires payment for private property taken for public use does not apply to the destruction of a house to check a conflagration, nor can he who abates this nuisance be made personally liable for trespass unless the act is done without actual or apparent necessity. *Ib.*

6. Where plaintiff's mining claim was overflowed by means of a dam erected by the defendants, the court ordered a reduction of the dam, so as to prevent the overflow, or if necessary its entire abatement. *Ramsay v. Chandler*, 3 Cal. 93.

7. To entitle a party to an injunction in case of a nuisance, the injury to be restrained must be irremediable, and such as cannot be adequately compensated by damages. *Middleton v. Franklin*, 3 Cal. 241.

8. The erection of a steam engine and machinery and a grist mill in the cellar, under an auction store, held not to be such an injury as to require a restraining power of the court, at least not until the question of nuisance or no nuisance should be determined by a jury, and even then the remedy at common law is adequate. *Ib.*

9. The district courts have constitutional jurisdiction of cases of nuisance. The grant of such jurisdiction by statute to the county courts cannot take away the constitutional jurisdiction of the district courts. *Fitzgerald v. Urton*, 4 Cal. 238.

10. In an action for nuisance or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

11. In an action for damages on an undertaking, given on suing out an injunction, the sureties cannot plead as a defense that the business enjoined was a nuisance. *Cunningham v. Breed*, 4 Cal. 385.

12. The term "special cases" in the constitution, does not include any class of cases for which the courts of general juris-

diction have always supplied a remedy, as in cases to abate a nuisance. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

13. The statute of this State, defining what are nuisances, and prescribing a remedy by action, does not take away any common law remedy in the abatement of nuisances, which the statute does not embrace. *Stiles v. Laird*, 5 Cal. 122.

14. In an action to abate a nuisance, damages are only an incident to the action, and the failure to recover them does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102.

15. A person may construct or continue what would otherwise be an actionable nuisance, provided that at the commencement of it no person was in a condition to be injured by it, or in other words, that mere priority as between owners of the the soil gave a superior right. *Tenney v. Miners' Ditch Co.*, 7 Cal. 339.

16. The diversion of a water course is a private nuisance. *Tuolumne Water Co. v. Chapman*, 8 Cal. 397.

17. Actions for the diversion of the waters of ditches, are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Kilham*, 8 Cal. 79.

18. In an action to abate a nuisance, caused by the running a ditch for the conveyance of water across the land of the plaintiff, the defendants set up in the answer that it was mineral land belonging to the United States, and that the ditch was for mining purposes, which allegations were stricken out on motion of plaintiff's attorney: held, that they were properly stricken out as irrelevant, for if true they constituted no defense to the action. *Weimer v. Lowery*, 11 Cal. 112.

19. Plaintiffs owned certain mining claims and quartz lode on the banks of a stream above the mill and dam of defendant. Defendant commenced raising his dam two feet higher. Plaintiffs brought suit against defendant, alleging that the addition of two feet to defendant's dam was a nuisance, and would back the water on to plaintiff's claims, and thus prevent them from working them, and would also destroy their water privilege for a quartz mill which they intended to construct: held, that the action was premature, and that the demurrer to the complaint on the

## Oakland —Oath.—Office.

ground that the complaint did not state facts sufficient to constitute a cause of action, was properly sustained. *Harvey v. Chilton*, 11 Cal. 120.

See ABATEMENT.

## OAKLAND.

1. The act of May 4th, 1852, "to incorporate the town of Oakland," confers no power of taxation directly, but leave it to be derived from the general act of March 27th, 1850, under which the trustees of towns have power to levy and collect a tax annually, not exceeding fifty cents on every one hundred dollars of the assessed value of the property, and provided further that unpaid taxes should be recovered by a suit in the name of the corporation: held, that an assessment of two and three-fourths per cent. was wholly unauthorized by law, and void. *Hays v. Hogan*, 5 Cal. 242.

2. Under the act of 1852, incorporating the town of Oakland, the corporate and municipal powers were lodged in a board of trustees. The board had power to lay out, make, open, widen, regulate and keep in repair all streets, bridges, ferries etc., and to authorize the construction of the same. Under this clause the board by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing and regulating wharfs within the city for thirty-seven years: held, that the ordinance was void as being a transfer of the corporate powers of the board, and that the city can come into equity to have the ordinance declared void, and the wharfs held by defendants thereunder, delivered up. *City of Oakland v. Carpentier*, 13 Cal. 549.

## OATH.

1. The administering of the oath as provided by the statute to a person who is challenged for not being a qualified voter,

is a matter of discretion of the judges of the election. *People v. Gordon*, 5 Cal. 236.

2. When the judges have administered the oath, the right to vote is concluded, and it is error to deny it. *Ib.*

See AFFIDAVIT.

## OCCUPATION.

See POSSESSION, USE AND OCCUPATION.

## OFFICE.

1. A public officer who stands in the relation of agent of the government or of the public, is not personally liable upon contract made by him as such officer and within the scope of his legitimate duties. *Dwinelle v. Henriquez*, 1 Cal. 392.

2. But this reason does not apply when neither the government nor the public in any way can be considered or held responsible for a contract made by a person, although a public officer. *Ib.*

3. The neglect of an officer to perform a mere ministerial act, will not defeat an election where there was actual notice and no fraud or surprise. *People v. Campbell*, 2 Cal. 137.

4. The unconstitutionality of the statute empowering the governor to commission a person as judge of the supreme court during the temporary absence of one of its judges, fully discussed. *People v. Wells*, 2 Cal. 198; 610.

5. The neglect of the plaintiff to qualify for the office within the days stipulated in the municipal charter after his election, was a refusal on his part to serve, and vacated the office so far as he had any right thereto. *Payne v. City of San Francisco*, 3 Cal. 125.

6. To entitle a party to recover his salary for an office, it is incumbent on him to show not only that he performed the du-

## Office.

ties of the office for the time alleged, but first, that he had been lawfully elected, and second, that he had qualified himself to hold the office by taking oath and filing his bond in the manner and at the time prescribed by law. *Ib.*

7. If an officer qualify before a person not lawfully qualified to administer the oath of office, it will be declared void. *Ib.* 127.

8. A resolution of a municipal body recognizing a party as street commissioner who has not lawfully qualified, will not enable him to recover for services rendered in that capacity on quantum meruit. *Ib.* 128.

9. Title to an office cannot be tried upon a mandamus neither at common law nor under the statute. *People v. Olds*, 3 Cal. 170.

10. A municipal charter provided for an election of officers in May and at the general election thereafter annually. The general election was fixed by law for the first Monday in September; it was held that those officers elected in May only held until September when those newly elected should succeed them. *People v. Brenham*, 3 Cal. 486.

11. Official terms should not be extended beyond the time clearly defined, but rather shortened by implication, if necessary. *Ib.* 487.

12. A district judge elected at the general election to fill a vacancy, can qualify and supersede a judge who has been commissioned by the governor for the unexpired term of his predecessor. The latter commission expires after an election by the people. *People v. Mott*, 3 Cal. 504.

13. The law presumes that every officer will faithfully perform his duties, until the contrary is shown. *Egery v. Buchanan*, 5 Cal. 56.

14. The act to prevent extortion in office does not conflict with the constitution. *Ryan v. Johnson*, 5 Cal. 87.

15. The act regulating fees in office is not an act of a general nature within the meaning of the constitution. It is entirely of a specific character. *Ib.*

16. It devolves upon an officer to see that proper bonds are filed, and the state has no right to visit upon a party the laches of her own officer. *People v. Aikenhead*, 5 Cal. 107.

17. When an officer is elected to a new

term he should give a new bond, and the sureties on the bond of an officer for one term will not be liable for any act done by him after election to a second term. *Ib.*

18. The legislature possess the power to alter or abridge the term of office of purely legislative creation. *People v. Haskell*, 5 Cal. 359.

19. In quo warranto the person who claimed the office held by the defendant, testified that his certificate of election was lost or destroyed, and the county clerk swore that there was not in his office or so far as he knew in the county, any record or written evidence of the persons who were elected to the different county offices: held, that this testimony was sufficient to let in secondary evidence of the election and certificate. *People v. Clingan*, 5 Cal. 391.

20. Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office. *Ib.*

21. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

22. Elections to fill vacancies occasioned by the death or resignation of an officer, are special elections. *People v. Porter*, 6 Cal. 28.

23. A resignation of an officer is ineffectual without its acceptance by the appointing power. *Ib.*

24. An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government. *Den v. Den*, 6 Cal. 82.

25. Where the act organizing a county provides for the term of office of the officers first elected, but makes no provision as to their successors, the duration of the term of the latter is governed by the general law. *People v. Colton*, 6 Cal. 85.

26. Wherever the law is obliged to trust to the sound judgment and discretion of an officer, public policy demands that he should be protected from any consequences of an erroneous judgment. *Downer v. Lent*, 6 Cal. 95.

27. Though the appointment of a sheriff by a county judge was void, yet the



## Office.

acts of such sheriff as a de facto officer are good. *People v. Roberts*, 6 Cal. 215.

28. The words extending the term of an office "until a successor is appointed and qualified," were intended only to prevent a hiatus or interregnum occurring between the last day of the incumbent's term and the day on which his successor enters into office, during which time the incumbent is a mere locum tenens. *People v. Reid*, 6 Cal. 289; *People v. Langdon*, 8 Cal. 11.

29. The provision of the constitution giving to the appointing power the right of removal at pleasure, of incumbents the duration of whose term of office is not provided for by the constitution or declared by law, must be construed to deny the right of removal in those cases where the tenure is defined. *People v. Jewett*, 6 Cal. 293.

30. Where the law requires a joint and several bond, and the officer filed a bond which was in form joint, and not joint and several: held, that he and his sureties cannot complain that their obligation is less burdensome than the law required. *Tevie v. Randall*, 6 Cal. 635.

31. The legislature failing to elect successors to the trustees of the insane asylum, the power of appointment vested in the governor. *People v. Baine*, 6 Cal. 510.

32. A law which provides that an officer may be removed in a certain way or for a certain cause, does not restrain or limit the power of removal to a cause or manner indicated. *People v. Hill*, 7 Cal. 102.

33. In an action by one claiming to have been elected to an office, against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 394; *People v. Scannell*, 7 Cal. 439.

34. Where the law requires an officer to file a new bond within two days after the meeting of the supervisors, the officer has the whole of the two days succeeding the day of meeting to execute and present his bond. *People v. Scannell*, 7 Cal. 439.

35. Where a party seeks to enter upon the duties of an office, and he is required to give a bond as a condition precedent, and he does execute and present a good

bond with sufficient sureties, and the officer or board whose duty it is to approve or reject the same neglects or refuses to act, it is not sufficient cause to defeat his rights. *Ib.* 440.

36. There is a very plain difference between the condition of a party claiming a right to enter upon the duties of an office and that of a party already in office, and who is sought to be excluded upon the ground of a forfeiture. *Ib.*

37. An information in the nature of a quo warranto is the proper proceeding to try the title to an office. *Ib.* 443.

38. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature and the governor appoints a successor to the office: held, that there has been no vacancy in office, and that this appointment vested in the appointee a right to hold for his full term, subject only to be defeated by the nonconcurrence of the senate. *People v. Mizner*, 7 Cal. 523; *People v. Addison*, 10 Cal. 7.

39. Where the term of an officer is fixed by the constitution or the statute, the power of removal does not vest in the executive. *People v. Mizner*, 7 Cal. 526.

40. If there was a term in the office, and the party had not been elected until one month after the expiration of the old term, it is evident that he could not hold but one year and eleven months, instead of the two years that the law says he shall. *People v. Langdon*, 8 Cal. 13.

41. Power to fill a vacancy and power to fill an office are distinct and substantial in their nature. *Ib.* 15.

42. The clerks of the different departments are officers within the meaning of section six of the act of April 21, 1856, reducing the salaries of officers. *Vaughn v. English*, 8 Cal. 41.

43. The acts of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. *Palmer v. Boling*, 8 Cal. 389.

44. The sureties upon the official bond of an officer are only responsible for the official acts, and not for private debts. *Hill v. Kemble*, 9 Cal. 72.

45. The defects in official bonds which are cured upon their suggestion in the complaint, in an action upon such bonds, under the eleventh section of the "act

## Office.

concerning the official bonds of officers", are omissions which, but for the statute, would operate to discharge the obligors. *People v. Edwards*, 9 Cal. 292.

46. The provision of the code, requiring actions against a public officer for acts done by him in virtue of his office, shall be tried in the county where the cause or some part thereof arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interferes with the property or rights of third persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 420.

47. A patent purporting to convey the lands of the State, is prima facie evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. *Summers v. Dickenson*, 9 Cal. 556.

48. The office having been created, must be presumed to be continuing, unless limited by the terms of the act, or by the nature of the duties to be performed. *People v. Addison*, 10 Cal. 7.

49. The federal office of surveyor general is a lucrative office, and the office of controller of the State an office of profit under the twenty-first section of the fourth article of the constitution of the State. *People v. Whitman*, 10 Cal. 43.

50. To constitute the "holding" of an office, within the meaning of the constitution, there must be the concurrence of two wills—that of the appointing power, and that of the person appointed. *Ib.*

51. When the constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious results. *Ib.* 45.

52. The failure on the part of the controller elect to qualify, creates no vacancy in the office, if there is an incumbent to hold over. *Ib.*

53. In determining upon the sufficiency of the bond of an officer, and whether the officer by his failure to comply with the requisition of the supervisors to file a new bond, has vacated his office, the supervisors exercise powers of a judicial character. *People v. Supervisors of Marin County*, 10 Cal. 345.

54. The power to declare an office vacant is vested under the statute where the duty to approve the bond of the officer is

lodged. That duty is imposed upon the county judge and not the supervisors; and where the supervisors declared the office of constable vacant, because the constable failed to comply with their order to file a new bond: held, that they exceeded their jurisdiction. *Ib.* 346.

55. An order of the supervisors, requiring a new bond of an officer, should specify the ground upon which the order is made; and where the supervisors made an order as follows: "ordered, by the board of supervisors, that the constable file another bond, with two or more sufficient sureties, within fifteen days": held, that the order was fatally defective. *Ib.*

56. A court is only justified in interfering with duties cast upon public officers by the law, when the fund is in danger of being wasted or impaired. *City of San Francisco v. Commissioners of the Funded Debt of City of San Francisco*, 10 Cal. 587.

57. An election to fill a vacancy in the office of district judge is invalid unless made under and in pursuance of the proclamation of the governor. *People v. Weller*, 11 Cal. 65; *People v. Wells*, 11 Cal. 339.

58. The clerk of the supreme court, though a constitutional officer, is subject to its orders in the control of its records. *Houston v. Williams*, 13 Cal. 28.

59. The act giving jurisdiction over the subject of contested elections to the judge of the county court, is constitutional, and district judges are embraced within it. *Saunders v. Haynes*, 13 Cal. 154.

60. A district judge inducted into office, with a commission from the governor showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date, and the question of his eligibility cannot be tried on mandamus. *Turner v. Meloney*, 13 Cal. 623.

61. The legislature having vested certain duties in a public officer, for whose services compensation is allowed, may take those duties and the fees from the office before the expiration of the term and confer them upon another officer. *People v. Squires*, 14 Cal. 15.

62. In quo warranto to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority, is a sufficient allegation of intrusion and usurpation. *People v. Woodbury*, 14 Cal. 45.

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63. If an incumbent resigns before the expiration of his term, there is a vacancy to be filled by the governor. His appointee would hold until the next general election, or at most until the qualification of the person elected by the people. *People v. Rosborough*, 14 Cal. 187.

64. Where an appointee of the governor to fill a vacancy in a judicial office, holds the office for several years because of no valid election by the people of his successor, his acts are as binding and effectual as to third persons as though he held the office by strict law. *Ib.* 188.

65. In the case of official bonds, the sureties undertake, in general terms, that the principal will perform his official duties; and a judgment against the officer in a suit to which they are not parties, is not evidence against them. *Pico v. Webster*, 14 Cal. 204.

66. The board of supervisors cannot abrogate a contract with defendant as county physician, by rescinding the order under which he was appointed or abolishing the office. *McDaniel v. Yuba County*, 14 Cal. 445.

67. It is part of the constitutional policy of this State that all elective officers connected with the executive department of the government shall be elected at the same time and place, and in the same manner. *People v. Melony*, 15 Cal. 62.

68. A controller must be elected biennially, at the same time and place and in the same manner with the governor and lieutenant governor, and an appointment of a controller by the governor before this biennial general election, whatever its effect otherwise, cannot defeat this constitutional policy, nor deprive the people of their right to fill the office of controller at such election. *Ib.*

69. Nor can election by the people, had before the election fixed for filling the office of governor, etc., defeat this policy. *Ib.*

70. *People v. Whitman*, 10 Cal. 116, doubted as to the point involved in that case; and as to the validity and effect of the election of the controller at the general election in September, 1858, held to be no authority. *Ib.*

71. The controller elect may take his office, whether the governor qualifies or not. *Ib.* 63.

72. In a proceeding by an elector to contest the right to an office of a party re-

turned as elected thereto at a general election, the defendant first moved to dismiss the proceedings; his motion being overruled, he declined to answer the statement filed by the contestant, and the court, without proof by either party, annulled the election: held, that this was error, and that the proceeding should have been dismissed. *Searcy v. Grow*, 15 Cal. 122.

73. The public is interested in a contest of this character; it is not a matter solely between the parties to the record, and the popular will is not to be set aside upon the mere failure of a party to respond to charges alleged against his right by an individual elector. It is not sufficient that ample causes of contest be set forth in the statement filed by a contestant; their truth must be established by clear proof, before an election can be annulled. *Ib.*

74. In suit under our statute by an elector, to contest an election, he becomes a party, and is responsible for costs if he fail. The court has no discretion to dismiss or entertain the case, as it deems the public interest requires. Nor has the State's attorney such discretion. The case is prosecuted like any other action instituted by a private citizen, subject only to the provisions of the statute. *Ib.*

75. Under the twenty-first section of article four of the constitution of this State, a person holding a federal office described in that section, is incapable of being elected to a State office; he cannot receive votes cast so as to give him a right to take the State office upon or after resigning the federal office. The word "eligible" in this action means capable of being chosen, the subject of selection or choice. *Ib.* 123.

76. The term "compensation," in section twenty-one, article four of the constitution of this State, means the income of the office, not the profit over and above the necessary expenses of the office. *Ib.*

77. An ordinance was passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided, that the board should appoint a person to superintend the cemetery, "annually, in October, who shall hold office for the term of one year:" and further, that the board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next,

## Office.

and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858, and held office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator was entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *People v. Murray*, 15 Cal. 222.

78. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *Ib.* 223.

79. The official act of such officers in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Hart v. Burnett*, 15 Cal. 616.

80. The authority to grant such lands was vested in the ayuntamiento, and in the alcaides or other officers who at the times represented it, or had succeeded to its "powers and obligations." *Ib.*

81. Where political power is vested in a public officer, he is responsible only in his political character to the country. Where discretion is vested in him, he but conforms to the law in exercising that discretion. But where a question of political power is not involved, where no discretion exists, but a specific legal duty is imposed, ministerial in its character, such as the issuance of a patent, the delivery of a commission, the payment of a specific sum, or the drawing of a particular warrant, and in the performance of that duty individuals have a direct pecuniary interest, the officer, like any other citizen, is subject to process of the regularly constituted tribunals of the country. If this be not so, then the officer can "sport with the vested rights of others, and the government will cease to deserve the "high appellation" of being a government of laws. *People v. Brooks*, 16 Cal. 54.

82. The aid of courts can be invoked only as against such officers as are intrusted by law with the management of the affairs of a corporation, and as against

these, the remedy is at law, and not in equity. *People v. Hill*, 16 Cal. 148.

83. The power of removing the private or ministerial officers of a private corporation, belongs to the corporation alone. Courts cannot remove such officers. *Ib.*

84. In suit by a stockholder in a private corporation, against the corporation and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business corporation: held, that this was error; that although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet as no fraud was shown, and as the superintendent had faithfully performed his duties as such, he was entitled to his salary. *Ib.* 149.

85. Where four of the trustees of a private corporation, owning sufficient stock to control its business, conduct the business in a grossly negligent manner, systematically disregarding the by-laws, keeping no account of receipts and expenditures, failing to pay their own assessments, without any excuse: held, that a stockholder may sue in equity for an account, making the corporation and said trustees alone parties—no objection being taken that all the stockholders were not parties—and the trustees will be compelled to make good any loss occasioned by their negligence or improper conduct. *Ib.* 151.

See APPOINTMENT TO OFFICE, ASSESSOR, ATTORNEY DISTRICT, ATTORNEY GENERAL, AUDITOR, BOND OFFICIAL, CLERK OF THE COURT, COUNTY JUDGE, ELECTION, GOVERNOR, QUO WARRANTO, RECORDER, SHERIFF, SUPERVISORS, SURVEYOR, TAX COLLECTOR, TREASURER, VACANCY.

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OPINION.

1. At common law, the appellate court either affirms or reverses the judgment upon the record before it. The opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Stearns v. Aguirre*, 7 Cal. 448.

2. The terms "opinion" and "decision" are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of the record. *Houston v. Williams*, 13 Cal. 27.

3. A decision of the court is its judgment, the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court, upon a petition for a rehearing or for a modification. The latter is the property of the judges, subject to their revision, correction and modification in any particular deemed advisable until with the approbation of the writer, it is transcribed in the record. *Ib.*

4. When opinions have been revised, and finally approved and recorded, then they cease to be subject of change. They then become like judgment records, and are beyond the interference of the judges, except through regular proceedings before the court by petition. *Ib.*

ORDER.

1. An order is a decision made during the progress of the cause either prior or subsequent to final judgment, settling some point of practice or some question collateral to the main issue presented by the pleadings, and necessary to be disposed of before such issue can be passed upon by the court or necessary to be determined in carrying into execution the final judgment. *Loring v. Mlsley*, 1 Cal. 27.

2. An appeal should not be taken from an order of the court refusing to set aside an interlocutory order. It should be taken from the order itself if any appeal would lie. *Stearns v. Marvin*, 3 Cal. 376.

3. An appeal does not lie from an interlocutory order except in cases provided by statute. *People v. Thurston*, 5 Cal. 517; *De Barry v. Lambert*, 10 Cal. 504; *Baker v. Baker*, 10 Cal. 528.

4. An order is the judgment or conclusion of the court or judge, upon any motion or proceeding, and includes cases where affirmative relief is granted or relief denied. *Gilman v. Contra Costa County*, 8 Cal. 57.

5. The supreme court will not hear any objections to an order entered in the court below, by consent of parties. *Meerholz v. Sessions*, 9 Cal. 277.

For appeal from orders of court see APPEAL, IX.

ORDINANCE.

1. The city charter of San Francisco provides that no ordinance or resolution shall be passed except by a majority of all the members elected; the number elected being eight: held, that an ordinance passed by a vote of four in the affirmative to three in the negative, was not passed by a majority of all the members elected, and was therefore void. *City of San Francisco v. Hazen*, 5 Cal. 171.

2. Where a city ordinance authorizes the making of a contract by certain committees, on behalf of the city, "subject to confirmation by the common council of said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co. v. City of San Francisco*, 6 Cal. 191.

3. Under the charter of the city of San José, an ordinance abolishing the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officer. *Wilson v. City of San Jose*, 7 Cal. 276.

4. Where an ordinance for the sale of city property was passed without the majority required by the charter, and before the sale

Ordinance.

another ordinance was legally passed appropriating a portion of the proceeds arising from the sale: held, that the second ordinance was a sufficient recognition of the first to render the sale valid and binding on all parties. *Holland v. City of San Francisco*, 7 Cal. 378; overruled in *McCracken v. City of San Francisco*, 16 Cal. 622.

5. Ordinances for the sale of property of a municipal corporation are subject to the rules of interpretation applicable to the written instruments of individuals, and not to those by which laws are construed. *Holland v. City of San Francisco*, 7 Cal. 379; overruled in *McCracken v. City of San Francisco*, 16 Cal. 622.

6. Where, in a suit brought by a municipal corporation upon a contract made under an ordinance, the defendant offered to prove a parol change in the contract, which the court refused to allow: held, not to be error, as the change in the contract could only be made by ordinance. *City of Sacramento v. Kirk*, 7 Cal. 420.

7. As the owner of property, the city has a right to make contracts for its sale, lease or improvement; and these contracts though informal at the time, may afterwards be ratified by ordinance, provided the vested rights of others are not impaired. An ordinance will estop the city, while acts in pais will not. *Lucas v. City of San Francisco*, 7 Cal. 469.

8. Where a municipal corporation has the power to perform an act, and in the execution thereof, the prescribed form is not followed, it has the power to subsequently ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Ib.* 472.

9. The proposition that a municipal corporation can incur no liabilities otherwise than by ordinance, is not, in its full extent, tenable. Under some circumstances, a municipal corporation may become liable by implication. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 469.

10. The answer that the defendant, a municipal corporation, has no knowledge or information of an ordinance set out in a verified complaint and therefore denies the same, is insufficient. *Ib.* 470.

11. An ordinance for the improvement

of the streets passed by the council before the expiration of the time for the presentation of the protest, is not thereby invalid. *Burnett v. City of Sacramento*, 12 Cal. 82.

12. An ordinance passed by the board of supervisors of the city and county of Sacramento, June, 1858, relative to the cemetery, in which it was provided that the board should appoint a person to superintend the cemetery, "annually in October, who shall hold office for the term of one year;" and further, that the board at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor has been appointed and qualified." Defendant was so appointed July 8, 1858, and held office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *People v. Murray*, 15 Cal. 222.

13. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public are concerned, the period designated is not of the essence of authority, but is a mere discretionary provision. *Ib.*

14. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

15. The act of the State legislature of March, 1858, confirming the so called Van Ness ordinance, was a legal and proper exercise of the sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Hart v. Burnett*, 15 Cal. 616.

16. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in the beach and water-lot prop-

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erty, on the 1st day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same, and such parties can defeat the claim of plaintiff who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Holladay v. Frisbie*, 15 Cal. 637.

17. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento v. Crocker*, 16 Cal. 122.

18. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant, is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Id.*

19. The common council of the city of San Francisco passed an ordinance authorising the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent * * the proposals to be opened and awarded by the street commissioner, with the committees on streets from the boards of Aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals based upon certain specifications, were received under the ordinance, and opened by the committees of the two boards and the commissioner, and the work awarded to B. Subsequently an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, set-

ting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed, by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer and payment demanded, and refused on the ground that there were no funds in the treasury applicable to them. Previous to the demand assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for money received by defendant to his use: held, that as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committees of the two boards, converted what were previously mere propositions on the part of the city, into contracts perfect in all their parts, binding alike upon the city and the contractor. *Argenti v. City of San Francisco*, 16 Cal. 277.

20. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for, is only a designation of the sources upon which the city relies for payment. *Id.* 282.

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21. In this case, the city having discharged the assessments, by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

22. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of all the members elected to each board. On the fifth of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of city ordinances as ordinance number four hundred and eighty-one. At the time the ordinance was presented to the board of assistant aldermen, there was a vacancy in the board, occasioned by resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance, and three against it: held, that the ordinance not having received a majority of the entire board—of the constituent number—was never passed, but was in fact rejected. *McCracken v. City of San Francisco*, 16 Cal. 618.

23. The alleged ordinance number four hundred and eighty-one authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction, to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale, the common council passed an ordinance, designated in the official book as ordinance number four hundred and ninety-three, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance number four hundred and eighty-one, and the appropriation of a portion of the proceeds of the sale, did not constitute an adoption and approval of what had been previously done, or might be subsequently done ac-

cording to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

24. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of the property in one way only, to wit: by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. The mode of selling the property having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

25. The only way in which the common council could give validity to a sale, was by passing a law directing it. Ordinance number four hundred and ninety-three does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance number four hundred and eighty-one. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

26. The land directed by the terms of ordinance number four hundred and eighty-one to be sold, was set apart and dedicated as a public dock by an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

27. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the questions involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire depart-

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ment, and matters connected with the general welfare of the city. *Ib.* 621.

28. *Holland v. The City of San Francisco*, 7 Cal. 361, distinguishable from this case in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance number four hundred and ninety-three recognized and adopted ordinance number four hundred and eighty-one, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

29. Admitting that ordinance number four hundred and ninety-three did adopt and pass number four hundred and eighty-one, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

30. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *Ib.* 623.

31. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Ib.*

32. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able, at the time, to make the contract to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Ib.* 624.

33. Ordinance number five hundred and five of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance number four hundred and eighty-one, the salaries of the members and officers of the

police for the months of November and December of the previous year, does not ratify ordinance number four hundred and eighty-one, because appropriating the proceeds of the sale. It assumes that ordinance number four hundred and eighty-one was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance number four hundred and eighty-one had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

34. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

35. The city of San Francisco is not estopped from denying the sale made under ordinance number four hundred and eighty-one, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance number four hundred and ninety-three, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance number four hundred and ninety-three, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance number four hundred and ninety-three, and in the

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subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

36. The sale of December 26th, 1853, under ordinance number four hundred and eighty-one, being void, no title passed to the purchasers at that sale. The title to the property still exists in the city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

See MUNICIPAL CORPORATION.

OWNERSHIP.

- I. In general.
- II. Of vessels.

I. IN GENERAL.

1. Laying off the premises into town lots, selling the same, and exercising other acts of ownership over them, does not operate as an abandonment, but taken in connection with previous acts of ownership, would rather seem to strengthen the plaintiff's possession. *Plume v. Seward*, 4 Cal. 97.

2. Possession is prima facie evidence of ownership. *Goodwin v. Garr*, 8 Cal. 616; *Killey v. Scannell*, 12 Cal. 75.

3. Where A, the owner of property, represents that certain property in his possession belongs to B, and that representation coming to the ears of C, a creditor of B, who sues out an attachment against B, and seizes the property: held that A is estopped from setting up claim to the property. *Mitchell v. Reed*, 9 Cal. 205; *McGee v. Stone*, 9 Cal. 606.

4. To overcome the prima facie ownership of property in the debtor, the receipt-

or must prove two things: first, that he claimed the property; second, that it was in fact his own. *Bleven v. Freer*, 10 Cal. 177.

5. The whole course of legislation and judicial decisions in this State, since its organization, has recognized a qualified ownership of the mines in private individuals. *State of California v. Moore*, 12 Cal. 70.

6. The ownership of goods is not changed when the claim to such ownership is based on a fraudulent contract. *Butler v. Collins*, 12 Cal. 461.

7. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner, and in the lawful possession of said claim at the time of the killing. The court refused testimony on this point: held, that defendant had a right to prove his ownership of the claim, for the purpose of showing his mental condition, the motive which prompted his action, and determining the character of the offense; that the ownership was part of the *res gestæ*, and should have been admitted, subject to instructions of the court as to its legal effect, though when admitted, it may not have amounted to a justification. *People v. Costello*, 15 Cal. 353.

II. OF VESSELS.

8. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring v. Illsley*, 1 Cal. 29.

9. The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; nor can a forced sale under execution have a greater effect. *Ib.* 31.

10. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of a vessel. *Brooks v. Minturn*, 1 Cal. 482.

11. The owner of a ship chartered by and in the name of his agent, may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Ib.*

Of Vessels.—Parent and Child.

12. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 273.

13. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Ib.*

14. The complaint showed that the vessel was in 1855 the property of the plaintiffs; that they appeared and defended the action against the vessel as owners, and there is nothing in the record to raise a presumption that they are not now the owners of it, and a judgment against them will be satisfied out of the vessel. *Russell v. Conway*, 11 Cal. 101.

See EJECTMENT IV. POSSESSION.

PARENT AND CHILD.

1. In marriages null in law, the issue are the inheritors of the father's name and his heirs apparent, and entitled to look to and demand from him his care, maintenance and protection, and he has the same right to their custody, control and obedience, as if the issue of a valid marriage. *Graham v. Bennett*, 2 Cal. 506.

2. The words of an acknowledgment of the paternity of an illegitimate child, for the purpose of making it an heir must be clear, and exclude all except one interpretation. *Estate of Sandford*, 4 Cal. 12.

3. Where the plaintiff was the step-mother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants: held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock v. Murdock*, 7 Cal. 513.

4. When the father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest. *Swartz v. Hazlett*, 8 Cal. 123.

5. The principle upon which the infant is allowed to collect his wages, is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Ib.* 124.

6. Where a parent executes to his infant son a conveyance of property, in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not legally bound to pay for his son's services. *Ib.* 125.

7. It is the duty of the parent to supply his child with necessaries, and he is liable to others who furnish them, under certain circumstances; and the duty of the parent to feed, clothe and educate the child, must be commensurate with the power to control and govern. *Ib.*

8. Where A, by a joint deed grants to his son and B certain premises, for which B pays a valuable consideration, and the son pays nothing, and the fact of this want of consideration on the part of the son is known to B, the fraud in part of the conveyance makes it wholly void as against the creditors of A, at the date of the deed. *Ib.* 128.

9. A posthumous child, for whom no provision is made in the will of the father, is entitled to one-half of the separate and common property, where no express intention of the testator to the contrary appears. *Estate of Buchanan*, 8 Cal. 509.

10. Mere hearsay evidence of the wife having given birth to a child, more than a year after the separation, and connecting therewith the name of a third person as its reputed father, raises no presumption of access by the husband. *Wells v. Stout*, 9 Cal. 498.

11. A child born in lawful wedlock is presumed to be the child of the husband. The marriage is an acknowledgment by the husband that the child is his; but to be effective there must be knowledge at the time of the fact admitted. Hence, when a man marries a woman with child, the law presumes the child is his. This presumption is based upon the assumed fact that he knew, at the time of his marriage, the situation of the woman. *Baker v. Baker*, 13 Cal. 99.

12. A woman to be marriageable must, at the time, be able to bear children to her

Parent and Child.—Parties in general.

husband, and a representation to this effect is implied in the very nature of the contract. A woman who has been pregnant over four months by a stranger, is not at the time in a condition to bear children to her husband, and the representation otherwise was false and fraudulent. *Ib.* 103.

13. A wife, divorced from her husband for extreme cruelty on his part, is entitled to the custody of their female child of tender years, the wife being blameless. The father has a right to see the child at all convenient times. *Wand v. Wand*, 14 Cal. 517.

14. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will, and devise to the son certain property, and the father dies without having complied with the agreement, the agreement is void—the conveyance is executed without consideration, express or implied, and a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property—it being shown that the transaction was not a gift. *Russ v. Mebius*, 16 Cal. 355.

15. If, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish the trust in favor of the son. *Ib.* 356.

16. The doctrine of resulting uses and trusts, is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Ib.*

17. No implication of trust arises upon a purchase of property by a parent in the name of his child; as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. Prima facie, such purchase is regarded as an advancement. *Ib.* 357.

PAROL CONTRACT.

See CONTRACT II.

PAROL EVIDENCE.

See EVIDENCE XXX.

PARTIES.

- I. In general.
- II. In a Foreclosure Suit.
- III. As Husband and Wife.
- IV. As Witnesses.

I. IN GENERAL.

1. All persons materially interested in the subject matter of the suit ought to be made parties, and sometimes it is limited to those who are interested in the object of the suit; but courts will not suffer this rule to be so applied as to defeat the very purposes of justice if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable. *Von Schmidt v. Huntington*, 1 Cal. 66.

2. This rule will not apply when the persons interested are so numerous that it would be impracticable to join them without interminable delays, and where the parties form a voluntary association for public or private purposes, it would be exceedingly inconvenient to join all in the proceeding, and for such like reasons. *Ib.*

3. Where the bill seeks a dissolution of a company, all the members need not be made parties when it will cause manifest inconvenience and oppressive delays in the action. *Ib.* 67.

4. The position of a priest who appears

In general.

to have charge of church property, coupled with an interest, seems to be nearly analogous to that of a sole corporation in England, and has power to sue as an inseparable incident to such corporation. *San-tillan v. Moses*, 1 Cal. 94.

5. The objection to a defect of parties should be taken by demurrer, or it must be deemed to have been waived and could not then be raised at the trial. *Rowe v. Chandler*, 1 Cal. 175; *Sampson v. Shaef-fer*, 3 Cal. 202; *Warner v. Wilson*, 4 Cal. 313; *Beard v. Knox*, 5 Cal. 257; *Jacks v. Cooke*, 6 Cal. 164; *Oliver v. Walsh*, 6 Cal. 456; *Tissot v. Throckmorton*, 6 Cal. 473; *McKune v. McGarvey*, 6 Cal. 498; *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334; *Alvarez v. Brannan*, 7 Cal. 510; *Dunn v. Tozer*, 10 Cal. 170. *Mott v. Smith*, 16 Cal. 557.

6. One copartner cannot sue another unless by bill for a dissolution, praying for an account. *Russell v. Ford*, 2 Cal. 87; *Buckley v. Carlisle*, 2 Cal. 420; *Stone v. Fouse*, 3 Cal. 292; *Nugent v. Locke*, 4 Cal. 320; *Barnstead v. Empire Mining Co.*, 5 Cal. 269.

7. When part of the defendants are not served with process, the plaintiff may proceed against those served. *Ingraham v. Gildermeester*, 2 Cal. 89.

8. In an action against partners, judgment can only be taken against those served with process. *Ib.*

9. When new parties in interest in a case become known to the plaintiff, it adds strength to his right of a new action after judgment had. *Truebody v. Jacobson*, 2 Cal. 283.

10. A contract not to sue, made only to a portion of joint debtors, does not release any of them. *Matthey v. Galley*, 4 Cal. 63.

11. In ejectment, one or more defendants may be sued and they may answer separately or demand separate verdicts, and if they do not do so, they will be concluded by the general verdict. *Winans v. Christy*, 4 Cal. 80; *Ellis v. Jeans*, 7 Cal. 417.

12. In an action upon a bond or written undertaking there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 88.

13. An attorney in fact, described as such in the instrument, does not hold the character of trustee, and is not a necessary party to a suit to represent the interest of

his principal. *Powell v. Ross*, 4 Cal. 198.

14. A, having an award in his favor against a city, and a suit pending to enforce the same, and the council made an appropriation for the payment of the award, it was held that A cannot be compelled to litigate his right with B, who stood by, without notice of his claim. *Wilson v. Heslep*, 4 Cal. 303.

15. A party ought not to be allowed the benefit of any proceeding unless he assumes the responsibility of it. *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 305.

16. An assignment of a contract as security for a debt, and also in consideration of a covenant not to sue upon the debt, entitles the assignee to sue on the contract in his own name. *Warner v. Wilson*, 4 Cal. 313.

17. Any creditor of an insolvent debtor has the right to be made a party for the purpose of opposing the discharge, or obtaining his proportion of the assets, whether he be named in the assignment or not. *Lambert v. Slade*, 4 Cal. 337.

18. When one of two innocent parties must suffer, it must be he who trusted most, or he whose misplaced confidence enabled the wrong to be committed. *Ruiz v. Norton*, 4 Cal. 358.

19. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *De Johnson v. Selpulbeda*, 5 Cal. 151; *Parke v. Kilham*, 8 Cal. 79.

20. If a judgment entered be irregular as embracing more parties than the testimony justifies, the proper practice is to move to correct the judgment in the court below. *Mulliken v. Hull*, 5 Cal. 247.

21. The code authorizes the court to make an order directing a party to produce books and papers in courts. *Barnstead v. Empire Mining Co.*, 5 Cal. 300.

22. The plaintiff filed her bill to remove a cloud upon her title to land, created by her husband's deed to one of the defendants; and she joined in the bill three other defendants, one of whom had bought a portion of the land from the plaintiff and her husband, and two of whom held a mortgage upon the property, executed by them: held, that the latter were unnecessary parties, as the grantee in the deed and those claiming under him were the only parties necessary to the complete ad-

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judication of the case. *Peralta v. Simon*, 5 Cal. 313.

23. H. purchased goods of P. & M., which were consigned to P., an agent. H. failed to pay for the goods upon delivery, and P. sued to recover the purchase money: held, that P. had no right of action in his own name. *Phillips v. Henshaw*, 5 Cal. 510.

24. It is the duty of a court of equity where all the parties to a controversy are before it, to adjust the rights of all, and leave nothing open for further litigation if it can be helped. *Ord v. McKee*, 5 Cal. 516.

25. To enable the assignee of a judgment to sue on the appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

26. Counties are quasi corporations,* and can sue and be sued, according to the act of May 11th, 1854. *Price v. Sacramento County*, 6 Cal. 255; *Tuolumne County v. Stanislaus County*, 6 Cal. 442; *Gilman v. Contra Costa County*, 6 Cal. 677; 8 Cal. 57; *Placer County v. Astin*, 8 Cal. 305.

27. In the absence of any statute to that effect, the State cannot be sued, and the judgment against her is erroneous. *People v. Talmage*, 6 Cal. 258.

28. Where plaintiff proceeds on proceedings supplementary to execution, to obtain an order to apply a judgment in favor of the defendant against A to the judgment of plaintiff, it seems that it is not necessary to make A a party to the proceeding. *Adams v. Hackett*, 7 Cal. 203.

29. Where an account is verbally assigned to a creditor, with the understanding that, in case he collects it, he will credit his claim with a portion thereof, and return the balance to the assignor, but if nothing is received, no sum is to be credited, the assignment is void, and the assignee cannot sue thereon in his own name. *Ritter v. Stevenson*, 7 Cal. 389.

30. Where two defendants are jointly sued and service had on both, the clerk of the court had no authority to enter judgment by default against one, and his act in so doing is without color of law, and void, and may be disregarded or set aside. *Stearns v. Aguirre*, 7 Cal. 449.

31. A plaintiff being the real party in interest, has a right to sue upon the bond, though made payable to the people of the State. *Taaffe v. Rosenthal*, 7 Cal. 518; *Baker v. Bartol*, 7 Cal. 554.

32. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney v. Stark*, 8 Cal. 516.

33. Where a plaintiff in an action to foreclose a mortgage against a party who has died since the service of the summons and before judgment, asks for a decree of sale of the mortgaged premises, and if the same is not sufficient to discharge the debt, then for a judgment over against the estate, the administrator is a necessary party to the suit. *Belloc v. Rogers*, 9 Cal. 125.

34. An agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, is assignable, and such assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 328.

35. Where there is no final settlement of the partnership accounts, and no balance struck, and no express promise on the part of the individual members to pay their ascertained portion of this amount, no action can be maintained therefor in assumpsit, nor can the claim be assigned so that the assignee may sue. *Bullard v. Kinney*, 10 Cal. 63.

36. The failure of the defendant to appear when the cause was called, authorized the trial by the court without the intervention of a jury. *Waltham v. Carson*, 10 Cal. 180; *Doll v. Feller*, 16 Cal. 433.

37. Our code, for convenience, has given the right to sue on a bond to the party beneficially entitled to the fruits of the action. *Summers v. Farish*, 10 Cal. 351; *Prader v. Purkett*, 13 Cal. 591.

38. An administrator is a proper party to a foreclosure suit. *Carr v. Caldwell*, 10 Cal. 285.

39. Under the old common law practice, the action could only be maintained in the name of the assignor for the benefit of the assignee, but under our system it may be brought in the name of the assignee as the party beneficially interested. *Wheatley v. Strobe*, 12 Cal. 98.

40. In a bill to enjoin the issuance of bonds of the city and county of San Francisco by the fund commissioners created

*The opinion in *Hunsacker v. Borden*, 5 Cal. 290, has become abrogated by the act of May 11th, 1854, statutes, p. 194, enabling a county to sue or be sued, which act has received judicial construction in *Price v. Sacramento County*, 6 Cal. 255, and other cases.

In general.

by the act of April 20, 1858, for the claims approved by the board of examiners, it is necessary that some of the persons to whom the bonds are to be issued, should be made parties to the action. *Hutchinson v. Burr*, 12 Cal. 103: *Patterson v. Supervisors of Yuba County*, 12 Cal. 106.

41. Where two persons are employed by the claimants of a tract of land under a Mexican grant, as agents to procure the confirmation of the grant in the United States courts, and services are thus rendered and expenses incurred by the agent: held, that such service and expense are individual in their character and not joint, and that separate actions may be maintained by such agents for their expenses thus incurred. *Conner v. Hutchinson*, 12 Cal. 127.

42. An action brought by an agent in his own name for a trespass in taking and converting coin from the possession of the agent, in which action the jury found that the coin belonged to the principal, and gave only nominal damages, is no bar to an action by the principal for such coin. *Pico v. Webster*, 12 Cal. 141.

43. An alien friend may sue an American in the consular courts of China, established there under the treaty of 1844. *Forbes v. Scannell*, 13 Cal. 283.

44. It does not lie in the mouth of the plaintiff below to say defendants, whom he has called in, and who are directly affected by the judgment, are not parties to it, and have no right of appeal. *Jones v. Thompson*, 12 Cal. 276.

45. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley v. Rand*, 12 Cal. 276.

46. Where three persons are sued on a promissory note given by one of the parties in the name of all as partners, and the evidence fails to show the partnership or the authority of the party making the note to bind all, and one of the parties is nonsuited and judgment taken against the other two: held, that there was no error in such judgment. *Stoddart v. Van Dyke*, 12 Cal. 438.

47. The interest which entitles a person to intervene in an action between other parties, must be in the matter in litigation, and of such a direct and immediate character that the party intervening

will either gain or lose by the direct legal operation and effect of the judgment. *Horn v. Volcano Water Co.*, 13 Cal. 70.

48. Where the record shows in general terms the appearance of parties, the appearance will be confined to those parties served with process. *Chester v. Miller*, 13 Cal. 560.

49. The rule requiring all persons materially interested, to be made parties to a suit, is dispensed with when it is impracticable or very inconvenient, as in cases of joint associations composed of numerous individuals. *Gorman v. Russell*, 14 Cal. 539.

50. Plaintiff, January 10th, 1858, in a suit entitled "C. v. M. and others, composing the Wisconsin Quartz Mining Co.," a corporation, attached a quartz mill and ledge belonging to the corporation. June 26th, 1853, the complaint was amended, so as to make the corporation, as such, the party defendant, and judgment was rendered against the company, August 14th, 1858, the property sold, and plaintiff the purchaser. October, 1857, W. received from the corporation a chattel mortgage on this property, had decree of foreclosure August 9th, 1858, sale October following — W. the purchaser. Defendants here are in possession, under sheriff's sale on the decree. Plaintiff claims title under judgment and sale: held, that he cannot recover; that he acquired no lien by his attachment, because the property attached belonged to the corporation, which was not a party to the suit until after the levy and return of the writ; that plaintiff's rights attach only from the date of his judgment, August 14th, 1858, and his lien being subsequent to the lien of W.'s judgment, August 9th, 1858, under which defendants claim, the latter have the better right. *Collins v. Montgomery*, 16 Cal. 403.

51. An action upon a duty due by an auctioneer to the State, under a special statute, not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State v. Poulterer*, 16 Cal. 532.

52. Executors have the right to institute actions under the general authority conferred upon them by the statute. No special authorization from the probate court is necessary in such cases. *Hallock v. Mixer*, 16 Cal. 579.

See DEFENDANT, INTERVENOR, PLAINTIFF.

In a Foreclosure Suit.

II. IN A FORECLOSURE SUIT.

53. A person claiming an interest in mortgaged premises, subsequent to the mortgage, is a proper party to a foreclosure suit; but cannot be subjected to the costs of the foreclosure beyond those occasioned by his own separate defense. *Luning v. Brady*, 10 Cal. 267; *Whitney v. Higgins*, 10 Cal. 552.

54. Subsequent incumbrancers are proper parties to a foreclosure suit; and they are necessary parties to a complete adjustment of all interest in the property; and the chancellor would be justified in ordering them to be brought in when not made parties, and they are not in all cases indispensable parties to a decree determining the right of the parties before the court as between themselves. *Montgomery v. Tutt*, 11 Cal. 315.

55. Subsequent incumbrancers are not indispensable parties to a foreclosure suit. If not made parties their rights cannot be affected; they are not bound by the decree; their equity of redemption from the purchaser continues, and this they can assert at any time within the period allowed by the statute of limitations. *Ib.*

56. Where a mortgage is given to secure the separate debts of several persons as mortgagees, it is a several security and may be enforced by each creditor, as in case of a separate mortgage. But where other parties are interested in the property, the court will require them to be brought in before ordering a sale or foreclosure. Where in such case, bill avers the other mortgagees are no longer interested, and they are not parties, demurrer for defect of parties does not lie. *Tyler v. Yreka Water Co.*, 14 Cal. 217.

57. A subsequent purchaser of land mortgaged is a proper party to a foreclosure suit; and if the complaint be faulty in praying to hold him as trustee of the mortgagor, on account of fraud in the purchase, such defect cannot be reached by demurrer. *De Leon v. Higuera*, 15 Cal. 495.

58. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here.

The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; and if he chose to recognise the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Macovich v. Wemple*, 16 Cal. 106.

59. Plaintiff, on obtaining his sheriff's deed, can then institute the necessary proceedings to enforce his rights, and the purchaser at the sheriff's sale under Wemple's decree will occupy no better position than Wemple himself. But so long as Pender has any interest in the property, plaintiff cannot, in advance of his own title, or of the extinction of Pender's, come into equity to enjoin sale. *Ib.*

60. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may be maintained by purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right, by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. *Goodenow v. Erwer*, 16 Cal. 468.

61. The owner of the mortgaged premises, where no power of sale is embraced in the mortgage, cannot under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose. *Ib.*

62. A mortgagor, who has not disposed

In a Foreclosure Suit.—As Husband and Wife.

of his interest, is a necessary party to a suit for a foreclosure and sale, under our law, even though no personal claim be asserted against him. If he has parted with the estate, his grantee stands in his shoes, and possesses the same right to contest the lien, and to object to the sale. And if the grantee be not made a party, the purchaser under the decree acquires no title. *Ib.*

63. It is only when the owner of the estate—whether such owner be the mortgagor or his grantee—has had his day in court, that a valid decree can pass for its sale. Under such decree, the purchaser takes the title which the mortgagor possessed, whatever it may have been, at the execution of the mortgage. *Ib.* 469.

64. A decree in a foreclosure suit for the sale of the premises, where the mortgagor had transferred his estate in the premises previous to the institution of the suit, and his grantee was not made a party, is void so far as it orders a sale. *Boggs v. Hargrave*, 16 Cal. 563.

65. A foreclosure suit, under our system, is only a proceeding for the legal determination of the existence of the lien, the ascertainment of its extent, and the subjection to sale of the estate pledged for its satisfaction. Upon the validity and extent of that lien, the owner of the estate, whether mortgagor or his grantee, has a right to be heard, and no valid decree for the sale of the estate can pass until this right has been afforded to him. *Ib.*

66. Only those who are beneficially interested in the claim secured on the estate mortgaged, are necessary parties to the foreclosure of a mortgage. *McDermott v. Burke*, 16 Cal. 589.

67. A mortgagor cannot make a lease which will bind his mortgagee, where the lessee, at the time, has actual or constructive notice of the mortgage. *Ib.*

68. The interest of the lessee, in such case, depends for its duration—except as limited by terms of the lease—upon the enforcement of the mortgage. So long as the mortgage remains unenforced, the lease is valid against the mortgagor, and, in this State, against the mortgagee; but with its enforcement, the leasehold interest is determined, even though the lessee be not made a party to the foreclosure suit. *Ib.*

69. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to the possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *Ib.* 590.

70. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Ib.*

71. But the tenant has no such absolute right, from the mere fact of his tenancy, as to require him to be a party to the foreclosure, in order to vest the legal title in the purchaser under the decree. *Ib.*

See MORTGAGE.

III. AS HUSBAND AND WIFE.

72. The code gives to a married woman the right to sue without her husband, if the action concerns her separate estate. *Snyder v. Webb*, 3 Cal. 86.

73. The code gives to a married woman the right to sue alone when the action is between herself and her husband, and takes away the necessity of suing by prochein ami. It is a remedial statute and must be beneficially construed. *Kashaw v. Kashaw*, 3 Cal. 321.

74. The wife in an action for divorce may make a party of any one claiming an interest in the common property. *Ib.* 322.

75. The objection that the wife is improperly joined with the husband as party plaintiff, should be taken advantage of by demurrer, and comes too late on appeal. *Tisot v. Throckmorton*, 6 Cal. 472.

76. A wife cannot sue alone to recover the homestead; it is a joint estate with right of survivorship, and both husband

As Husband and Wife.—As Witnesses.—Partition.

and wife must join in the action. *Poole v. Gerrard*, 6 Cal. 73.

77. In an action brought by a married woman concerning property belonging to her as a sole trader, under the act of 1852, the husband need not be joined. *Guttman v. Scannell*, 7 Cal. 458.

78. In an action against the husband alone the homestead right cannot be determined. Both parties must be before the court. *Kraemer v. Revalk*, 8 Cal. 75; *Van Reynegan v. Revalk*, 8 Cal. 76; *Cook v. Klink*, 8 Cal. 352; *Marks v. Marsh*, 9 Cal. 97; *Moss v. Warner*, 10 Cal. 297.

79. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York, via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there and consequent illness, and other inquiries though based on a contract, sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner v. Steamer Uncle Sam*, 9 Cal. 729.

80. When the action concerns the separate property of the wife, and is not between herself and husband, she may sue with or without him. *Van Maren v. Johnson*, 15 Cal. 310.

See HUSBAND AND WIFE.

IV. AS WITNESSES.

81. Where the defendant calls the plaintiff as a witness, and the plaintiff testifies to new matter not responsive to the inquiries, the defendant may offer himself as a witness in his own behalf, but his testimony must be limited to an explanation or contradiction of such new matter. *Dwinelle v. Henriquez*, 1 Cal. 389.

82. A plaintiff or defendant cannot be permitted to testify on the part of his co-plaintiff or defendant. *Gates v. Nash*, 6 Cal. 194; *Lucas v. Payne*, 7 Cal. 96; *Turner v. McIlhaney*, 8 Cal. 579.

83. The assignor of a claim is incompetent as a witness in favor of the claim when his assignee is a formal party to the record, and equally so when the suit is prosecuted for the immediate benefit of his assignee, though not a party. *Adams v. Woods*, 8 Cal. 315.

84. A party who calls on an adverse party to testify, makes him a witness and

waives his incompetency to be heard for himself or for codefendant or coplaintiff. *Turner v. McIlhaney*, 8 Cal. 580.

85. If a party be improperly joined as defendant, the court or jury upon application should first pass upon his case, and after he is discharged he could then be examined as a witness for the other defendant. *Domingo v. Getman*, 9 Cal. 103.

See WITNESS.

PARTITION.

1. A deed of release, conveyance and partition, providing for the appointment of commissioners to make partition of the land therein described, according to certain terms set forth in the deed, and also, by its terms, providing that the release shall take effect upon the making the partition and report, by the commissioners, of a map of a partition, which, together with the deed, is to be handed over to one F., who is to file the same for record in the proper office, is sufficient to estop a party thereto from controverting the deed. *Tewksbury v. Provizzo*, 12 Cal. 24.

2. On the happening of the event, the deed became effectual as a partition and release. When parties go into a partition of property upon certain terms and conditions, each to receive a several portion of a common estate, the instrument of partition, founded upon mutual releases itself, is such affirmation of interest and title on the part of each as to estop him to deny that he did have interest and ownership in the premises; and the release and conveyance of his interest to his parceners is evidence of title in his grantees which he cannot dispute. *Ib.* 25.

3. Where such commissioners, in pursuance of a contract of a portion of the parties executing such deed, allotted to one G., who was not a party to the deed of partition and release, one hundred acres, and where the defendant claimed through the parties executing such contract, and both contract and deed were upon record at the time of the defendant's purchase: held, that the defendant, in contemplation

Partition.—Passengers.

of law, had notice of such contract of his predecessors and vendors, and that he is bound by it. *Ib.* 26.

4. Where such commissioners in the partition and allotment failed to divide and allot some marsh land, a part of the tract, and where no proof was offered that this land was of any value, or that the division made was affected in any manner by the failure to divide or allot it, or that the allotments made would in any degree have been affected by the allotments of this, or that any injury resulted to any one interested in consequence of this omission, and where important rights have vested under the partition, this court would not be warranted in holding the action of the commissioners void because of the failure to divide and allot the marsh land. *Ib.*

5. A tract of land was held by several tenants in common, and on partition a certain portion was set apart and quitclaimed to plaintiff, representing M., who had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he held the premises conveyed by H. to him as security for the indorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was, therefore, in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 307.

6. Plaintiff sues defendants for partition of certain property. The court orders a sale of the property and distribution of the proceed. After the sale G. files a petition stating that he is a creditor of one F. M. Harris (not plaintiff) and has an attachment lien on the interest of said F. M. Harris in the property sold; that said property in fact belonged to F. M. Harris, and that any conveyance of the same from him to plaintiff were merely colorable for the use and benefit of F. M. Harris, and made to hinder, delay and defraud his creditors. G. asked the court to pay him the share of the proceeds of the partition sale coming to plaintiff. Court refused: held, that there was no error; that the petition of G. being an attempt to defeat a conveyance to plaintiff

on the ground of fraud, is insufficient in this: that there is no allegation of the insolvency of F. M. Harris, and that the charges of fraud were too general and do not state the specific facts constituting the fraud. *Harris v. Taylor*, 15 Cal. 349.

7. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. *Goodenow v. Ewer*, 16 Cal. 272.

8. From rents so received the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor to any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.*

PARTNERSHIP.

See COPARTNERSHIP.

PASSENGERS.

1. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 364.

2. The appellate court will not interfere

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with the verdict of a jury where the question upon which they have passed is one solely of liquidated damages, unless beyond doubt the verdict be unjust and oppressive: so held in an action brought by a passenger against the owners of a steamer for not furnishing him with the conveniences during the voyage which the contract of conveyance required. *George v. Law*, 1 Cal. 365.

3. The act of 1855, imposing a tax of fifty dollars on every person arriving in this State by sea who is incompetent to become a citizen, is void. *People v. Downer*, 7 Cal. 171.

See COMMON CARRIERS.

PATENT.

1. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive as between the United States and the State. *Owens v. Jackson*, 9 Cal. 324.

2. Immediately upon the passage of the act of Congress of September 28th, 1850, this State became the owner, with absolute power of disposition, of all the swamp lands within her limits, which had not been disposed of. The title of the State in no way depends upon a patent. The act itself operated as a conveyance. *Summers v. Dickinson*, 9 Cal. 555.

3. The governor, in issuing a patent to an individual of such lands, acts as the agent of the State, under powers conferred by the statute, and his authority extends only to such lands as were granted to the State by the act of Congress. *Ib.*

4. A patent from the governor, purporting to convey the lands of the State, can have no validity unless expressly authorized by law. *Ib.* 556.

5. Such a patent is prima facie evidence of title in the grantee, as the law presumes in favor of the acts of all public officers. *Ib.*

6. On the 21st of January, 1842, the Mexican government granted to the Indian chief, Francisco Solano, a tract of land called Suisun, covering four square leagues

within exterior limits, embracing about eight leagues. On the 4th of March, 1840, the same government granted to Armijo a tract of land called Tolenas, covering three leagues within exterior limits, embracing from twelve to twenty leagues. The maps referred to in both grants cover the land in controversy. Upon final confirmation and survey, a patent was issued, January 18, 1857, by the United States, to Ritchie, successor in interest to Solano, for four leagues of land, with the specific description of the official survey by the United States. This patent covers the land in dispute. The grant to Armijo, from whom defendant traced title, was confirmed by the United States District court, and stands on appeal to the supreme court. Assuming that Armijo occupied and claimed from the entire quantity comprehended within the map referred to in his grant, three specific leagues covering the land in controversy: held, that the patent is conclusive against the defendant, unless he shows title superior to the patent, under a confirmed Spanish or Mexican grant, located under those governments, or under government of the United States. *Waterman v. Smith*, 13 Cal. 409; *Moore v. Wilkinson*, 13 Cal. 486.

7. When the patent issued upon land conflicts with prior rights of third parties, its conclusiveness is then maintained only so far as may be necessary for the protection of such prior rights. *Waterman v. Smith*, 13 Cal. 415.

8. The government having issued a patent to R. of a portion of the land included in the general tract designated in the grant to A., it does not lie in the mouth of the latter to complain, there still remaining of such general tract more than sufficient to satisfy the specific quantity granted to him. If the patentee accepted the land described on his patent as answering his claim, other persons cannot complain, even if a portion of the land thus taken was without the boundaries of his original claim. *Waterman v. Smith*, 13 Cal. 417; *Moore v. Wilkinson*, 13 Cal. 487.

9. The patent is only evidence of the pre-existing title made perfect by confirmation and survey. *Waterman v. Smith*, 13 Cal. 418.

10. The patent is conclusive evidence of the right of the patentee to the land

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described therein, not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship. *Waterman v. Smith*, 13 Cal. 419; *Moore v. Wilkinson*, 13 Cal. 487; *Yount v. Howell*, 14 Cal. 469; *Stark v. Barrett*, 15 Cal. 366.

11. The act of Congress (May 20th, 1836,) vesting the title of public lands patented to a person dead at the date of the patent, in "the heirs, devisees, or assigns of the deceased patentee," was intended to cover all cases where any rights belonging to the United States existed in lands which could be relinquished by patent, even though the lands were not strictly public lands. *Waterman v. Smith*, 13 Cal. 420.

12. Parties holding claims which may be located without the boundaries of the patent, and still within the limits of the general tract designated in the grants to them, do not constitute such third persons, nor do parties who hold claims only upon the bounty of the government, nor do intruders, nor even settlers, having certificates of sale, unless the same antedate the presentation of the claim of the patentee to the Board of Land Commissioners for California, to which period the patent takes effect by relation. *Waterman v. Smith*, 13 Cal. 420; *Moore v. Wilkinson*, 13 Cal. 488.

13. If settlers, after steps taken for confirmation, could by location acquire such rights to the premises as to authorize them to compel a patentee, in every suit for the recovery of his land, to establish the correctness of the action of the officers of government in their survey and location, the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation, and the settlement of land titles in the country be delayed a quarter of a century. *Moore v. Wilkinson*, 13 Cal. 488.

14. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defendant cannot set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it

would only follow that the patent was inoperative to that extent—not that it is void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3d, 1851, and the patent would be like a second deed to premises previously granted, and pass as to the property, no interest. *Boggs v. Merced Mining Co.*, 14 Cal. 363; *Yount v. Howell*, 14 Cal. 469.

15. A patent from the United States proves itself. Courts take judicial notice of the signature of the president, and of the seal of the government. *Yount v. Howell*, 14 Cal. 467.

16. Where the complaint in ejectment avers that the land sued for "is known by the name of "La jota," heretofore granted to plaintiff by the Mexican government, and the patent issued thereon refers to the grant, the proceedings before the land commission and the United States court for confirmation; these recitals in the patent support the averment of title through the grant. *Ib.*

17. The patent is in itself as against the government, evidence of the existence and validity of the grant recited in it, as well as of the relinquishment of all claim of the United States to the land it embraces. *Ib.*

18. A patent can have no greater effect upon the title than the judgment of the proper court; the patent would save the parties the necessity of proving anything beyond it, and limit the evidence in the case to matters arising upon mesne conveyances under the original grantee. But so far as the title is concerned, the boundaries of the land being given—its segregation, in other words, from the public domain, being made by the decree itself, nothing further could be required. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 551.

19. The eleventh section of the act of 1856, for the protection of actual settlers and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton v. Folger*, 15 Cal. 284.

20. The patent, in recognizing the validity of the grant, necessarily establishes the validity of all properly executed intermediate transfers of the grantee's interest. *Stark v. Barrett*, 15 Cal. 366.

21. The patent is the record of the

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State that the land was subject to location under the grant of the United States, and has been located, through her officers, in pursuance of the terms of the donation; and as against parties who have no higher right than that which arises from mere occupation, it imports absolute verity. *Doll v. Meador*, 16 Cal. 324.

22. If a patent be void upon its face, it may be assailed at any time and in all cases, for it is itself record evidence of the matter which renders it a nullity. If it be issued in the absence of legislation directing a disposition of the property described, or by an officer who is not invested with power to sign the same, or for an estate prohibited, its validity may also be controverted in any action, either directly or collaterally; but if the authority to issue the patent depend upon the existence of particular facts in reference to the condition or location of the property, or the performance of certain antecedent acts, and officers have been appointed for the ascertainment of these matters in advance, who have passed upon them, and given their judgment—then the patent, though the judgment of the officers be, in fact, erroneous, cannot be attacked collaterally by parties showing title subsequently from the same source, much less by those who show no color of title in themselves. In such cases, the parties without title cannot be heard at all, and the parties with subsequent title must seek their remedy by *scire facias*, or bill, or information, to revoke the first patent, or limit its operation. *Ib.*

23. A patent not void upon its face cannot be questioned, either collaterally or directly, by persons who do not show themselves to be in privity with a common or paramount source of title. *Ib.* 325.

24. The defendants in this case stand in no privity with the United States, and possess no claim, legal or equitable, to the lands upon which they are settled—inasmuch as they failed to accept the proffered offer of the general government to invest them with title through the action of certain officers—and, therefore, cannot be heard in opposition to the patent which the plaintiff holds from the State of California. *Ib.* 326.

25. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the

survey of the United States—which selections are only subject to three qualifications: first, they must not be of lands reserved from sale by any law of Congress or the proclamation of the President; second, they must be in parcels of not less than three hundred and twenty acres each; and third, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Ib.* 331.

26. State selections will not become absolute and definite until the survey—until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

27. In ejectment on a patent from the United States for land under a Mexican grant, in which patent there was incorporated a plat of survey, on the margin of which was a memorandum that the land was surveyed, under the orders of the United States surveyor general, by Von S., deputy surveyor, and that the field notes from which it was made had been examined and approved by the United States surveyor general for California, and were on file in his office, plaintiff offered the patent in evidence, and defendant objected to the survey it set forth, on the ground that the deputy surveyor who made it was interested in the grant: held, that the objection is untenable; that it is immaterial whether the deputy was, at the time, interested in the grant or not, as the approval of the survey by the surveyor general and by the proper department at Washington imparted validity to the survey, and put it beyond the reach of attack in actions of ejectment; that such approval was the judgment of the appropriate tribunal, that the survey was in conformity with the final decree of confirmation—this case having arisen previous to the act of Congress, of 1860, giving the district court supervision over the action of the surveyor general, etc. *Mott v. Smith*, 16 Cal. 548.

28. Where, in ejectment on a patent from the United States, reciting that the patentee had presented his claim to the board of land commissioners, and that the claim was founded on a Mexican grant made to Pablo Gutieras "in the summer

of 1844, by Captain John A. Sutter, who, according to the records of the board, derived his authority from Governor Micheltorena, on the twenty-seventh day of December, 1844," etc., it was objected to the introduction of the patent in evidence, that it rested on a grant from one who had no authority to grant: held, that even conceding Sutter had no such authority, still, the tribunals established by the United States government for the express purpose of ascertaining and determining the validity of grants claimed to have been issued by the Mexican government having passed upon this grant and pronounced it valid, its validity cannot be questioned, either by the government or by individuals claiming under the government, either collaterally in ejectment, or directly in any other form of proceeding; that the validity of the grant has become the law of the case. *Ib.*

See EJECTMENT, LAND.

PAYMENT.

1. Gold dust is not cash within the meaning of a contract calling for the payment of cash. *Gunter v. Sanchez*, 1 Cal. 46.

2. On a sale of chattels where no time of payment and no time for delivery are agreed upon, delivery and payment are concurrent acts; and neither party can maintain an action for nonperformance without showing a readiness and willingness to perform on his part. *Cole v. Swanston*, 1 Cal. 54.

3. A being indebted to B, delivered to him a quantity of lumber as security for payment of the debt, with the understanding that B. should proceed and sell the lumber and pay his debt out of the proceeds. The lumber was afterwards levied upon by the defendants under an execution in their favor against A, as his property: held, that the lumber was not subject to seizure under an execution against A, without payment in the first place of his indebtedness to B. *Swanston v. Sublette*, 1 Cal. 124.

4. Where it was agreed in a charter party that a vessel should be chartered for fifteen months, at \$2,000 per month, and

payments to be made semi-annually in New York city: held, that the owner of the vessel had lost his right of lien on the cargo for the nonpayment of the sum stipulated in the charter party. *Brown v. Hayward*, 1 Cal. 424.

5. A check is presumptive evidence of payment of a debt due and not of money loaned. *Headley v. Reed*, 2 Cal. 324.

6. The principle that a liability by a less sum than the amount due applies to payment in money, and has never been extended to a case where merchandise or property in goods was accepted in satisfaction. *Gaven v. Lord*, 2 Cal. 497.

7. If a payment be made in mistake of law and not of fact, the court cannot relieve the party. *Smith v. McDougal*, 2 Cal. 587.

8. A payment to the sheriff for the redemption of land sold cannot be made in certified checks. *People v. Hays*, 4 Cal. 152.

9. Plaintiff having protested against the sale, purchased the property in order to protect it from a clouded title, made the payment under protest, and in a few days after commenced suit for the recovery of the money: held, that this was sufficient notice to the officer to hold the fund, and fixes his liability. *Hays v. Hogan*, 5 Cal. 242.

10. Receipts executed by a third party acknowledging the payment of money, are but secondary evidence, as the party executing them is a competent witness to prove the payments, or any other person who saw the payments made. *Ford v. Smith*, 5 Cal. 314.

11. In an action for contribution between joint obligees, the statute of limitations does not begin to run until after the payment of the debt by the plaintiff, *Sherwood v. Dunbar*, 6 Cal. 54.

12. Where the payment was made by plaintiff by a settlement of accounts with the payee of the note, the statute only begins to run from the date of the appropriation of money due by the payee to the plaintiff, to the payment of the note. *Ib.*

13. A payment to a clerk of a banking house over the counter is a legal payment, by which the payor loses all control over the money, nor is it vitiated by a subsequent agreement by the payor with the clerk, to allow the latter to use the money *Rhodes v. Hinckley*, 6 Cal. 284.

Payment.

14. When a draft is accepted conditionally, to be paid upon the happening of a contingency, whether the contingency has happened is a question for the jury. *Nagle v. Homer*, 8 Cal. 358.

15. A draft payable in terms out of an "appropriation" for work done by the acceptor, becomes due on payment for the work by government. *Ib.*

16. A executed a note and mortgage to B. Subsequently A and B entered into partnership in the livery business. A was to furnish the stable, hay and grain, and board B, and B. was to attend the stable, the profits to be equally divided, and the share of A was to be applied in discharge of the note. B. received the sum of three hundred and ninety-six dollars, as share of the profits of the business, and then after maturity assigned the note and mortgage to C. C. brought suit against A for the whole amount. A plead payment and set-off: held, that A was entitled to the credit of the payment. *Mount v. Chapman*, 9 Cal. 296.

17. Where money is paid upon compulsion, the law raises an obligation to refund, and the action is for money had and received to the plaintiff's use. *McMillan v. Richards*, 9 Cal. 418.

18. The object of a protest is to take from a payment its voluntary character, and thus conserve to the party a right of action to recover back the money. *Ib.*

19. A bill in equity may be filed and an injunction obtained in advance forbidding the sheriff from paying over the money which the creditor might pay to effect the redemption, until the further order of the court of chancery. *Ib.* 420.

20. There is no such rule of law which prevents a debtor in insolvent circumstances from the application of his property to the payment of one debt rather than another. *Randall v. Buffington*, 10 Cal. 494.

21. Defendants were indebted to plaintiff in the sum of \$10,000. Subsequently parties had a settlement, and defendants gave to plaintiff, in part payment of the debt, a note of third parties for \$2,500, which was received by plaintiff without objection, and the same left with defendants for collection. The note was not paid at maturity, and plaintiff demanded the amount for which the note was taken in settlement of the defendants, who paid

\$1,200 and gave to plaintiff another note of same parties for the balance, payable in one year: held, in an action by plaintiff against the defendants to recover the balance, that defendants are liable for the amount. *Griffith v. Grogan*, 12 Cal. 321.

22. Unless the note was received by express agreement as payment, it did not extinguish the debt; it only operated to extend the time of payment of the debt to the time the note fell due, and hence the statute of limitations would commence running only from that time. *Ib.* 222.

23. The acceptance of a note of a third party by the creditor is considered as accompanied with the condition that the note shall be paid at its maturity. *Ib.*

24. The obligation of the debtor to pay in such case does not rest upon notice by the creditor of the nonpayment of the note, but upon the fact that the note was not paid; and hence delay on the part of the creditor in calling on the debtor will not absolve him from his obligations to pay. *Ib.*

25. A part payment of a demand by one of two debtors will not discharge such debtor making the payment from the payment of the balance. This obligation is to pay the whole. *Ib.*

26. Nothing is to be considered as payment in fact but that which is in truth such, unless something else is expressly agreed to be received in its place. *Ib.*

27. Where a redemptioner under the statute pays to the sheriff an excess of money under protest as to the excess, the payment is not compulsory and the redemptioner may recover it back on demand. *McMillan v. Visher*, 14 Cal. 240.

28. If the debtor at the time of or previous to payment neglects to designate to which of several debts he applies his payment, his right to control the application is gone, and the creditor may exercise it at any time before suit. *Haynes v. Waite*, 14 Cal. 448.

29. The institution of suit evidences the creditor's application of the payment. *Ib.*

30. As a security for a debt, default in the payment of a mortgage does not change its character. Payment after default operates to discharge the lien equally with payment at the maturity of the debt. *Johnson v. Sherman*, 15 Cal. 293.

31. Where bonds were issued as a payment of warrants which had been stolen.

Payment.—Penalty.

they cannot be recovered back, and if the rule that voluntary payments are not recoverable be not applicable, still the equity of the defendants is equal to that of plaintiff, and courts will not interfere. *State of California v. Wells*, 15 Cal. 344.

32. The State, being in default in making the monthly payments under the State prison contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill and McCauley to their original position, they having been in possession of the prison for nearly three years and having performed valuable services, cannot claim in equity a rescission of the contract. *State of California v. McCauley*, 15 Cal. 458.

33. To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that funds to meet the same should be at the time in the treasury. *People v. Brooks*, 16 Cal. 28.

34. The provision in the constitution, "that no money shall be drawn from the treasury, but in consequence of appropriations made by law," means only that no money shall be drawn, except in pursuance of law. *Ib.*

35. The act of April 13th, 1854, amendatory of the act concerning the office of controller, and providing that no warrants shall be drawn except there be "an unexhausted, specific appropriation" to meet the same, means only that the controller shall not draw a warrant for a specific object, when he has already drawn for the full amount of the appropriation made for that object. *Ib.*

36. Under the mechanic's lien act of 1858, material-men, subcontractors, etc., have a lien upon the property described in the act to the extent—if so much be necessary—of the contract price of the principal contractor; but they must give notice of their claims to the owner, or the mere existence of such claims will not prevent the owner from paying the contractor, and thereby discharging himself

from the debt. By giving such notice, the owner becomes liable to pay the subcontractor, material-men, etc., as on garnishment or assignment; but if the owner pay according to his contract, in ignorance of such claims, the payment is good. *McAlpin v. Duncan*, 16 Cal. 127.

37. Taxes not justly due and paid under protest may be recovered back under suit against the tax collector. *Falkner v. Hunt*, 16 Cal. 170.

38. A mere stranger who voluntarily pays money due on a mortgage, and fails to take an assignment thereof, but allows it to be canceled and discharged, cannot afterwards come into equity, and, in the absence of fraud, accident or mistake of fact, have the mortgage reinstated and himself substituted in the place of the mortgagee. *Guy v. DuUprey*, 16 Cal. 198.

PENALTY.

1. An action founded upon a statute to recover a penalty, where no penalty is imposed by the statute, cannot be sustained. *Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 198.

2. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 9 Cal. 642.

3. Where a telegraph company fails to transmit a message upon compliance by the person contracting with it with the conditions required by section one hundred and fifty-four of the act of 1850, an action for the penalty given by the act lies in favor of such person. *Thurn v. Alta Telegraph Co.*, 15 Cal. 475.

4. The sum to be so recovered is a penalty for a breach of the duty to transmit the message, and the act is in this section a penal law to be strictly construed. *Ib.*

5. The person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the despatch. *Ib.*

PERJURY.

1. An indictment for perjury, charging that the accused in a certain proceeding, describing it, "did willfully, corruptly, and falsely swear," etc., but not alleging that the perjury was committed "feloniously," is sufficient. *People v. Parsons*, 6 Cal. 488; *People v. Olivera*, 7 Cal. 404.

2. A conviction for perjury cannot be sustained without the false oath be material to the issue, and therefore prejudicial to some one; otherwise, however willful, it cannot be perjury. *People v. McDermott*, 8 Cal. 290.

3. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appealed from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People v. Wooster*, 16 Cal. 435.

See CRIMES AND CRIMINAL LAW, INDICTMENT.

PERPETUITY.

1. A covenant for a lease to be renewed indefinitely at the option of the lessee, is in effect the creation of a perpetuity, and is against the policy of the law. *Morrison v. Rosignol*, 5 Cal. 65.

PERSON.

1. The word "person," in its legal signification, is a generic term, and was intended to include artificial as well as natural persons. *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 306; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

See PARTIES.

PHYSICIAN.

1. In a suit by a physician against a county, on a contract for services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless the demurrer distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

2. If after such contract which compels the physician to perform such services only as the supervisors might require, they put it out of his power to render the services, he is still entitled to his salary. *Ib.* See INSANE ASYLUM.

PILOT.

1. When a vessel is properly in charge of a licensed pilot, the owner is not liable for damages which may ensue from the negligence or misconduct of the pilot, but the owner is not exempt from liability for injuries committed by taking an improper berth in the harbor, although it may have been selected by the pilot. *Griswold v. Sharpe*, 2 Cal. 24.

2. Pilots are appointed by virtue of an act of the legislature; have a fixed term to their employments; have definite duties prescribed; fixed rates of compensation; are required to give bond, and are entitled to all the business of pilots for the harbor of San Francisco. They are subject to penalties for misfeasance or malfeasance, and are protected by law in the enjoyment of their offices and emoluments. *People v. Woodbury*, 14 Cal. 45.

3. Quo warranto lies to test the right of a pilot to the office as appointed by the board of pilot commissioners. *Ib.*

4. In quo warranto for the alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to hold the office: held, that these al-

legations as to relator's right, cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *People v. Abbott*, 16 Cal. 364.

5. The act of April 21st, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21st, whose term of office had not expired when this act went into operation. *Ib.* 365.

6. The title of an act cannot be used to restrain or control any positive provision of the act, but where the meaning of the body of the act is doubtful, the title may be resorted to as a means of ascertaining the intention of the legislature. *Ib.* 365.

PILOT COMMISSIONERS.

1. The board of pilot commissioners is a quasi judicial body, entrusted with duties, the performance of which requires the exercise of judgment and discretion; and its members are not civilly answerable for their acts as such. *Downer v. Lent*, 6 Cal. 95.

2. The Board of pilot commissioners under the act of 1854 as amended by the act of 1858, have only the powers conferred by the act, and must appoint the pilots from all classes of persons named therein. They cannot appoint a man as pilot who has not served two years on a pilot boat in the harbor, or commanded a vessel in and out of port for three years. *People v. Woodbury*, 14 Cal. 45.

See OFFICE, PILOT.

PLACER COUNTY.

1. The special act of the legislature, approved April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at \$3,000, was intended in lieu of all services rendered the county. *Mitchell v. Stoner*, 9 Cal. 204.

PLAINTIFF.

1. An agent cannot ordinarily sue in his own name in respect to the subject matter of his own agency, and this rule applies to consignees and endorsers of bills of lading unless they are in truth but the agents of the shippers. *Lineker v. Ayesford*, 1 Cal. 82.

2. A sheriff who levies an attachment by virtue of the process of the court has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Mulhado*, 1 Cal. 105.

3. In an action of ejectment brought by several plaintiffs jointly, all must recover or none can. *Sunol v. Hepburn*, 1 Cal. 260.

4. The plaintiff always, in contemplation of law, has the affirmative and the right to open and conclude the cause. *Benham v. Rowe*, 2 Cal. 408.

5. Where suit is brought upon a bill of lading made to the plaintiff jointly with another, the plaintiff has no separate cause of action. *Mayo v. Stansbury*, 3 Cal. 467.

6. A principal may sue in his own name on a contract in writing, made and signed by his agent without disclosing his principal, but the principal must show the agency and the power of the agent to bind him at the time. *Ruiz v. Norton*, 4 Cal. 358.

7. H. purchased goods of P. & M., which were consigned to P., an agent. H. failing to pay for the goods on delivery, P. brought an action to recover the purchase money: held, that P. had no right of action in his own name. *Phillips v. Henshaw*, 5 Cal. 510.

8. A plaintiff or defendant cannot be permitted to testify on the part of his co-plaintiff or defendant. *Gates v. Nash*, 6 Cal. 194; *Lucas v. Payne*, 7 Cal. 96; *Turner v. McIlhaney*, 8 Cal. 579.

9. The want of capacity in the plaintiff to sue should be specifically set up in the answer. The general issue is not sufficient. *California Steam Navigation Co. v. Wright*, 8 Cal. 590.

10. It is no ground of demurrer to a complaint that the christian name of one of the plaintiffs does not appear. *Nelson v. Highland*, 13 Cal. 75.

Plaintiff.—Pleading.

11. On an injunction bond given to plaintiff and others as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

12. In an action by the wife for money, which, when recovered, will be her separate property, subject to the management and control of the husband, he is properly joined with her as plaintiff. *Van Maren v. Johnson*, 15 Cal. 310.

13. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. This suit not being a prosecution but a civil action for the recovery of money due the State, is properly brought in the name of the State. *State of California v. Poulterer*, 16 Cal. 532.

PLEADING.

1. Pleadings must be construed, when they are ambiguous, most strongly against the pleader. *Snow v. Halstead*, 1 Cal. 361; *Chipman v. Emeric*, 5 Cal. 51; *Kashaw v. Kashaw*, 3 Cal. 322; *Green v. Covillaud*, 10 Cal. 322; *Dye v. Dye*, 11 Cal. 167; *Sparks v. De la Guerra*, 14 Cal. 111; *Collins v. Butler*, 14 Cal. 227.

2. Great latitude is given to the courts, in our statute, in amending and altering pleadings. *Pollock v. Hunt*, 2 Cal. 194; *Stearns v. Martin*, 4 Cal. 229.

3. The verdict must be confined to the matter put in issue by the pleadings. *Benedict v. Bray*, 2 Cal. 256; *Truebody v. Jacobson*, 2 Cal. 285.

4. A contract contained a covenant of stipulated damages, and by the same contract the parties were constituted partners: it was held, that in an action on the

contract, the legal demand for damages could be joined with the equitable demand for a dissolution. *Stone v. Fouse*, 3 Cal. 294.

5. A copartnership contract contained a covenant also for damages: it was held that one partner could not sue the other for the damages without seeking an account and a dissolution. *Ib.*

6. Pleadings must be strongly taken against the pleader, and in the absence of an allegation the presumption is that the fact does not exist. *Kashaw v. Kashaw*, 3 Cal. 322.

7. Where a bill disclosed that the same subject matter has been litigated between the same parties in a prior suit, and that in the said suit the plaintiff in this suit had set up the same equity which he claims by this bill, the bill was ordered to be dismissed. *Barnett v. Kilbourne*, 3 Cal. 327.

8. The allegation of ignorance in making the necessary averments, or of insufficient conduct in the prosecution of a former suit, does not constitute ground of relief in chancery. *Ib.*

9. A plaintiff may waive a tort, and sue in assumpsit or for an account if he prefer it. *Lubert v. Chauviteau*, 3 Cal. 462; *Fratt v. Clark*, 13 Cal. 90.

10. The distinctions in the form of actions ex delicto and ex contractu was abolished by statute; but the general principles which govern such actions are retained. *Lubert v. Chauviteau*, 3 Cal. 463.

11. Assumpsit on the condition of a bond would be held bad on demurrer. *Baker v. Cornwall*, 4 Cal. 16.

12. Where a party alleges assignment to him of a contract made with another, he must aver a positive transfer and the character of it. *Stearns v. Martin*, 4 Cal. 229.

13. Matters in avoidance must be specially pleaded. They cannot be used as defenses under an answer which is a simple denial of the allegations of the bill. *Gaskill v. Trainer*, 4 Cal. 235.

14. Under the code it is competent for the plaintiff to recover real property, with damages for withholding it, and the rents and profits, all in the same action and as one cause of action. *Sullivan v. Davis*, 4 Cal. 292.

15. A party ought not to be allowed the

Pleading.

benefit of any proceeding unless he assumes the responsibility of it. *Douglass v. Pacific Mail S. S. Co.*, 4 Cal. 305.

16. The word "person" in the code of practice is a generic term, and was intended to include artificial as well as natural persons, corporations as well as individuals. *Ib.*; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

17. We are not disposed to encourage nice or technical rules of pleading, but we desire something like certainty, and that the bar would conform as near as possible to the requirements of the code. *Mershon v. Randall*, 4 Cal. 326.

18. The substitution of pleadings is always within the discretion of the court, and notice of the motion to apply for it need not be given when the notice can be of no use. *Benedict v. Cozzens*, 4 Cal. 382.

19. An action may be brought by one person against another, for the purpose of determining an adverse claim which the latter makes against the former for money or property, upon an alleged obligation. *King v. Hall*, 5 Cal. 84.

20. A court of equity will not permit litigation by piecemeal. The whole subject matter and all the parties should be before it, and their respective claims determined once and forever. *Wilson v. Lassen*, 5 Cal. 116.

21. Under our system it is only necessary that the cause of indebtedness should be stated in such a manner as to apprise the defendants of the object of the suit. *Mulliken v. Hull*, 5 Cal. 246.

22. Notwithstanding our statute has dispensed with the old form of pleading, and it is no longer necessary to allege a fictitious demise, still, facts sufficient must be pleaded to show the plaintiff's right to recover, and it will not do to state conclusions of law in place thereof. *Payne v. Treadwell*, 5 Cal. 311.

23. Though a plea would be good on demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient reason to set aside the report. *Osgood v. Davis*, 5 Cal. 454.

24. For the furtherance of justice, courts should allow pleadings to be amended, so as to present a question of fraud to the jury when the defendant has been arrested, that the question may be submitted

to the jury and a judgment be entered in conformity to the facts found. *Mattoon v. Eder*, 6 Cal. 61; *Davis v. Robinson*, 10 Cal. 412.

25. Where the complaint in an action of trespass asks also for the equitable interpositions of the court, if the law and equity are inseparably mixed together, it would be demurrable; but it is not necessary that there should be express words, showing where the declaration in trespass leaves off, and the bill in equity begins. *Gates v. Kieff*, 7 Cal. 125.

26. A complaint which joins an action of trespass "quare clausum fregit," ejectment and prayer for relief in chancery, will be held bad on demurrer. To sustain such a complaint would be subversive of all the rules of pleading. *Bigelow v. Gove*, 7 Cal. 135.

27. No court could properly sustain a pleading or uphold a kind of hybrid answer, half demurrer and half plea, with nothing to designate where the one left off and the other commenced. *Andrews v. Mokelumne Hill Co.*, 7 Cal. 334.

28. Under no system of pleading will alternative or disjunctive allegations be permitted. *Porter v. Hermann*, 8 Cal. 624.

29. In forcible entry and detainer, when the title becomes involved, the justice must certify the pleadings to the district court. *Dickinson v. Maguire*, 9 Cal. 50.

30. Under a plea of general issue, evidence of a counter claim is not admissible, but should be specially plead. *Hicks v. Green*, 9 Cal. 75.

31. The code makes no distinction between the rules of pleading applicable to natural persons and those applicable to artificial persons. *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 467.

32. The test of the materiality of an averment in a pleading is this: Could the averment be stricken from the pleading without leaving it insufficient? *Whitwell v. Thomas*, 9 Cal. 500.

33. When a pleader assumes to set out the particulars of his case, he must be held to have done so. *Low v. Henry*, 9 Cal. 551.

34. The code has abolished all distinctions in the forms of action, and requires only a simple statement of the facts constituting the cause of action or defense. *Piercy v. Sabin*, 10 Cal. 27.

35. The plaintiff is compelled to set out every fact necessary to constitute his

Pleading.

cause of action, and the defendant every new matter of defense. This is required by the true principles of pleading. *Ib.*

36. The statute has not altered any of the ordinary rules of pleading for cases for divorce, except that nothing can be taken by admission or default. *Conant v. Conant*, 10 Cal. 254.

37. The defendants cannot object to a pleading as it stands, when they refused to permit it to be amended to suit their own views of the law. *Summers v. Farish*, 10 Cal. 352.

38. When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts. *Dye v. Dye*, 11 Cal. 167.

39. Common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons. *Hunt v. City of San Francisco*, 11 Cal. 258.

40. The fact that, by reason of one count having been imperfectly stated, no judgment could be rendered on that count, does not affect the right of plaintiff to take judgment on those which are rightly stated. *Ib.* 259.

41. Where personal property is tortiously taken, the party aggrieved may waive the tort, and sue in assumpsit for the value of the property. *Pratt v. Clark*, 12 Cal. 90.

42. The old rules of chancery pleading are superseded by the practice act. *Cordier v. Schloss*, 12 Cal. 147.

43. The code governs all cases of pleading, legal and equitable, by the same rules. *Goodwin v. Hammond*, 13 Cal. 160; *Riddle v. Baker*, 13 Cal. 302; *Payne v. Treadwell*, 16 Cal. 243.

44. Pleadings in justices' courts are not held to much strictness. *Liening v. Gould*, 3 Cal. 599; *Stuart v. Lander*, 16 Cal. 374.

45. Though a pleading is not strictly proof for the party making it, still a complaint may be read to the jury to show what allegations are not denied, and hence admitted. *Garfield v. Knight's Ferry and Table Mountain Water Co.*, 14 Cal. 36.

46. An appeal will be dismissed when the record contains no copy of the pleadings. *Hart v. Plum*, 14 Cal. 152.

47. A court cannot properly, even upon consent of parties, pass upon questions not raised by the written allegations of the pleadings. *Boggs v. Merced Mining Co.*, 14 Cal. 356.

48. The object of sworn pleadings is to elicit the truth, and this object must be entirely defeated if the same fact may be denied and admitted in the same pleading. *Hensley v. Tartar*, 14 Cal. 509; *Blankman v. Vallejo*, 15 Cal. 644.

49. The rules of pleading under our system of practice are very simple, and can be readily followed; yet we find in numerous instances before us, pleadings filled with recitals, digressions and stories which only tend to prolixity and obscurity. *Green v. Palmer*, 15 Cal. 414; *Coryell v. Cain*, 16 Cal. 571.

50. Facts only must be stated in the complaint, as contradistinguished from the law, from argument, from hypothesis and from the evidence of the facts. *Ib.*

51. Each party must allege every fact which he is required to prove, and will be precluded from proving any fact not alleged. *Green v. Palmer*, 15 Cal. 415.

52. Nothing should be stated which is not essential to the claim or defense, or in other words, that none but issuable facts should be stated. If this be violated, the adverse party may move to strike out the unessential parts. *Ib.* 416.

53. All statements in pleadings must be concisely made, and when once made, must not be repeated. *Ib.* 417.

54. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion, and to require a denial of every specific averment in a sworn bill, in substance and in spirit, and not merely a denial of its literal truth; and wherever the defendant fails to make such denial he admits the averment. *Blankman v. Vallejo*, 15 Cal. 644.

55. There is but one form of civil actions in this State, and all the forms of pleadings and the rules by which their sufficiency is to be determined, are prescribed by the practice act. *Payne v. Treadwell*, 16 Cal. 243.

See ABATEMENT, ACTIONS, ACTIONS JOINDER OF, ADMISSIONS, III, AMENDMENT, ANSWER, APPEARANCE, AVOIDANCE, BAR PLEA IN, COGNOVIT, COMPLAINT, CONCILIATION, DEFAULT, DEMURRER, DISCONTINUANCE, ELECTION, DOCTRINE OF, ITEMS BILL OF, JUSTICE OF THE PEACE, III, PRACTICE, PUIS DARREIN CONTINUANCE, VARIANCE.

PLEDGE.

1. A party by pledging negotiable securities transferable by delivery, loses all right to the securities when transferred by the pledgee in good faith to a third party. *Coit v. Humbert*, 5 Cal. 261.

2. The pledgee in such a case should be treated in the transaction as the agent of the owner, and the owner should be bound by his acts in the premises. *Ib.* 262.

3. The purchase of property by a factor in his own name makes him to all the world the apparent owner, and as far as affects the rights of third persons his power is unlimited. He has the right to pledge. *Leet v. Wadsworth*, 5 Cal. 405.

4. A factor has no right to pledge goods when his only business is to sell goods consigned to him for that purpose wherefore, on account of his notorious employment, all the world is charged with notice that the goods in his possession are the property of others, and that he has power to sell them and no power to pledge them. *Hutchinson v. Bours*, 6 Cal. 385.

5. A pledge is a bailment which is reciprocally beneficial to both parties, and therefore the law requires of the pledgee the exercise of ordinary diligence in the custody and care of the goods pledged, and he is responsible for ordinary negligence. *St. Losky v. Davidson*, 6 Cal. 647.

6. When the bailors agreed that the goods pledged should be stored in a certain warehouse at their risk and expense: held, that their removal by an agent of the bailees, though without their knowledge, charged them for safe keeping of the goods after their removal, and that they were responsible for any damage to said goods caused by their removal to an insecure or improper place of storage. *Ib.*

7. When there is nothing in the business of consignees to make them technical factors, third parties are not bound to know that they acted as factors in pledging particular goods. *Glidden v. Lucas*, 7 Cal. 29.

8. A mortgage of personal property passes the present legal title in the property itself to the mortgagee, subject to be revested in the mortgagor, his heirs or assigns, upon the performance by him or them of an express condition subsequent. *Dewey v. Bowman*, 8 Cal. 150.

9. Where a negotiable promissory note not yet due is taken bona fide, as collateral security for a preëxisting debt, it is not subject to any defense existing at the date of the assignment between the original parties. *Payne v. Bensley*, 8 Cal. 267; *Robinson v. Smith*, 14 Cal. 48; *Naglee v. Lyman*, 14 Cal. 454.

10. A pledge of personal property is a "mortgage" within the meaning of the attachment act, the word being there used in the most general signification, meaning "security." *Payne v. Bensley*, 8 Cal. 267.

11. The rule that a factor cannot pledge the goods of his principal is in that case confined to technical factors, when the rights of third parties are involved. *Horr v. Barker*, 11 Cal. 402.

12. At one time seven shares of stock in a company were pledged by defendant to plaintiff as security for a note of defendant then executed. At another time twenty more shares were pledged as security for another note of defendant then executed. In suit on the notes and for sale of the stock, etc., the judgment was for the amount of the notes, and directed a sale of all the shares of stock and an application of the proceeds to the payment of the judgment: held, that the judgment was wrong so far as it ordered a sale of the stock in gross and an application of the proceeds to the entire indebtedness. *Mahoney v. Caperton*, 15 Cal. 315.

See DELIVERY, MORTGAGE, STATUTE OF FRAUDS.

POSSESSION.

- I. Of Real Estate.
- II. Of Personal Property.
- III. Abandonment of Possession.

I. OF REAL ESTATE.

1. A person cannot be dispossessed of his property under an order of court proceeding ex parte on the statement of the plaintiff, and without citation or notice of the defendant. *Ladd v. Stevenson*, 1 Cal. 22.

2. In the action for the recovery of

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land, if the plaintiff prove no title, the defendants being in possession, cannot be ousted; but if the defendants have entered into possession, claiming under the plaintiff, and in subordination to his title, they are estopped from questioning it. *Hoen v. Simmons*, 1 Cal. 121.

3. Where a contract is made to convey land by a quitclaim deed, at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person had intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

4. Nor can such action be sustained on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to that effect, that at the time of making the agreement he consented and agreed that the vendee should take possession of the lot forthwith. *Ib.*

5. One who is in the actual possession of land cannot by process of law be ousted by another who has neither title nor color of title. *Suñol v. Hepburn*, 1 Cal. 259.

6. The fact that horses and cattle of a person have roamed over and grazed upon a particular tract of land does not of itself alone make out his actual possession of the land. *Ib.* 260.

7. If the plaintiff was not in possession at the time of the defendant's entry, he cannot maintain ejectment. *Ib.*

8. When the plaintiff seeks to recover upon the sole ground of prior possession, a clear and unequivocal possession should be proven. Taking possession and driving some surveyor's stakes and clearing away some brush for the purpose of erecting a dwelling house, but performing no other acts of ownership at that or any other time, are insufficient evidences of possession. *Woodworth v. Fulton*, 1 Cal. 310.

9. Courts will protect the rights of the actual possessors, and if the complaint avers possession by the plaintiff and is not denied by the answer, it will be assumed by the court as a conceded fact. *Folsom v. Root*, 1 Cal. 376.

10. A lot of land in the harbor of San Francisco, lying within the line of streets as laid down and recognized by the city on its official map, and being in the actual

possession of a person who claims to be the owner, cannot be taken from him and appropriated to the public use without paying him a just compensation. *Gunter v. Geary*, 1 Cal. 465.

11. After the purchase of land by a party at sheriff's sale, he has the right to sue for his possession; and the discovery of a fraud after suit brought would entitle him so to shape his action as to include it for the consideration of the court. *Truebody v. Jacobson*, 2 Cal. 284.

12. Possession is always prima facie evidence of title, and proof of prior possession is enough to maintain ejectment against a mere naked trespasser. *Hutchinson v. Perley*, 4 Cal. 34; *Hicks v. Davis*, 4 Cal. 69; *Winans v. Christy*, 4 Cal. 78; *Plume v. Seward*, 4 Cal. 96; *McMinn v. Mayes*, 4 Cal. 210; *Bequette v. Caulfield*, 4 Cal. 278; *Ramirez v. Murray*, 4 Cal. 293; *Norris v. Russell*, 5 Cal. 250; *Grover v. Hawley*, 5 Cal. 486; *Covillaud v. Tanner*, 7 Cal. 39; *McCarron v. O'Connell*, 7 Cal. 153; *Bird v. Dennison*, 7 Cal. 302; *Merced Mining Co. v. Fremont*, 7 Cal. 302; *Bird v. Lisbros*, 9 Cal. 5; *Nagle v. Macy*, 9 Cal. 427.

13. To constitute a possession sufficient to establish prima facie evidence of title, there must be an actual bona fide occupation or possessio pedis, and not a mere assertion of title. *Plume v. Seward*, 4 Cal. 96.

14. In actions of forcible entry and detainer, the statute does not require an allegation of possession by the plaintiff. *Cronise v. Carghill*, 4 Cal. 122.

15. It is not for the jury to determine whether the fact of prior possession is evidence of title; it is so declared by law. *Castro v. Gill*, 5 Cal. 42.

16. A party's possession is not always confined to his actual enclosure. *Ib.*

17. Proof of possession, however short, will entitle a claimant to recover, unless the defendant can account for such possession, or show a prior possession or title in himself or a third person. *Potter v. Knowles*, 5 Cal. 88.

18. Where two parties rely upon possession merely as proof of title, the presumption of ownership is in favor of the first possessor. *Ib.*

19. To sustain an action of ejectment in favor of a party relying upon mere prior possession, the defendant in the ac-

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tion is treated as an intruder and wrong doer, who invades without right in the premises. *McClintock v. Bryden*, 5 Cal. 101.

20. Where the plaintiff claimed title to the premises as part of a preëmption claim located by him, he must prove an enclosure of, or marked and visible boundaries embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 166.

21. A claim for the possession of real property, with damages for its detention, cannot be joined in the same complaint under any system of pleading with a claim for consequential damages arising from a change of a road, by which a tavern-keeper may have been injured in his business. *Bowles v. Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

22. Prior possession is evidence of title, and this cannot by any system of reasoning be made to yield to mere color of title. *Norris v. Russell*, 5 Cal. 250.

23. The occupant of mineral land may rely upon his possession against a mere trespasser, unless he uses the land for grazing or agricultural purposes. *Fitzgerald v. Urton*, 5 Cal. 309.

24. The right of enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or administrator, and the right of the deceased be conveyed by a regular sale to another. *Grover v. Hawley*, 5 Cal. 486.

25. To enable the plaintiff in ejectment to recover on prior possession, he must allege and prove an actual ouster. *Watson v. Zimmerman*, 6 Cal. 47.

26. In cases of forcible entry, what is an actual and what a constructive possession, in many cases, must be a question of fact for the jury. *O'Callaghan v. Booth*, 6 Cal. 65.

27. In an action for the recovery of a portion of a tract of land, both parties relying on possession, and the defendant proving a prior possession by actual enclosure of the entire tract, it was error to instruct the jury that the defendant's possession was not valid, unless in conformity with the preëmption laws of the United States or the possessory law of this State. *Bradshaw v. Treat*, 6 Cal. 172.

28. Possession gives title only by presumption; then when the possession is shown to be of public land, why may not

any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption, for a license to occupy from the owner will be presumed. *Conger v. Weaver*, 6 Cal. 557.

29. Where a plaintiff in ejectment seeks to recover upon prior possession, and does not show a compliance with the statute concerning possessory actions in this State, he can only recover upon proof of actual bona fide occupation. *Murphy v. Wallingford*, 6 Cal. 649.

30. Possession is not constructive notice of title, but it may be admitted in evidence along with other facts to establish fraud or actual notice. *Stafford v. Lick*, 7 Cal. 489.

31. Parties in possession of land, claiming title thereto, are presumed to be the owners thereof, and are entitled to compensation before it can be taken for public uses. *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 579.

32. The plaintiff having entered into possession under S. M. H. and in subordination to his title, cannot question S. M. H.'s right to execute the mortgage or agreement which conferred the right of reëntry upon defendant. *Henderson v. Grewell*, 8 Cal. 584.

33. The possession of J. being that of his employer, was not notice to the purchaser of a mining claim. *Jenkins v. Redding*, 8 Cal. 603.

34. A mere trespasser upon the prior actual possession of a party cannot justify his act by showing the true title outstanding in a third person, no party to the suit; else a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird v. Lisbros*, 9 Cal. 5.

35. But when the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good prima facie right may set up and show the true title to be in another party. *Ib.* 6.

36. Possession is evidence of title; and the party in possession is therefore deemed in law to be the owner. *Ib.* 7.

37. If any one acquires a title by adverse possession, it must be the party having the prior actual possession. The party having the prior actual possession is always entitled to recover the possession of the premises from the second possessor

when both claim only by possession, and the suit is only between two parties. *Humphreys v. McCall*, 9 Cal. 64.

38. It is error to refuse, in an action of ejectment, a nonsuit as to such defendants as were not in possession of the premises at the commencement of the action. *Garner v. Marshall*, 9 Cal. 270.

39. The possession of one tenant in common is possession for all; but this possession is one which ceases the moment it becomes adverse to the others. *Partridge v. McKinney*, 10 Cal. 184.

40. It has been held that the declarations of a tenant in possession of land, those declarations being made at the time of possession, may sometimes be given in evidence as a part of the *res gestæ*, to qualify the possession, the possession being the transaction which the declarations illustrate. But in order, and prior to the introduction of these declarations, it must be proved that the tenant was in possession at the time the proposed declarations were made. *Ellis v. Janes*, 10 Cal. 458.

41. Where a party takes possession of a part of a tract of land under a deed of conveyance to the whole, and at the time of entry no one is holding adversely, such possession will extend to the whole tract described in the deed. *Rose v. Davis*, 11 Cal. 141.

42. Possession of the grantor under whom the plaintiff claims inures to the benefit of such plaintiff. *Ib.*

43. Possession of one partner or tenant in common is the possession of all. *Waring v. Crow*, 11 Cal. 371.

44. Parties taking possession of a quartz lead under an agreement made with another party cannot retain possession and refuse compliance with their agreement made in consideration of such possession and right to the lead. *Hitchins v. Nougues*, 11 Cal. 36.

45. The delivery of a deed and cutting of firewood on the tract is not sufficient evidence of possession. The cutting of timber by itself was neither possession or title as against the owner. *Stockton v. Garfrias*, 12 Cal. 316.

46. Open and notorious possession of real estate by one having an unrecorded deed for it, is evidence of notice to a subsequent purchaser of the first vendee's title. But the possession must exist at the time of the acquisition of title or deed of

the subsequent vendee from the common vendor. *Hunter v. Watson*, 12 Cal. 376.

47. Where the complaint called upon the defendant to answer not only the character of the possession but the fact of possession of it, a failure to deny the averment is an admission of it. *Burke v. Table Mountain W. Co.*, 12 Cal. 407.

48. In an action of ejectment, where the complaint alleges possession in the defendant, a denial in the answer in the following words is not sufficient to put at issue the question of possession: "Defendant denies that he has unlawfully, wrongfully, and in violation of the plaintiff's rights, had the possession," etc. This denial might be true, and yet the defendants be in possession. The defendant was called on to answer not only the character of the possession, but the fact of possession. *Ib.* 409.

49. Though an agreement may show an attempt by plaintiff to get possession and work a mining claim in dispute on the day the defendant got his title, and though not sufficient of itself to show actual possession or a right of possession, yet shows a fact which in connection with other proof tended to prove the bona fides of plaintiff's claim, or notice of it by defendant. *Mc Garrity v. Byington*, 12 Cal. 430.

50. In an action of ejectment to recover mining claims, an answer to the complaint which avers "that any right which plaintiffs may have ever had to the possession, etc., they forfeited by a noncompliance with the rules, customs and regulations of the miners of the diggings embracing the claims in dispute prior to the defendant's entry," is insufficient in not setting forth the rules, customs, etc. *Dutch Flat Water Co. v. Mooney*, 12 Cal. 534.

51. Where a party takes possession of a tract of land, and encloses it with a fence consisting of posts seven feet apart, and one board six inches wide nailed on to the posts, and the same is not sufficient to turn cattle, and the land is not cultivated, such possession is not sufficient to sustain an action of ejectment as against a party in possession of a part of the tract, under a deed to the whole. *Baldwin v. Simpson*, 12 Cal. 560.

52. The fact that a party had cattle on the land, or was there for short periods himself, or that he claimed within given

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limits, is, in the absence of any enclosure or some visible physical signs of the extent of his boundaries or claim, insufficient to show the fact of possession of any particular tract, when others were also in possession. *Wilson v. Corbier*, 13 Cal. 167.

53. A perfect equity united with possession is, under our system, equivalent for all purposes of defense to a legal title. *Morrison v. Wilson*, 13 Cal. 500.

54. Possession of a tenant is not notice of his landlord's title. *Smith v. Dall*, 13 Cal. 511.

55. Possession of land at the death of a party gives prima facie title to his heirs or representatives. *Gregory v. McPherson*, 13 Cal. 572.

56. Mere prior possession of land cannot prevail against the present possession of defendant, taken under claim of title, derived regularly or not, from the rightful owner. *Gregory v. Haynes*, 13 Cal. 595.

57. Defendant had been let into possession under judgment in ejectment by him against C. This judgment is afterwards reversed. C. sells to G.: held, that defendant's possession was sufficient, until restored by due course of law, to break the force of the claim of G. based upon the prior possession of C. *Ib.*

58. The right to a preemption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a preemption right or any other purpose, or the land itself, may be mortgaged. *Whitney v. Buckman*, 13 Cal. 539.

59. An allegation in the complaint, that plaintiffs are the sons of Joaquin Castro, and have been in possession of the rancho since his decease, is, in the absence of a special demurrer, a sufficient allegation of heirship. *Castro v. Armesti*, 14 Cal. 39.

60. Where a complaint for the possession of land avers defendants to be in possession, and the answer does not deny, but affirmatively shows it, then, even if the allegation of possession be not material, and therefore not requiring a denial, the fact of possession becomes a matter of admission or agreement between the parties, as an independent fact not in issue by the pleadings but affecting the whole case. *Powell v. Oullahan*, 14 Cal. 116.

61. The possession of agricultural land

is prima facie proof of title against a trespasser; but where it is shown that the party goes on mineral land to mine, there is no presumption that he is a trespasser; and the statutory presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 14 Cal. 383.

62. Mere entry on public land, without enclosing it, does not give a right of action on the possession alone. *Wright v. Whitesides*, 15 Cal. 47.

63. A party claiming land under the possessory act of 1852, must show compliance with the provisions of the act. He must be a citizen of the United States; must file the affidavit required by section two; and make his improvements within ninety days, etc. Merely residing on a part of the land, tracing lines, putting up stakes for boundaries, etc., is not sufficient. *Ib.*

64. Merely going on waste, uninclosed public land, and building or occupying a house and corral, and even subsequently cutting hay on part of the land, does not give the party any claim to or possession of the whole tract of one hundred and sixty acres. The case would be different if the party claimed and entered under the possessory act of this State, and pursued the necessary steps prescribed by it; or probably, if he had made his entry under the preemption laws of the United States. *Garrison v. Sampson*, 15 Cal. 95.

65. Where, in such case—there being no claim under the possessory act, or the preemption laws of the United States—plaintiff claims one hundred and sixty acres by force of his prior possession, and a contract or consent on the part of defendant, whom he let into possession, to hold the premises for him, or subject to his order, the judgment cannot be in favor of plaintiff for the whole tract, but only for the small part on which the house and corral were situated, and of which plaintiff was in the actual occupancy—there being no proof, except defendant's general consent, as above named, that defendant agreed to hold the whole tract for plaintiff. *Ib.*

66. In ejectment for mineral land, plaintiff averred possession of a large tract of land, including the mining ground in controversy, and that he occupied the land

for agricultural and mining purposes, without stating that any use was made of the particular portion held by defendants. This averment of possession, and also the averment of ouster, were insufficiently denied in the answer; but the answer averred affirmatively, that, at the time defendants entered upon the ground in dispute, it was a part of the public domain of the United States, contained large and valuable deposits of gold, that they entered upon and took possession of it for mining purposes, and that they have since held and used it for such purposes only. The court below gave judgment for plaintiff on the pleadings: held, that these affirmative averments of defendants being proved, plaintiff could not recover without showing such an actual and meritorious possession and occupancy as rendered the interference of the defendants unjust and inequitable; that he could not recover on the pleadings because the character of his possession did not appear, the complaint not averring that this particular portion of the land was ever used by plaintiff for any purpose whatever. *Smith v. Doe*, 15 Cal. 104.

67. The allegation of possession is too broad to defeat the rights of a person who has in good faith located upon public mineral land for the purpose of mining. *Ib.*

68. Ejectment for mining ground, the parties being owners of claims on opposite sides of the same hill. Plaintiffs were an ordinary joint stock company, or common partnership, and claimed by purchase and transfer from the original members of the company. The practice of the company was to issue to members certificates of stock, and these certificates constituted the only evidence of membership recognized by the company, transfers being made by an assignment of the certificates, and a notice thereof in the books of the company. On the trial, these certificates with the assignments were read in evidence by plaintiffs, to show their interest in the ground, and their right to maintain the action, defendants objecting to them on the ground of irrelevancy, and that their execution was not proved. The court instructed the jury—1st, that if they found that plaintiffs located their claim as now claimed, before the location of defendants' claim, then they should find for plaintiffs; and 2d, if they found that defendants

never located any claim adjoining plaintiff's claim, then they should find for plaintiffs: held, that the instructions are wrong, as violating the principle that plaintiff must recover on the strength of his own title; that defendants, having been in actual possession for a long time, were not required to show anything beyond it until a prior and paramount right was shown in plaintiffs; that it was not essential to defendants' possession that they had ever formally located their claim in accordance with any mining regulations, or that they had or claimed any other mining ground. *Pennsylvania Mining Co. v. Owens*, 15 Cal. 136.

69. Possession taken of the property mortgaged, by consent of the owner or by contract with him, may confer rights as against third parties, but they are independent and distinct from any rights springing from the mortgage, from which they derive no support. *Johnson v. Sherman*, 15 Cal. 293.

70. To sustain forcible entry and detainer, plaintiff must have been in actual possession, and where the land is public land, not taken up under our possessory act nor under the federal laws, such actual possession can be shown only by actual inclosure or its equivalent. *Preston v. Kehoe*, 15 Cal. 318.

71. A stranger to the title of real property, though in possession, cannot go into equity and enjoin the purchaser and owners thereof from setting up and enforcing their title, on the ground that it was fraudulently and illegally acquired by them of a third person who does not complain. *Treadwell v. Payne*, 15 Cal. 499.

72. Where a vendee of personal property buys it bona fide, takes possession openly and holds it in exclusive possession for a year or more, and afterwards puts the property into the possession of the vendor as attorney in fact of the vendee, this qualified possession of the vendor does not, as matter of law, show the sale to be fraudulent and void as against the creditors of the vendor. *Stevens v. Irwin*, 15 Cal. 506.

73. Where plaintiff had been in the peaceable and quiet possession and use of premises through his agent and by his tenants, and the building being unrented, had locked the door and taken the key to his office, he was in the "actual possession"

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of the premises, within the statute of forcible entry and detainer. *Minturn v. Burr*, 16 Cal. 109.

74. That statute does not require actual occupancy, and "actual possession" consists as much of a present power and right of dominion as of an actual corporal presence in the house. *Ib.*

75. Where a building locked up and so in possession of plaintiff has been entered by third persons, and taken possession of forcibly and unlawfully, and is detained, it should be left to the jury to determine how and by whose direction, agency, or procurement the entry was made, and whether by preconcert and arrangement or not; and if they find possession was not taken by the act, agency, and coöperation of all the defendants, and the holding, whether by one or many, was in pursuance of such arrangement or preconcert, then the defendants are guilty of the entry and detainer. *Ib.*

76. The fact that the defendants did not themselves go into the actual corporal possession of the premises, or did not personally take possession or make entry, does not defeat the action. *Ib.*

77. The objection to a complaint in forcible entry and detainer, that it does not aver "actual" possession—the word "possession" only being used—was a mere defect in pleading, which should have been taken advantage of below, where, if the objection be good, the complaint could have been amended, but it cannot be urged in the supreme court for the first time. *Ib.*

78. There is no necessity, in a complaint in ejectment, in negating the possibly rightful character of defendant's possession. Such possession is a pleadable and issuable fact; but if it rest upon any existing right, defendant must show it affirmatively in his defense. *Payne v. Treadwell*, 16 Cal. 243.

79. On the trial in ejectment, plaintiff can rest his case, in the first instance, upon proof of his seizing, and of the possession by defendants. From these facts, when established, the law implies a right to the present possession in the plaintiff, and a holding adverse to that right in defendants. *Ib.* 244.

80. In this State, although the larger portion of the mineral lands belong to the United States, yet defendant cannot defeat an action for mining claims, water privi-

leges and the like, by showing the paramount title of the government. Our courts, in determining controversies between parties thus situated, presume a grant from government to the first appropriator. This presumption, though of no avail against the government, is held absolute in such controversies. *Coryell v. Cain*, 16 Cal. 572.

81. In controversies respecting public lands, other than mineral lands, the title, as between citizens of the State, where neither party connects himself with the government, is considered vested in the first possessor, and to proceed from him. This possession must be an actual one, and not constructive; and the right it confers must be distinguished from the right given by the possessory act of the State. *Ib.*

82. A party relying on the possessory act of the State must show compliance with its provisions, and can then maintain an action for the possession of land occupied for cultivation or grazing, without showing an actual enclosure or actual possession of the whole claim. *Ib.* 573.

83. Where plaintiff relies not on the possessory act of the State, but on the prior possession of himself, or of parties through whom he claims, such possession must be shown to have been actual in him or them; and by actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property. *Ib.*

84. The cases where possession must be surrendered, before action for the purchase money can be brought, are those where a contract has been made, and possession has been taken thereunder, and the vendee seeks to rescind the contract, on the ground of defective title, or the inability of the vendor to perform the contract on his part, or of some fraudulent representations inducing its execution. In these cases, the vendee must first offer to restore whatever he has received, before he can call upon the vendor to refund the purchase money. Where the contract is void, there is nothing to rescind; no rights are acquired, and there are in consequence no rights to restore. This distinction between the cases where the possession is taken under a con-

Of Real Estate.—Of Personal Property.—Abandonment of Possession.

tract, and where there is possession with a void contract—that is, where there is no contract—rests upon principle, and is fully recognized by the authorities. *McCracken v. City of San Francisco*, 16 Cal. 628.

85. To render possession adverse, so as to set the statute of limitations in motion, it must be accompanied with a claim of title; and this claim, when founded “upon a written instrument as being a conveyance of the premises,” must be asserted by the occupant in good faith, in the belief that he has good right to the premises, and with the intention to hold them against all the world. The claim must be absolute—not dependent upon any contingencies—and must be “exclusive of any other right;” and to render the adverse possession, thus commenced, effectual as a bar to a recovery to the true owner, the possession must be continued without interruption, under such claim, for five years. When parties assert, either by declarations or conduct, the title to property to be in others, the statute cannot, of course, run in their favor. Their possession, under such circumstances is not adverse. It would seem impossible, therefore, for the parties who have sued for the purchase money—basing their right to recover upon the ground that the title to the property never passed to them, but that it still remains in the city, and that the proceedings of the mayor and land committee were unauthorized acts—to set up an adverse possession against the city. *Ib.* 636.

See EJECTMENT, IV, FORCIBLE ENTRY AND DETAINER, USE AND OCCUPATION.

II. OF PERSONAL PROPERTY.

86. The rule of law that possession of personal property is prima facie evidence of ownership is uniform, and applies as well to vessels. *Bailey v. Steamer New World*, 2 Cal. 373.

87. Possession of personal property is prima facie evidence of ownership. The possession of the servant is the possession of the master. *Goodwin v. Gaar*, 8 Cal. 617.

88. A party in the actual possession of cattle at the time of the injury, can maintain an action for an injury to them while in his possession. *Polk v. Coffin*, 9 Cal. 58.

89. The possession of a promissory note, whether obtained before or after maturity, is prima facie evidence of ownership. *McCann v. Lewis*, 9 Cal. 246.

90. Lawful possession of personal property is prima facie evidence of ownership, and property thus possessed is prima facie liable to be seized under a writ of attachment against the party in possession of such property. *Killey v. Scannell*, 12 Cal. 75.

91. The doctrine of continuous possession of personal property has no application to the case of a paper, the mere evidence of a debt. *Hall v. Redding*, 13 Cal. 220.

92. Personal property beyond the limits of this State, assigned in trust to pay the creditors of the assignor, the assignor and assignee both residing and being at the time in the foreign jurisdiction, where the property was, and possession being taken by the latter, rest in the assignee according to the lex loci, and his title will be maintained here against execution by the creditors of the assignor. *Forbes v. Scannell*, 13 Cal. 276.

93. A surviving partner has, under the statute of May, 1850, regulating the settlement of the estates of deceased persons, section one hundred and ninety-eight, the exclusive right to possession, and the absolute power of disposition of the assets of the partnership. *People v. Hill*, 16 Cal. 118.

See DELIVERY, SEGREGATION, STATUTE OF FRAUDS.

III. ABANDONMENT OF POSSESSION.

94. Laying off land into town lots, selling the same, and exercising other acts of ownership over them, is no evidence of abandonment; but taken in connection with previous acts of ownership, furnishes additional evidence of possession. *Phane v. Seward*, 4 Cal. 97.

95. Where a party only shows prior possession, that reliance may fail, if it be shown that he voluntarily abandoned his possession, without the purpose of returning. *Bequette v. Caulfield*, 4 Cal. 279.

96. The removal of an enclosure of land, for the purpose of replacing it with a better one, so far from being evidence of

Abandonment of Possession.—Powder Magazine.—Power.

an intention to abandon the premises, is direct evidence of the contrary. *Sweetland v. Hill*, 9 Cal. 557.

97. The doctrine of abandonment only applies where there has been a mere naked possession without title. But where there is a title, to preserve it there need be no continuance of possession; and the abandonment of possession cannot affect the rights held by virtue of the title. *Ferris v. Coover*, 10 Cal. 631.

98. In ejectment it is not reasonable to hold that plaintiffs intended to abandon all rights to any other land, provided the official survey did not conform to the boundaries they indicated. *Moore v. Wilkinson*, 13 Cal. 489; *Moore v. Roff*, 13 Cal. 489.

POWDER MAGAZINE.

1. The act of the legislature of 1852, authorizing the construction of a powder magazine in the city of San Francisco, did not repeal the right of the city to license a powder magazine which previously existed by virtue of the power granted in her charter, and powder could be stored in either magazine. *Harley v. Heyl*, 2 Cal. 481.

POWER.

1. The power to fill an office carries by implication the power to fill a vacancy and all necessary authority to carry out the original power, and prevent it from becoming inoperative. *People v. Fitch*, 1 Cal. 536; *People v. Campbell*, 2 Cal. 137.

2. Corporations or quasi corporations possess only such powers as are expressly given by statute or by their charter, and such as are necessary to the exercise of the powers enumerated. *Dunbar v. City of San Francisco*, 1 Cal. 356.

3. The State has the power to require the payment by foreigners of a license fee

for the privilege of working the gold mines in this State. *People v. Naglee*, 1 Cal. 235.

4. The authority by act of the legislature to erect a court house and jail, would necessarily embrace the power to purchase the land on which to erect them. *De Witt v. City of San Francisco*, 2 Cal. 295.

5. Where a vendor under a power to sell in a mortgage, received instead of money an article of fluctuating value, he is chargeable with the highest market value of the lot sold. *Benham v. Rowe*, 2 Cal. 408.

6. Authority to deliver goods confers no authority to take them back, or to countermand the shipment. *Adams v. Blankenstein*, 2 Cal. 418.

7. Prima facie the governor of California, under the Mexican dominion, had the power to make a grant of mission lands to an individual, and a demurrer to a complaint setting forth such a grant, on the ground of want of authority in the governor, is not sustainable. *Den v. Den*, 6 Cal. 82; *Brown v. City of San Francisco*, 16 Cal. 458.

8. When an agent is required to accomplish a certain end, or to do a certain thing, all necessary incidental powers are implied. *Lucas v. City of San Francisco*, 7 Cal. 473.

9. An agent cannot delegate discretionary powers, but he may delegate mere mechanical powers or duties. *Sayre v. Nichols*, 7 Cal. 542.

10. An agent for the collection of a note is confined to the taking of money in payment, and has no power to take goods in payment, unless special authority be given, of which there must be proof. *Mudgett v. Day*, 12 Cal. 140.

11. The authority of an attorney, who appears will be presumed, and his action bind the party, unless in cases of fraud or insolvency of the attorney. *Holmes v. Rogers*, 13 Cal. 201.

12. Authority to an agent in general terms to collect or secure a claim of the principal, is not an authority to purchase for the principal the property of the debtor to secure the claim. Such purchase is not the natural or usual means of securing the debt. *Taylor v. Robinson*, 14 Cal. 399.

13. If an agent has a power coupled with an interest, that is, a power which conveys to the agent an interest in the property, then the execution of the power

Power of Attorney.

after the death of the principal is good. *Travers v. Crane*, 15 Cal. 16.

14. In this State there is no limitation upon the power of disposition by will. *Norris v. Harris*, 15 Cal. 254.

See AGENCY, POWER OF ATTORNEY.

POWER OF ATTORNEY.

1. An agent, authorized by power of attorney, to wind up and adjust the affairs of a mercantile house in the city of New York, derives no authority therefrom to bind his principal by a promissory note given for the purchase of real estate in the city of San Francisco. *Fisher v. Salmon*, 1 Cal. 414.

2. A power of attorney acknowledged before a notary public in New York city, who is not authorized by our statute to take such acknowledgments, is insufficient. *Lord v. Sherman*, 2 Cal. 501.

3. When the vendor, under a power of sale reserved in such a contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor. *Gouldin v. Buckelew*, 4 Cal. 111.

4. A power of attorney confirming all sales, leases and contracts, of every description, confers the power to sell land. *Sullivan v. Davis*, 4 Cal. 292.

5. General words in a power of attorney are limited and controlled by particular terms and designations. The authority granted by B to A to do all acts in his name, concerning their mining operations, followed by the authority to sign B's name to any "company articles," does not authorize A to sign B's name to a promissory note, even where the money was used to carry on joint mining operations. *Washburn v. Alden*, 5 Cal. 464.

6. The destruction of a power of attorney does not destroy the power. Upon the loss, its existence might have been shown, and the power continued so as to carry out the object of both the principal and agent. *Posten v. Rasette*, 5 Cal. 469.

7. Where a power of attorney is coupled

with an interest, upon proper allegations, sustained by unequivocal proof, a court of equity will restrain its revocation and enable the attorney to execute the trust. *Ib.*

8. A party who gives a general power of attorney to another to transact all business, authorizing the attorney "to make, execute and deliver promissory notes," will be held liable for all such notes, etc., executed in his name by his attorney, when they have reached the hands of an innocent holder, although they may have been made for the private purposes of the attorney. *Hellman v. Potter*, 6 Cal. 15.

9. A power of attorney authorizing the attorney "to settle and adjust all partnership debts, accounts and demands, and all other accounts and demands, now subsisting, or which may hereafter subsist between me and any person or persons whatever," and to execute releases for such purposes, does not confer a power to release a covenant of guaranty made to the principal and others jointly for the payment of rent and purchase money of property sold by them as tenants in common. *Johnston v. Wright*, 6 Cal. 375.

10. Where authority to perform specific acts is given by a power of attorney, and general words are also employed, such words are limited to the particular acts authorized. *Billings v. Morrow*, 7 Cal. 175.

11. A general ratification of all the acts of an attorney does not include acts not within the scope of the power. The principal who ratifies must know the character of the acts to be ratified, otherwise the ratification is void. *Ib.*

12. The principal is not bound to notice recorded conveyances, executed in his name by his attorney, not authorized by the power. *Ib.*

13. It must be assumed that as a party made the power of attorney to be executed in this State, he did so with a full knowledge of the law as it existed here at the time. *Davidson v. Dallas*, 8 Cal. 249.

14. Where a principal gives a power expressly to collect debts for the purpose of providing the means to return advances made by the agent, there would seem to be no doubt of the irrevocable character of the power. *Marziou v. Pioche*, 8 Cal. 535.

15. Where D. gave a power of attorney to P., authorizing and empowering him to

"sell and convey" certain real property, belonging to D. & P., executed to V. a deed of the property, purporting on its face to be for the consideration of \$8,000, when, in fact it was not executed upon any sale or for any consideration paid or agreed to be paid, but in order to enable V. to control the property, and keep off trespassers, held, that the deed not being executed in pursuance of the power, did not pass any title to the grantee, and, as between the attorney and the grantee, it was a nullity. *Dupont v. Wertheman*, 16 Cal. 367.

16. A power to sell and convey property is special, and must be strictly pursued. *Ib.*

17. No presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power. *Ib.*

18. A power of attorney not affecting real estate is not required to be recorded, and the fact of such instrument being acknowledged and recorded does not authorize it to be read in evidence without proof of its execution. *Stevens v. Irwin*, 12 Cal. 308.

19. A deed made under and in pursuance of a general power of attorney, which authorizes the attorney "to make and execute conveyances," and where the purchase money was received by the principal, cannot be assailed for the want of authority to execute it. *Hunter v. Watson*, 12 Cal. 376.

20. Where a building is in process of construction by three tenants in common, according to a plan agreed on, a power of attorney from one to an agent, authorizing him "to represent the principal's interest in the property, to cast his vote in relation thereto, in all matters relating to the administration or improvement of the property, and to do and perform every act or thing relating to and concerning such interest, except the sale or hypothecation thereof," authorizes the agent to consent to alterations in the plan. *Hastings v. Halleck*, 13 Cal. 211.

21. Where a power of attorney, not under seal, authorizes the agent to sell a saw mill, dwelling, etc., by the execution of all needful instruments, sealed or otherwise, and the agent sells the right of the principal by a paper not under seal, rep-

resenting himself as the attorney of the principal, and the vendee takes possession and retains it for several years, he has an equitable estate in the premises, with the right to its full enjoyment, and this right, united to possession, enables him to maintain an action for interruption to his possession, or injury to the property. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 234.

22. A power of attorney to sell land must contain some description of the property sold, unless it be shown aliunde that the land in controversy is the only land owned by the principal at the time. *Stafford v. Lick*, 13 Cal. 242.

23. Where one man acts openly and avowedly for another in leasing or controlling his property, this is sufficient, as against third persons, to show that the property is that of the person recognized by the agent as owner; and the possession of the agent is the possession of the principal, who can maintain forcible and unlawful detainer against such third persons, whether the agent had any written authority or not. And where proof was admitted, without objection, of the acts of the agent in renting and controlling the property for the principal, defendant cannot afterwards claim a nonsuit on the general ground that no power of attorney from the principal was shown, and that, therefore, his possession was not sufficiently proven. *Minturn v. Burr*, 16 Cal. 109.

24. A power of attorney, authorizing the agent to "superintend my real and personal estate, to make contracts, to settle outstanding debts, and generally to do all things that concern my interest in any way, real or personal, whatsoever, giving my said attorney full power to use my name, to release others or bind myself, as he may deem proper and expedient, hereby making the said Schoolcraft my general attorney and agent, and by these presents ratifying whatsoever my said attorney may do by virtue of this power," gives the agent power to execute a lease of real estate, containing a clause that the lessee "shall have the privilege of purchasing any part of said land during the continuation of this lease, at its value, in preference to any other persons." *De Rutte v. Muldrow*, 16 Cal. 512.

25. Where a power of attorney rela-

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tive to real estate authorizes the agent "to grant, bargain and sell the same, or any part or proportion thereof, for such sum or price, and on such terms as to him might seem meet," the agent has no power to make a conveyance in consideration of love and affection in the principal for the grantee in the conveyance, and such conveyance is on its face a nullity. The power of attorney authorizes a sale for a moneyed consideration only. *Mott v. Smith*, 16 Cal. 557.

PRACTICE.

1. After the process of the court is finally and completely executed, from that moment the power of the sheriff under it, and the authority of the court to enforce it, cease. *Loring v. Illsley*, 1 Cal. 28.

2. When a cause is assigned for trial on a certain day, and afterwards for a novel reason the court abridges the delay, without the consent of the defendant, and orders the cause to be tried at an earlier day, the proceedings are irregular. *Horrell v. Gray*, 1 Cal. 134.

3. In an action on a promissory note by a special endorsee against the maker, the plaintiff must prove at the trial the genuineness of the endorsements, although the defendant has not denied the same under oath. It need not be proven in the action against the endorsers, if they fail to deny the genuineness of the endorsements. *Grogan v. Ruckle*, 1 Cal. 159; *Youngs v. Bell*, 4 Cal. 202.

4. All distinctions between actions at law and suits in equity, and between the forms of such actions, are abolished. *Rowe v. Chandler*, 1 Cal. 173.

5. The legislature clearly intended by the code that all technical and formal defects should be disregarded, and the rights of all parties to a suit should be determined in that suit, without turning the parties round to a new action for the purpose of obviating some technical difficulty. *Ib.*

6. The code provides that there shall be but one form of civil action, but it does not intend to abolish all distinctions between law and equity as to actions. The innovation extends only to the form of action and the

pleadings, while the technicalities of the pleading have been dispensed with. *Dewitt v. Hays*, 2 Cal. 468; *Smith v. Rowe*, 4 Cal. 7.

7. The plaintiff, and not the defendant, always in contemplation of law, has the affirmative, and the right to open and conclude the argument. *Benham v. Rowe*, 2 Cal. 408.

8. The code gives to a married woman the right to sue in her own name without her husband, when it concerns her separate estate. *Snyder v. Webb*, 3 Cal. 86.

9. A married woman cannot bring suit in her own name upon a contract which she is not authorized by statute to make. *Ib.* 88.

10. Under the code, where the mere forms of proceeding are simplified, all that is substantial in the body of the law is preserved to give it certainty and logical conclusiveness as a science. *Sampson v. Shaeffer*, 3 Cal. 201.

11. In the absence of any statutory prohibition, the court may in equity resort to the well known rules and settled principles of chancery cases. *Smith v. Rowe*, 4 Cal. 7.

12. No statute should be construed so as to give a retrospective effect to divest the rights of individuals vested previous to its passage, or previous to the time the act took effect, unless such intention be expressed in terms. *People v. Hays*, 4 Cal. 131.

13. It is always within the power of a court when exercising proper discretion to extend the time fixed by law, whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes*, 5 Cal. 62.

14. Two of the leading ends contemplated by the code are simplicity and economy. *Adams v. Hackett*, 7 Cal. 201; *Piercy v. Sabin*, 10 Cal. 28.

15. Our system of practice recognizes none of the old forms of action, but is designed to afford a plain, unembarrassed remedy upon the particular facts of each case. *Ortman v. Dixon*, 13 Cal. 37.

16. The code, regulating proceedings in civil cases, applies as a general rule, as well to equity as to common law suits. *Riddle v. Baker*, 13 Cal. 302; *Goodwin v. Hammond*, 13 Cal. 169; *Duff v. Fisher*, 15 Cal. 380.

17. Mining claims are real estate with-

Preëmption.—Presumption.

in the code, defining the venue of civil actions. *Watts v. White*, 13 Cal. 324.

18. Where it appears from the whole conduct of a cause that a particular fact is admitted between the parties, the jury have the right to draw the same conclusion as to that fact as if it had been proved in the evidence, and to draw such conclusions as to all the issues on the record. *Powell v. Oullahan*, 14 Cal. 117.

19. The legislature may constitutionally prescribe rules of practice in criminal or civil cases. *People v. Arnold*, 15 Cal. 479.

See ADMISSION, AMENDMENT, ANSWER, APPEAL, COMPLAINT, DEMURRER, PLEADING.

PRE-EMPTION.

1. Where the defendant claimed title to the premises as part of a preëmption claim located by him, he must prove an inclosure of, or marked and visible boundaries, embracing the lot in dispute. *Larue v. Gaskins*, 5 Cal. 166.

2. The policy of the government of the United States has been to encourage the immigration of foreigners, and to this extent a system of preëmption has been adopted in all territories and new States, in which there is no discrimination between foreigners and native citizens. *People v. Folsom*, 5 Cal. 379.

3. The right to a preëmption in public land is not assignable; but the possession of public land, whether taken for the purpose of getting a preëmption right or any other purpose, or the land itself, may be mortgaged. *Whitney v. Buckman*, 13 Cal. 539.

4. A defendant in ejectment, claiming under the government of the United States as a new preëmptioner, cannot show that the land described in the grant from the Mexican government and petition to the land commissioners is different from that embraced in the patent. *Yount v. Howell*, 14 Cal. 469.

5. Settlers upon mining lands cannot claim title under the preëmption law, as mineral lands are expressly exempted from

preëmption by the legislation of Congress. *Boggs v. Merced Mining Co.*, 14 Cal. 373.

6. The municipal preëmption act of May 23d, 1844, confers a right upon the corporate authorities or county judges, to purchase the land forming a town site, at the minimum government price, for the benefit of the inhabitants thereof, before the commencement of the public sale of the body of the land in which the town site is included—and if such right be not exercised, such lands, with the general mass, are offered for sale to the public. *Doll v. Meador*, 16 Cal. 314.

See LAND.

PRESCRIPTION.

See LIMITATION, STATUTE OF.

PRESUMPTION.

1. A grant of land by a Mexican alcalde before the war will be presumed to have been made in the course of his ordinary and accustomed duties and within the scope of his legitimate authority, and the burden of proof lies on him who controverts the validity of such a grant to show that it is not made by a competent officer and in the form prescribed by law. *Reynolds v. West*, 1 Cal. 326; *Payne v. Treadwell*, 16 Cal. 227.

2. Where judgment was entered upon a default for \$124.75, and it did not appear that any testimony had been heard, the presumption that a judicial officer had acted regularly was held to apply. *Crane v. Brannan*, 3 Cal. 195.

3. In the absence of proof, where the judgment itself of another State is silent on the subject, it will be presumed that under the law of that State no interest is allowed on judgments of that character. *Thompson v. Manrow*, 2 Cal. 100; *Cavender v. Guild*, 3 Cal. 253.

4. A grant of land in San Francisco

Presumption.

made by an alcalde, whether a Mexican or of any other nation, raises the presumption that the alcalde was a properly qualified officer; that he had authority to make the grant, and that the land was within the boundaries of the pueblo. *Cohas v. Raisin*, 3 Cal. 450.

5. Where there is no abandonment or dedication of the land, the use for a limited time by the public cannot fairly raise the presumption of a dedication. *City of San Francisco v. Scott*, 4 Cal. 116.

6. Where proof has been given that a newspaper containing notice of the dissolution of a partnership between the defendants was taken by the plaintiffs at the time, it is not error to admit in evidence other papers not taken by way of establishing the publicity of the notice, and raising the presumption of their actual knowledge of the fact. *Treadwell v. Wells*, 4 Cal. 263.

7. Where two parties rely upon possession solely, as proof of title, the presumption of ownership is in favor of the first possessor. *Potter v. Knowles*, 5 Cal. 88.

8. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is that both parties understood that the same salary was to be paid. *Nicholson v. Patchin*, 5 Cal. 475.

9. An officer will not be presumed to have exceeded his authority, especially the officer of a foreign government. *Den v. Den*, 6 Cal. 82.

10. The question of homestead is a question of fact, and the presumption arising from residence may be defeated by facts and circumstances aliunde. *Holden v. Pinney*, 6 Cal. 236.

11. For the purpose of settling men's differences, a presumption is often indulged, where the fact presumed cannot have existed. *Conger v. Weaver*, 6 Cal. 556.

12. Possession gives title only by presumption: then, when the possession is shown to be public land, why may not any one oust the possessor? Why can the latter protect his possession? Only upon the doctrine of presumption for a license to occupy from the owner will be presumed. *Ib.* 557.

13. Where plaintiffs gave their note, payable in one year, with ten per cent. interest, when the current rate was ten per

cent. per month, in consideration of which he received a covenant from the payees to convey them certain land, on the payment of the note at maturity, the low rate of interest raises the presumption that the parties intended that the note should be paid at maturity. *Brown v. Covillaud*, 6 Cal. 572.

14. When there are two presumptions equally reasonable, arising upon the face of the record, this court is bound to adopt that which will maintain the judgment of the court below. *Whipley v. Flower*, 6 Cal. 632.

15. The fact that a bill of exchange by the usual conveyance reached its destination within a month from its date, was sufficient to raise a presumption that defendants had received notice of payment in double that time. *Weaver v. Page*, 6 Cal. 684.

16. A party being about to fail can assign a bill of lading of the goods to arrive, not yet paid for, to another in trust for the vendor, and the vendor's assent is presumed, being for his benefit. *Le Cacheux v. Cutter*, 6 Cal. 681.

17. Parties in possession of land claiming title thereto are presumed to be the owners of the same. *Sacramento Valley R. R. Co. v. Moffat*, 7 Cal. 579.

18. In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years. *Ashbury v. Sanders*, 8 Cal. 64.

19. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel, bound for a specified port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of death. *Ib.*

20. The act of the officer making the assessment must be presumed to be in conformity with law, until the contrary is shown. *Palmer v. Boling*, 8 Cal. 387.

21. Where a party employed receives a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for extra pay, otherwise he cannot recover. *Caney v. Halleck*, 9 Cal. 201.

Presumption.

22. Where there is an entire absence of evidence in the record on a point, still the presumption would be in favor of the jurisdiction of the court, and of the regularity of its proceedings; and for the want of such evidence the decree cannot be impeached in this collateral action. *Alderson v. Bell*, 9 Cal. 321; *Battersby v. Abbott*, 9 Cal. 568; *People v. Glenn*, 10 Cal. 37.

23. Mere hearsay evidence of the wife having given birth to a child more than a year after the separation, and connecting therewith the name of a third party as its reputed father, raises no presumption of access by the husband. *Wells v. Stout*, 9 Cal. 498.

24. The law presumes in favor of the acts of all public officers. *Summers v. Dickenson*, 9 Cal. 556; *Hart v. Burnett*, 15 Cal. 616.

25. If a child is over fourteen years of age, the presumption is that he possesses the requisite knowledge and understanding to be a witness; but if under that age the presumption is otherwise, and it must be removed upon the examination by the court, or under its direction and in its presence, before he can be sworn. *People v. Bernal*, 10 Cal. 67.

26. No presumption of a ratification of an alleged sale under a power can be indulged, unless knowledge of the alleged sale, with its attendant circumstances, is brought home to the grantee of the power. *Dupont v. Wertheman*, 10 Cal. 367.

27. Presumptions are the conclusions which the law draws from acts which leave no reasonable question of the intent or motive. *Williams v. Covillaud*, 10 Cal. 428.

28. The mere fact that one tenant in common or partner goes away and remains absent from the premises of the joint business or property, leaving his associates in possession, creates no presumption of abandonment, nor does his refusal to pay, or his delay in paying the expenses of the business, or the assessments, create of itself a forfeiture. *Waring v. Crow*, 11 Cal. 371.

29. The law of this State in relation to the right of husband and wife as to the common property is similar to the laws of Louisiana and Texas; and in those States it is held by their highest tribunals, that all property acquired by either spouse during the existence of the community is

presumed to belong to it, and that this presumption can only be overcome by clear and satisfactory proof that it was acquired by the separate funds of one or the other; and that the burden of proof lies upon the party claiming the property as separate. *Smith v. Smith*, 12 Cal. 224; *Meyer v. Kinzer*, 12 Cal. 252.

30. Where a brick building was erected on such lots during the existence of the community, the presumption that it was but the form in which the common property was invested is too cogent to be overcome by loose and unsatisfactory testimony. *Smith v. Smith*, 12 Cal. 224.

31. The invariable presumption which attends the possession of property by either spouse, during the existence of the community, can only be overcome by clear and certain proof that it was owned by the claimant before marriage, and acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for or in the investment, or as the price of the property so originally owned or acquired. *Meyer v. Kinzer*, 12 Cal. 253.

32. The law presumes nothing in favor of the jurisdiction of justices' courts, and a party who asserts a right under the judgment of a justice, must affirmatively show every fact necessary to confer such jurisdiction. *Swain v. Marsh*, 12 Cal. 285.

33. A child born in lawful wedlock is presumed to be the child of the husband. *Baker v. Baker*, 13 Cal. 99.

34. Presumptions are indulged to supply the absence of facts, but never against ascertained established facts. *Boggs v. Merced Mining Co.*, 14 Cal. 375.

35. It is a very convenient rule in determining controversies between parties on the public lands, where neither can have absolute rights, to presume a grant from the government of mines, water privileges and the like to the first appropriator, but such a presumption can have no place for consideration against the superior proprietor. *Ib.*

36. The presumption under our statute is, that all land in the State is public land until the legal title is shown to have passed from the government to private parties, and this presumption is reconcilable with the presumption arising from possession. *Burdge v. Smith*, 14 Cal. 383.

37. The possession of agricultural land

Presumption.—Priest.—Printer, State.

is prima facie proof of title against a trespasser, but where it is shown that the party goes on mineral lands to mine, there is no presumption that he is a trespasser, and the statutory* presumption that it is public land, in the absence of proof of title in the person claiming it as agricultural land, applies. *Burdge v. Smith*, 14 Cal. 383; *Coryell v. Cain*, 16 Cal. 573.

38. In the absence of proof to the contrary, the common law is presumed to exist in those States in the Union which were originally colonies of England, or were carved out of such colonies. *Norris v. Harris*, 15 Cal. 252.

39. No such presumption can prevail as to the States of Florida, Louisiana and Texas. In these States, at the time of their accession to the country, organized governments existed, the laws of which remained in force until they were abrogated by proper authority, and new laws were promulgated. *Ib.* 253.

40. In the absence of proof as to the laws of Texas, the courts of this State, in interpreting a will made in that State, will presume its laws to be in accordance with the laws of California. *Ib.*

41. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of the appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 73.

PRIEST.

1. The position of a priest who appears to have charge of church property coupled with an interest seems to be nearly analogous to that of a sole corporation in England, and his power to sue is an inseparable incident to such corporation. *Santillan v. Moses*, 1 Cal. 94.

2. A priest had no authority to lease

lands belonging to the mission after the cession of California to the United States, and a title so derived is invalid. *Brown v. O'Connor*, 1 Cal. 419.

See MISSIONS.

PRINCIPAL.

See AGENCY, POWER, POWER OF ATTORNEY.

PRINTER, STATE.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment, as well as the first one, was irregular and void. *People v. Fitch*, 1 Cal. 536.

2. The act of May 1st, 1854, creating the office of State printer, required the controller to draw his warrants on the treasury for such sums as may be due the State printer. This does not conflict with the general law requiring there should first be funds appropriated for that purpose. *Redding v. Bell*, 4 Cal. 333.

See OFFICE.

PRISONER.

See IMPRISONMENT.

PRIVILEGE.

1. The confidential counselor, solicitor, or attorney of a party, cannot be compelled to disclose the communications made to him, or letters or entries made to him in that capacity; and the same rule extends also to the clerk of an attorney. *Landsberger v. Gorham*, 5 Cal. 451.

PROBATE COURT.

1. *Letters of guardianship of a lunatic, issued by a probate court, cannot be questioned in a collateral proceeding.* *Warner v. Wilson*, 4 Cal. 313; overruled in *Smith v. Andrews*, 6 Cal. 654.

2. The constitutional provision which requires that in all issues of fact joined in the probate courts the jurisdiction of the district courts shall be unlimited, does not give the district court an appellate jurisdiction from the probate courts. *Reed v. McCormick*, 4 Cal. 342.

3. The claim of exclusive original jurisdiction in courts of probate over the persons of minors as well as their estates is unfounded. *Wilson v. Roach*, 4 Cal. 366.

4. The probate court is a court of special and limited jurisdiction: most of its general powers belong to a court of chancery, which still retains all of its jurisdiction, and persons not parties to the settlement of an account in the probate court may disregard the account and proceed against the administrator by bill. *Clarke v. Perry*, 5 Cal. 60.

5. The probate court has jurisdiction to try and determine issues of fact arising in proceedings before it, and it may send such to the district court to be passed upon as the probate judge is unwilling to pass his judgment upon; or where, from the great conflict of evidence, a reasonable doubt must exist in his mind as to which side has the right, subject to review by the supreme court. *Keller v. Franklin*, 5 Cal. 433.

6. Over issues of fact joined in the probate court, the jurisdiction of the district court shall be unlimited; but this

cannot be said to deprive the probate court of its jurisdiction. *Ib.* 434.

7. A probate judge has no jurisdiction to order an administrator who resigned to pay the money in his hands into court. *Wilson v. Hernandez*, 5 Cal. 443.

8. It does not appear that there ever was a probate court in California prior to the conquest, and the probating of a will was a proceeding unknown to the laws and customs of California. *Castro v. Castro*, 6 Cal. 161; *Grimes v. Norris*, 6 Cal. 625.

9. The probate court is an inferior court, and therefore cannot take jurisdiction, or administer remedies other than those given, and in the manner provided by statute. *Grimes v. Norris*, 6 Cal. 625.

10. In pleading the judgment of a probate court, it being a court of limited and inferior jurisdiction, it is necessary to set forth the facts which give jurisdiction. *Smith v. Andrews*, 6 Cal. 654.

11. So much of the act of 1855 as provides for the transfer to the district court of issues of fact already decided in the probate court is unconstitutional and void. *Deck's Estate v. Gherke*, 6 Cal. 669.

12. The power of the probate judge to remove, in his discretion, an administrator for any of the causes named in the statute, will not be interfered with by the appellate court, unless it should be clearly shown that there has been a gross abuse of discretion. *Ib.*

13. A suit for the foreclosure of a mortgage is peculiarly an equity proceeding; and when a district court gains jurisdiction of the case for the purpose of foreclosure, it has the right to give full relief, and for this purpose to decree and execute a sale of the mortgaged premises. But when the claim has been presented to the administrator and probate court, and allowed, it is otherwise. *Belloc v. Rogers*, 9 Cal. 129.

14. A sale of property under an order of the probate court, is a judicial act, and therefore not within the statute of frauds; it is in substance similar to a decree in chancery for the sale of specific property. *Halleck v. Guy*, 9 Cal. 195.

15. The probate court has no right to accept the resignation of an administrator until he has settled his accounts with the estate. *Haynes v. Meeks*, 10 Cal. 116.

16. Although probate courts are of limited and special jurisdiction, still no great

Probate Court.

strictness should be required as to the manner of obtaining facts in the record. *Ib.* 117.

17. The probate court does not lose its jurisdiction over a subject of which it has taken cognizance by adopting the proceeding of an issue whereby to determine the issue advisedly; the finding of a jury is merely in aid of its jurisdiction by settling the facts and thus furnishing the material upon which to act. *Pond v. Pond*, 10 Cal. 500.

18. Issues of fact are sent from the probate to the district court not as from an inferior to a superior tribunal, but for the sake of convenience, because the probate court has not the machinery of jury trial and its incidents. *Ib.*

19. There is no relation of inferiority in the constitution or powers of the probate court, as respects the district court. They are unlike, but within their respective spheres equal. They are both constitutional courts; no appeal lies from one to the other. *Ib.*

20. An administrator filed in the probate court his account for final settlement, and an issue of fact was made thereon, which was certified to the district court for trial, and trial was had, the jury finding on each issue, and the judge rendering his decision on such findings, and this was certified back to the probate court, which court refused to give effect to the decision and judgment of the district court, but gave judgment on such findings as it construed them: held, that there was no error in the judgment of the probate court. *Ib.* 502.

21. Upon the death of the head of the family, it is made the duty of the probate court to set apart the homestead, for the benefit of the wife and legitimate children of the deceased. *Estate of Tompkins*, 12 Cal. 125.

22. The jurisdiction of the probate court over testamentary and probate matters is not exclusive. Most of its general powers belong peculiarly and originally to the court of chancery, which still retains its jurisdiction. *Deck's Estate v. Gerke*, 12 Cal. 436.

23. Citation to heirs, to show cause against probate of will not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila v. Padilla*, 14 Cal. 106.

24. A decree of the probate court ordering a claim to be paid, rendered on petition of the administrator, and without objection by him, is final and conclusive, and cannot be assailed collaterally nor directly on the ground that it was rendered on insufficient evidence. *Estate of Cook*, 14 Cal. 130.

25. S. dies out of the State, leaving property in Santa Clara county, and the probate court thereof takes jurisdiction of the estate, and grants letters of administration to K. The widow subsequently files a petition to revoke the letters, on the ground that the probate court of San Francisco ought to have issued them, whereupon the administrator asks the court to transfer the cause to that court, representing that the widow and a majority of the witnesses resided there, and that the interest of several persons interested in the estate would be advanced by the transfer, to which both parties agreed. The court made an order of transfer. The probate court of San Francisco, on the papers being filed therein, refused to take jurisdiction of the cause, and ordered the papers back: held, that on these facts the court of Santa Clara could not divest itself of jurisdiction and vest it in the probate court of San Francisco, and that mandamus will not issue to compel the latter court to take jurisdiction. *Estate of Scott*, 15 Cal. 221.

26. The proceedings for the settlement of an estate and matters connected therewith are not civil actions within the meaning of sections eighteen to twenty-one of the practice act. *Ib.*

27. An order of a probate court setting aside a judgment of that court refusing to admit a will to probate is not an appealable order, because not within section two hundred and ninety-seven of the act to regulate the settlement of the estates of deceased persons. *Peralta v. Castro*, 15 Cal. 511.

28. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intestate to the plaintiff for \$3,000, and to procure an order of the court for the sale, asking the court to confirm this agreement; and asking further, that, if the court should refuse so to confirm, then for

Probate Court.

a general order of sale upon the petition, which sets up other facts usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart v. Allen*, 16 Cal. 478.

29. Held, further, to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale; that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way, that if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale and confirming it afterwards being still left to the court, uninfluenced by any such agreement. *Ib.*

30. Held, further, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale—the proper course—but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause—asking, as it did, what the court could not grant—yet, as the petition presented all the facts necessary to give the court jurisdiction of the matter of sale, it was sufficient to support the decree when attacked collaterally. *Ib.*

31. Held, further, that the decree and proceedings are not void, on the ground of inconsistency, in this: that the first order

confirms the agreement with plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction; but that these irregularities and defects must be corrected on appeal, and cannot be indirectly attacked. *Ib.*

32. The court had no power to confirm this private sale, and the order to that effect was void; but this act of the court, though an assumption of power, did not divest it of its rightful powers. It had to order a sale of the land, and this power was exercised by its final or second decree. *Ib.* 501.

33. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is sufficient to pay debts. *Ib.*

34. To the exercise of jurisdiction, in ordering a sale of real estate, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. *Ib.*

35. So far as the question of jurisdiction is concerned, it is immaterial whether the statements of the petition be true or not; the jurisdiction rests upon the averments of the petition, not upon their truth. *Ib.*

36. Where the petition for the sale of real estate, after setting out the debts, proceeds, “that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said decedent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;” and after giving some further matter, concludes: “Petitioner further alleges, that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seized, and the condition and value

Probate Court.—Process.

thereof, which said inventory is made a part of this petition": held, that the petition contains a sufficient averment as to the "amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of," within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Ib.* 502.

37. The prayer of the petition in this case is in the alternative, and, therefore, the petition, as a pleading, was defective, but this defect does not go to the jurisdiction of the court; but, if the true construction of the petition be that it prays for a sale only in the event that the agreement with plaintiff is not confirmed, still, perhaps, even then, the jurisdiction of the court would not be affected. *Ib.*

38. Query, whether, under the act of 1851, relative to the estates of deceased persons, in the petition for the sale of real estate, which shows that the personal estate, whether disposed of or not, is insufficient to pay the debts, it be essential also to aver how much of the personal estate has been disposed of; or whether the sole jurisdictional fact is that required by the one-hundred and fifty-fourth section of the act, making the one hundred and fifty-fifth and one hundred and fifty-sixth sections thereof mere modes to give effect to the substantive power conferred in section one hundred and fifty-four, and hence—like other statutory means to carry out a power—merely directions to the court in the exercise of its jurisdiction, and not conditions to the existence of the jurisdiction. *Ib.*

39. In this case, the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and, therefore, undisposed of. The statement is of a fact existing at the time of the filing of the petition—and that fact is, that the property of the estate is shown by the inventory, and is insufficient

to pay the debts, etc.; and if it be the property of the estate, it has not been disposed of. *Ib.*

40. In cases of this sort, where titles to real estate will be injuriously affected by holding probate courts to great strictness of proceeding, a fair and liberal construction should be given to their acts, whenever it can be legally done. *Ib.* 503.

41. Taking the petition and inventory together, in this case, the description of the real estate is not so defective as to render the sale void upon its face. To require an accurate or exact description is too strict a rule. *Ib.*

42. Where upon petition by the administrator to sell real estate of the deceased, to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and, on the same day, a guardian ad litem was appointed for such heirs, who, on the same day, appeared, and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed and the order to show cause was made on the same day. *Ib.* 504.

43. The statute is silent as to the time when the guardian, ad litem, is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

44. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

See ADMINISTRATOR, ADMINISTRATOR PUBLIC, DEATH, ESTATES OF DECEASED PERSONS, WILL.

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• PROCESS.

1. Attendance upon any court as a witness, juror, or party only, exempts the person in attendance from arrest in a civil action, but not from obeying any ordinary

process of court. *Page v. Randall*, 6 Cal. 33.

2. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates v. Nash*, 6 Cal. 194.

3. In the service of process, the sheriff is responsible only for unreasonably or not reasonably executing it. He is bound to start, on the instant of receiving a writ, to execute it without regard to anything else. *Whitney v. Butterfield*, 13 Cal. 338.

4. Reasonable diligence in the execution of process depends upon the particular facts; whether for instance the writ be for fraud or because defendant is about to leave the State, or remove his property, or the like. *Ib.* 340.

5. Under the code, personal service of writs and process is made by delivering a copy to the party upon whom service is required. Independent of the statute, the mode would be by showing the original under seal of the court, and delivering a copy. *Edmondson v. Mason*, 16 Cal. 388.

See ARREST, ATTACHMENT, INJUNCTION, REPLEVIN, SUMMONS.

### PROCHEIN AMI.

1. The code permits the wife to sue alone when the action is between herself and her husband, and takes away the necessity of suing by prochein ami. It is a remedial statute and must be beneficially construed. *Kashaw v. Kashaw*, 3 Cal. 321.

See HUSBAND AND WIFE, PARTIES.

### PROCLAMATION.

1. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections; and the proclamation of the governor required by statute is necessary to the validity of a special

election. *People v. Porter*, 6 Cal. 28; *People v. Weller*, 11 Cal. 67; *People v. Martin*, 12 Cal. 410; *People v. Rosborough*, 14 Cal. 187.

2. An election which was ordered by the board of supervisors, to fill a vacancy in the office of county judge occasioned by the resignation of the incumbent, without proclamation of the governor, is invalid; and the office being vacant, can be properly filled by the appointment of the governor. *People v. Porter*, 6 Cal. 68; *People v. Martin*, 12 Cal. 411.

See ELECTION, GOVERNOR.

### PROMISSORY NOTES.

See BILLS OF EXCHANGE.

### PROTEST.

- I. In general.
- II. Of Bills and Notes.

#### I. IN GENERAL.

1. Plaintiff having protested against the sale of his property for taxes illegally assessed, purchased the property in order to protect it from a clouded title, made the payment under protest, and in a few days commenced suit for the recovery of the money: held, that this was sufficient notice to the officer to hold the fund, and the money could be recovered back. *Hays v. Hogan*, 5 Cal. 242.

2. The object of a protest against an illegal payment is to take from the payment its voluntary character, and thus conserve to the party the right of action to recover back the money. It is only available in cases of payment under decrees or coercion, or when undue advantage is taken of the party's situation. It has no

In general.—Of Bills and Notes.

application to voluntary payments. *McMillan v. Richards*, 9 Cal. 417.

3. An ordinance for the improvement of the streets, passed by the council of of Sacramento before the time of the presentation of the protest, is not thereby invalid. The statute only inhibits the council from proceeding with the improvements in case of such protest. *Burnett v. City of Sacramento*, 12 Cal. 82.

4. Taxes not justly due, and paid under protest, may be recovered back by suit against the tax collector. *Falkner v. Hunt*, 16 Cal. 170.

## II. OF BILLS AND NOTES.

5. A guarantor of a promissory note is entitled to demand and notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Brady v. Reynolds*, 13 Cal. 32; *Geiger v. Clark*, 13 Cal. 580.

6. A promissory note made before the statute of 1851, (which makes the fourth day of July a nonjudicial day) which fell due on the first July, and was payable on the fourth; held, that notice of nonpayment on the third was premature, and ineffectual to charge the endorser. *Toothaker v. Cornwall*, 3 Cal. 146.

7. If a note is payable in bank, notice of nonpayment may be given to the endorser on the evening of the day on which the note is payable, after the close of banking hours, and if not payable in bank, notice may be given on the evening of the day it is payable, at the close of the usual hours of commercial business. *Toothaker v. Cornwall*, 4 Cal. 30; overruled in *McFarland v. Pico*, 8 Cal. 631.

8. In places where there are no regular hours of business, the notice may be given after sunset of the day of dishonor. *Toothaker v. Cornwall*, 4 Cal. 30.

9. An express notice of waiver of nonpayment is equivalent to an admission that the note has been presented, or need not be presented. *Matthey v. Galley*, 4 Cal. 63.

10. A notice of the dishonor of a note is sufficient if it appear or can be reasonably inferred from the notice that the note or bill has been duly protested for non-

payment, or has been dishonored. *Stoughton v. Swan*, 4 Cal. 213.

11. The second of a foreign bill of exchange drawn here payable at sight was presented to the drawee, and payment being refused, it was duly protested. Afterwards and before suit was brought, the first of exchange was paid to the holder, with interest and cost of protest: it was held, the drawer was released from the payment of damages for the dishonor of the second of exchange. *Page v. Warner*, 4 Cal. 395.

12. By the fifth section of the act concerning notaries, bills are made protestable, and by the tenth section the protest of the notary is expressly made evidence of demand, and nonpayment of notes and bills. *Connolly v. Goodwin*, 5 Cal. 221.

13. Where payment by the maker to the endorser is relied on as the excuse for want of demand and notice, it must be a payment directly and specifically for the note, and not as security for all transactions in the aggregate. *Van Norden v. Buckley*, 5 Cal. 284.

14. An endorser of a promissory note, after maturity, is entitled to demand and notice of nonpayment, before he is liable to pay. *Vance v. Collins*, 6 Cal. 439; *Beebe v. Brooks*, 12 Cal. 311.

15. At common law, promissory notes were not protestable securities; they are made so by our statute, and as a consequence the protest of them must be attended with all the incidents belonging to foreign bills of exchange. *Tervis v. Randall*, 6 Cal. 635.

16. Where the second of a set of bills of exchange was presented and protested, owing to the absence of the drawee, and the first of exchange arrived nine days after, and was paid with costs of protest of the second, and two months after suit was commenced on the protested bill: held, that in an action for malicious prosecution of said suit, the question whether the plaintiffs in said suit knew that the bill was in fact paid at the time when they commenced suit was a question for the jury. *Weaver v. Page*, 6 Cal. 684.

17. Notice of nonpayment may be dispensed with by express waiver, or by any act which will amount to a waiver. *Min-turn v. Fisher*, 7 Cal. 574.

18. A notarial certificate of presentment and demand and of protest for non-



payment of a promissory note, taken from the record of the notary is admissible and is prima facie evidence of the facts contained therein, in like manner as the original protest. *McFarland v. Pico*, 8 Cal. 635.

19. The merchant who states that he has received notice of protest of certain paper, and the lawyer who offers to prove that notice of protest has been given to the endorser of the paper in suit, both mean the same thing, that the necessary steps have been taken to fix the liability of the endorser, namely: presentment, refusal of payment and notice given. *Ib.* 636.

20. No precise form of words is necessary to constitute the notice. It will be sufficient if it inform the party to whom it is given, either in express terms or necessary implication that the note has been duly presented at the maturity and dishonored. *Ib.*

21. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

22. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Hartman v. Burlingame*, 9 Cal. 561.

23. Where a draft is drawn by the president and secretary of a corporation upon its treasurer, no notice of presentation and nonpayment is necessary to hold the corporation. The draft, in such cases, is only an order of the corporation upon itself. *Dennis v. Table Mountain W. Co.*, 10 Cal. 370.

24. Where a place of payment is named in a bill or note, it is not a substantial contract, and it is not necessary to allege and prove a demand at the place specified. *Montgomery v. Tutt*, 11 Cal. 327; overruling *Wild v. Van Valkenburgh*, 7 Cal. 167.

25. In an action upon a promissory note, payable "on demand after date," it is not necessary to show actual demand before bringing suit. The institution of suit is a demand. *Ziel v. Dukes*, 12 Cal. 482.

26. A notice to the endorser of a note of nonpayment is sufficient, if it appear that the endorser, at the time of receiving the notice, knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, and this though the notice was verbal and the note neither produced nor described. *Thompson v. Williams*, 14 Cal. 162.

27. Where a note due January, 1857, was endorsed by the payee to the present holder November 26th, 1858, and he, November 29th, 1858, demanded payment of the maker, and verbally notified the endorser of such demand, and that he would be held on his endorsement, it is no objection to the notice that it did not state the time of demand. The demand was good if made within a reasonable time, and before the notice; otherwise as to notes endorsed before maturity. In such a case the notice must state the time of demand. *Ib.* 163.

28. If much time intervenes between demand and notice, in transfers after maturity, the question may arise whether the delay has not released the endorser. *Ib.*

29. A notice by the holder that he had demanded payment of that note, implies that payment was demanded of the person liable to pay, to wit: the maker; and the declaration that he intended to look for payment to defendant, the endorser, implies the fact of nonpayment. *Ib.* 164.

30. A notarial certificate of protest of a note is of itself presumptive evidence that the notary had authority from the proper parties to make the protest. *Gillespie v. Neville*, 14 Cal. 409.

31. A protest need not state that the persons requesting him to protest are the holders of the note or the agents of the holders. *Ib.*

32. An endorser of a note payable on demand, no demand being made until thirteen months after the endorsement to plaintiff, is prima facie not liable. The delay is unreasonable. *Jerome v. Stebbins*, 14 Cal. 458.

33. Notice left by a notary at the residence of an endorser of a note—he being absent at the time—describing the note, stating that it was protested by him for nonpayment, and that the holder looked to the endorser for payment, but not signed by any one, nor indicating in any way

from whom it proceeded, is insufficient to charge the endorser. *Klockenbaum v. Pier-son*, 16 Cal. 376.

34. Such notice having been so left on Saturday, the day the note matured, the record shows that on Monday, in a conversation between the endorser and the notary, "something was said about the note," and that the notary informed the endorser that plaintiff was "its owner and holder:" held, that as a verbal notice, this conversation was insufficient; that a notice must inform the endorser, either expressly or by necessary implication, that the note has been duly presented at its maturity and discharged. *Ib.* 377.

See **BILLS OF EXCHANGE, NOTARY.**

## PUBLIC ADMINISTRATOR.

See **ADMINISTRATOR, PUBLIC.**

## PUBLIC LAND.

See **LAND, MINES AND MINING, II.**

## PUBLIC POLICY.

1. A deed of conveyance from an Indian to a white person is a nullity on its face, and no one can derive title under it. Such a conveyance is contrary to the policy of the Spanish and American law, and is strictly forbidden. *Suñol v. Hepburn*, 1 Cal. 283.

2. Wagers, which tend to excite a breach of the peace, or are against good morals, or which are against the principles of sound policy, are illegal, and no contract arising therefrom can be enforced. *Bryant v. Mead*, 1 Cal. 444.

3. A contract not to navigate certain waters under a penalty is not against public policy, as creating a monopoly; it only licenses the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world besides are left at full liberty to enter upon the same enterprise. *California Steam Nav. Co. v. Wright*, 6 Cal. 262.

4. At common law, all contracts by which one obliged himself to do an act or omission tending to injure the public were void, and the general rule is, that contracts in restraint of trade are contrary to public policy. The stringency of this rule has been gradually relaxed as the reason for it—the security of mechanics and tradesmen—ceased. *Ib.*

5. Such a contract gives no monopoly—giving an exclusive enjoyment of the business only as against a single individual—while all the world beside are left at full liberty to enter upon the same enterprise. *Ib.*; 8 Cal. 590.

6. Where the defendant employed the plaintiffs to superintend the erection of a building of which he was one of the contractors, they cannot plead that it is against public policy that he should occupy two positions of which the interests were in conflict, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews*, 9 Cal. 74.

7. There were pending before the board of U. S. land commissioners three cases—No. 58, Nos. 45 and 812. The claimants in No. 558 entered into a written agreement with V., the claimant, and B., his attorney of record, in cases Nos. 45 and 812, by which the former agreed to pay to V. a certain portion of the proceeds of the sales of that portion of the claim No. 558, known as the Miranda claim, the parties agreeing to appoint an agent to go on and make sales. Contemporaneous with this agreement was another between the same parties, by which V. and B. agreed to withdraw and discontinue claims Nos. 45 and 812 before said board, and also to cause to be withdrawn the depositions of Theodore Miranda and Francisca Miranda, taken before a commissioner in said case, No. 558, and on file therein; and to use their "best endeavors to procure the confirmation of said claim, No. 558." B. was the attorney for the Miranda claim, which was for the same land as claim No.

558. To defeat claim No. 558 he acted for the U. S. law agent in taking said depositions, which were important to the government in defeating claim No. 558, and he attempted to carry out his agreement to withdraw such depositions—though he was not directly retained by the government. V. and B. sue for the specific execution of the agreement; held, that such agreement is against public policy, and cannot be enforced; that B. could not, without a violation of his duty to the government as an attorney, carry out such agreement. *Valentine v. Stewart*, 15 Cal. 397.

8. If any part of the consideration of an agreement be void, as against public policy, the whole contract fails. *Ib.*, 404.

9. A mere intruder upon land could not set up the manner in which the owner acquired it, as being against public policy, as a ground for perpetually enjoining the purchaser from maintaining an action for the possession. *Treadwell v. Payne*, 15 Cal. 499.

10. W. died, leaving a wife and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intestate to the plaintiff for \$3,000, and to procure an order of court for the sale, asking the court to confirm this agreement; and asking further, that if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other facts, usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made, in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart v. Allen*, 16 Cal. 498.

11. Held, further, that to make such

the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale: that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale, and confirming it afterwards, being still left to the court, uninfluenced by any such agreement. *Ib.*

## PUBLICATION.

1. An affidavit of the attorney of record for plaintiff, that defendant conceals himself to avoid service of process, is sufficient to obtain an order on defendant for service of the summons by publication. *Anderson v. Parker*, 6 Cal. 201.

2. The date of publication of notice to creditors, under our insolvent act, is the first day on which the notice is published. *Clarke v. Ray*, 6 Cal. 604.

3. A judgment obtained by publication of summons against a defendant out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is a mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

4. Under the code, after the expiration of six months, if the absent defendant fails to deny the allegations of the complaint, he is held to admit them as true, and cannot afterwards show their falsity. *Ware v. Robinson*, 9 Cal. 111.

5. When there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unneces-

principal clerk. *Gray v. Palmer*, 9 Cal. 639.

6. The requirement of the statute being positive, that in actions against a minor under fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit for publication. *Ib.*

7. An affidavit which avers a cause of action against the defendant; that defendant cannot, after due diligence, be found in the State; that he was beyond the limits of the State; that summons has been issued, but the sheriff cannot find him; that defendant's residence is in the county where the summons was issued, and that defendant still has a family residing in said county; is insufficient to authorize the publication of the summons for only thirty days; it must be for three months. *Jordan v. Giblin*, 12 Cal. 102.

8. The provisions of the revenue act of 1857, which requires the tax collector to publish the delinquent tax list, giving the name of the owner, when known, of all real estate, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the State, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property holder, but the defect may be remedied by the legislature. *Moore v. Patch*, 12 Cal. 271; *People v. Seymour*, 16 Cal. 345.

9. The act of 1858, dispensing with the publication required by the act of 1857, also dispensed with the proof of that fact. *Moore v. Patch*, 12 Cal. 271.

10. An affidavit for an order of publication of the summons upon the ground of the absence of the defendant from the State, is insufficient if it does not show that the defendant had left the State, or that any diligence had been used to ascertain his whereabouts beyond inquiring of a single individual; where there is no pretense that he was concealing himself to avoid service. *Swain v. Chase*, 12 Cal. 285.

11. A board of equalization has no power to raise the valuation of land as

fixed by the assessor, without notice to the owner. The general notice of the sitting of the board by publication does not amount to the notice required, as it could scarcely be expected that every tax payer is to wait upon the board from the first Monday in August until the second Monday in September, all the time, to see if his taxes are increased. *Patten v. Greene*, 13 Cal. 329.

12. The offer of a reward or compensation by public advertisement either to a particular person or class of persons, or to any or all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Until performance, the offer may be revoked at pleasure. *Ryer v. Stockwell*, 14 Cal. 137.

13. Such advertisements, upon acceptance of their terms and performance of the services, become written contracts. *Ib.*

14. A tax collector has power to contract for publishing the delinquent list of tax payers so as to bind the county for the payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of the agency the county is responsible. *Randall v. Yuba County*, 14 Cal. 221.

15. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector has assented to a contract previously made or attempted by the supervisors with another party for publishing the list is not enough to affect plaintiffs, if they had no notice of it; and evidence of such assent was properly ruled out. *Ib.* 222.

## PUEBLO.

1. Before the military occupation of California, by the army of the United States, San Francisco was a Mexican pueblo or municipal corporation, and was invested with title to the lands within her boundaries. *Cohas v. Raisin*, 3 Cal. 453;



*Welch v. Sullivan*, 8 Cal. 188; *Hart v. Burnett*, 15 Cal. 615.

2. Where a plaintiff sues for a lot in the former pueblo of San Francisco, and derails his title from the city, it is prima facie evidence of title. *Seale v. Mitchell*, 5 Cal. 402.

3. The authority to grant lands in the city of San Francisco was vested in the ayuntamiento, and in the alcalde or other officers who at that time represented it, or had succeeded to its powers and obligations. *Hart v. Burnett*, 15 Cal. 616.

4. The official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

5. *Hart v. Burnett*, 15 Cal. 530, holding—first, that San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organizations; second, that such pueblo had a certain right or title to the lands within its general limits, and that the portions of such lands which had not been set apart or dedicated to common use, or to special purposes, could be granted in lots, by its municipal officers, to private persons in full ownership; third, that the authority to grant such lands was vested in the ayuntamiento, and in the alcaldes or other officers who, at the time, represented it, or who had succeeded to its “powers and obligations;” fourth, that the official acts of such officers, in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority, affirmed. *Payne v. Treadwell*, 16 Cal. 228.

6. A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city, in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo. *Ib.* 232.

7. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands, were not suspended, ipso facto, by the war

with Mexico, or by the conquest, and the fact that such officers, during the military occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which, by the existing laws of the country, belonged to such municipal officers. And the same presumptions attach to their grants of lots, whether made before or after the conquest and cession. *Ib.* 240.

8. Where land within the general limits of the pueblo of San Francisco, and also within the limits of the old “Mission,” was granted to an individual by the governor and departmental assembly, in 1839–40, before the “Mission” had been entirely secularized, it would seem to have been, at the date of the grant, exempt from the exercise of pueblo rights over it, and must be presumed to be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown v. City of San Francisco*, 16 Cal. 460.

See ALCALDE, GRANT.

## PUIS DARREIN CONTINUANCE.

1. Evidence of the discharge of the debt sued, by transactions subsequent to the filing of the answer, is admissible only under the plea of payment puis darrein continuance. *Jessup v. King*, 4 Cal. 332.

## QUO WARRANTO.

1. This writ is to prevent the usurpation of any office, franchise or liberty, as also to afford a remedy against corporations for a violation of their charters, tending to a forfeiture thereof. *Ex parte the Attorney General*, 1 Cal. 87.

2. From the exercise of the remedies which this writ affords, juries are to be empaneled to try the various issues of fact which, from the nature of the investigation, would be a wide range, and of the most exciting character. *Ib.*

## Quo Warranto.—Railways.

3. The constitution has not clothed the supreme court with the powers and jurisdiction of the court of king's bench in England. *Ib.*

4. The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus; and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of an office. *Ib.* 88.

5. The superior court of the city of San Francisco has no jurisdiction of proceedings by quo warranto, and a judgment of that court by which the right to an office was determined in these proceedings was reversed on appeal. *People v. Gillespie*, 1 Cal. 343; *People v. King*, 1 Cal. 345.

6. The code provides a remedy against any person who usurps, intrudes into, or unlawfully holds or receives any public office, civil or military, or any franchise in the State. *People v. Olds*, 3 Cal. 175.

7. The distinction between writs of mandate and quo warranto, as held in England, is not abolished by the statutes of this State; but is fully recognized. *Ib.* 177.

8. An information in the nature of a quo warranto is the proper proceeding to try the title to an office. *People v. Scannell*, 7 Cal. 439.

9. In quo warranto, to determine the right to an office, an allegation that defendant is in possession of the office without lawful authority is a sufficient allegation of intrusion and usurpation. *People v. Woodbury*, 14 Cal. 45.

10. Quo warranto lies to test the right of a pilot appointed by the board of pilot commissioners. *Ib.* 46.

11. In quo warranto for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to relator's right cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *People v. Abbott*, 16 Cal. 364.

See OFFICE.

## RAILWAYS.

1. Where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person for his own benefit, as to run a railway there, in the pursuit of a business which involves constant risk and danger, he is bound in the exercise of such right to use extraordinary care. In this a private railway differs from a public one. *Wilson v. Cunningham*, 3 Cal. 243.

2. If by the construction of a railroad through an enclosure of a farmer, it is made necessary to construct fences on either side of the road to protect his crops, the cost of such fences must be included in the compensation to be paid by the railroad company. *Sacramento Valley R. R. Co. v. Moffatt*, 6 Cal. 75.

3. Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession who had filed his claim to the damages. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 640.

4. Where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for right of way, and makes the parties in possession defendants to their application, the latter are entitled to have the land as determined by the commissioners paid to them, although third parties have given notice of the ownership of the land. *Sacramento Valley R. R. Co. v. Moffatt*, 7 Cal. 579.

5. A railway company cannot refuse to enter a transfer of stock in said company on their books, on the ground that the assignor of the stock is indebted to the company, unless the company had a lien upon the stock at the date of its transfer. *People v. Crockett*, 9 Cal. 114.

6. Steamboat and railroad companies, in propelling boats on the river and cars on the railroad, must provide all reasonable precautions, to protect the property of others, and they must also be properly used. Carelessness in either particular resulting to the injury of an innocent party will make the company liable. They are bound to temper their care according to

## Railways.—Rape.—Ratification.

the circumstances of the danger. *Gerke v. California Steam Navigation Co.*, 9 Cal. 256; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

7. In an action against a railroad company for running over a horse and killing him, the plaintiff has the right to prove the custom of the country "to permit domestic animals to roam at large upon the unclosed commons," where the defense is negligence on the part of the plaintiff in thus allowing his horse to run at large. *Waters v. Moss*, 12 Cal. 538.

8. The rule of common law, which requires owners of cattle to keep them confined within their own close, does not prevail in this State. The common law was adopted only so far as it was not repugnant to the constitution and statutes of the State. *Ib.*

9. Under the act of April 28th, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river, at or near Knight's Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection, provided the effect of the work is to make the connection. *Pattison v. Supervisors of Yuba County*, 13 Cal. 189.

10. The fact that fire was communicated from the engine of defendant's cars to plaintiff's grain, with proof that this result was not probable from the ordinary working of the engine, is prima facie proof of negligence sufficient to go the jury. *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 388.

See COMMON CARRIERS.

## RAPE.

1. On a trial for rape, where the prosecutrix is the only witness, evidence that she had committed acts of lewdness with other men is admissible, as tending to disprove the allegation of force and total absence of assent on her part. *People v. Benson*, 6 Cal. 222.

2. It seems that proof of particular acts of lewdness should be admitted in preference to general reputation which may be good or bad, either deservedly or undeservedly. *Ib.* 223.

3. If these particular instances of lewdness are admissible, it is immaterial by whom they are proven, and it is unnecessary to question the prosecutrix as to them; they are introduced not so much to impeach her testimony as to do away with the presumption of the greatest reluctance and resistance on her part. *Ib.*

4. In such cases, the facts\* that there was no outcry, though aid was at hand and the prosecutrix knew it; that there was no immediate disclosure; that there was no indication of violence on her person, and that the act was committed at a time and under circumstances calculated to raise a doubt as to the employment of force, are put as strong circumstances of defense, not as conclusive, but as throwing doubt upon the assumption that there was a real absence of assent. *Ib.*

5. No case of this class of prosecutions should ever go to the jury on the sole testimony of the prosecutrix, unsustained by facts and circumstances corroborating it, without the court warning them of the danger of a conviction on such testimony. *Ib.*

See CRIMES AND CRIMINAL LAW.

## RATIFICATION.

1. The law conferring other than judicial functions upon the court of sessions was unconstitutional and void, and any contract not incident to their judicial functions, made by a court of sessions under its provisions, is a nullity. Such a contract being void, could not be made valid by subsequent ratification of the board of supervisors. *Phelan v. Supervisors of San Francisco County*, 6 Cal. 540.

2. It is a well settled rule, that a principal who ratifies the acts of his agent must be made acquainted with the character of those acts, and unless all the circumstances are made known to him, the ratification is void. *Billings v. Morrow*,

## Ratification.—Receipt.—Receiver.

7 Cal. 174; *Davidson v. Dallas*, 8 Cal. 244.

3. Where a municipal corporation has the power to perform an act, and in the execution thereof the prescribed form is not followed, it has the power subsequently to ratify and confirm the informal act, so as to make it as binding as if originally done in the proper manner. *Lucas v. City of San Francisco*, 7 Cal. 469.

4. Where the president of a corporation has an alleged power to make a contract to bind the corporation as agent, if such authority were doubtful, the acts of the corporation may amount to a ratification of the contract. *Shaver v. Bear River and Auburn W. and M. Co.*, 10 Cal. 401.

5. Ratification by a principal of the acts of his agent depends upon the knowledge of those acts on the part of the principal, and where the knowledge is partial, so will be the ratification. *Marxiou v. Pioche*, 8 Cal. 535.

6. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. *Ellison v. Jackson Water Co.*, 12 Cal. 551.

7. Acts of an agent without authority, subsequently ratified by the principal, bind the principal back to the inception of the transaction. *Taylor v. Robinson*, 14 Cal. 400.

8. But such ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification of the principal, as attachments levied on property of the debtor after a sale by or to an agent. *Id.*

9. A ratification is equivalent to a previous authority. It operates upon the act ratified in the same manner as though the authority had been originally given; and where the authority can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. *McCracken v. City of San Francisco*, 16 Cal. 624.

10. Where an authority to do any particular act on the part of a corporation can only be conferred by ordinance, a ratification of such act can only be by ordinance. *Id.*

11. A ratification can only be made when the principal possesses at the time the power to do the act ratified. He must be able at the time to make the contract

to which, by his ratification, he gives validity. The ratification is the first proceeding by which he becomes a party to the transaction, and he cannot acquire or confer the rights resulting from that transaction unless in a position to enter directly upon a similar transaction himself. *Id.* 625.

## RECEIPT.

1. A receipt given to one joint debtor on a note, for a part payment, coupled with the words "which is in full on his part on the within note, and the said A. B. is hereby discharged from all obligations on the same," is not such a release as will discharge the others. *Armstrong v. Hayward*, 6 Cal. 186.

2. A receipt acknowledging payment of a debt, whether in money or some other medium, may be explained or contradicted by parol. *Hawley v. Bader*, 15 Cal. 46.

3. In suit on an account against B. & S. as a firm, a receipt to B. alone signed by plaintiffs "in full for accounts and demands due us at this date" was offered in evidence by B., S. having made default, together with parol proof that the receipt was intended to embrace the account sued on: held, that the parol proof was admissible; that the term "all accounts" may be shown to cover firm as well as personal indebtedness. *Id.*

See PAYMENT.

## RECEIVER.

1. Where the allegations of a bill are general in their nature, and the equities are fully denied by the answer, such a case is not presented as will justify the appointment of a receiver, the withdrawal of the property from the hands of one intimately acquainted with all the affairs of the concern, and placing it in the hands of another, who may not be equally com-





## Receiver.—Recognizance.

equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant filed a bond to account as receiver, which defendant did, a judgment for twenty thousand dollars was rendered against defendant in this suit, and proper demand being made and refused, suit was brought by plaintiff on the bond, which was made payable to the people of the State of California: held, that the plaintiff could recover thereon. *Baker v. Bartol*, 7 Cal. 553.

12. A receiver is appointed on behalf of all the parties who may establish rights in the cause, and the money in his hands is in custodia legis. *Adams v. Woods*, 8 Cal. 315.

13. A receiver is an indifferent person as between the parties, and is an officer of the court and not to be disturbed by any person, without the special leave of the court. *Ib.*

14. In a suit for a dissolution of partnership, the appointment of a receiver is only a means to attain the end contemplated by the plaintiff; and so is the employment of counsel by the receiver. *Ib.* 316.

15. A receiver having the right to stipulate with the counsel employed by him that the counsel shall rely upon the allowance made by the court for his services, it is the duty of the receiver to report, among his disbursements, the claim of the counsel, leaving the amount to be fixed by the court, and if the counsel or any other person employed by the receiver feels aggrieved by the order of the court thereon, he can appeal therefrom. *Ib.*

16. A receiver is an officer of the court, and property in his hands is in the custody of the law; but it is equally true that he holds it for whoever can make out a title to it. *Adams v. Woods*, 9 Cal. 28.

17. Under the statute, the county judge may grant an injunction in cases in the district court but he cannot appoint a receiver, at least, not as a thing distinct from the injunction. *Ruthrauff v. Kresz*, 13 Cal. 639.

18. The transfer to a receiver by order of court, of the effects of an insolvent in the suit of a judgment creditor, is not an assignment absolutely void under the insolvent act of 1852, according to any decisions of this court, but only void as

against the claims of creditors. *Nagle v. Lyman*, 14 Cal. 456.

19. Generally, a receiver can pay out nothing except on an order of the court; but there are exceptions to the rule; nor will he be denied reimbursement in every case in which he neglects to obtain the order, especially in a court of equity. *Adams v. Woods*, 15 Cal. 207.

20. Where a receiver was authorized by order of the court appointing him to prosecute suits for the recovery of assets of the estate he represents, and certain important mercantile books belonging to such estate being lost, the receiver paid \$1,127 for their recovery, without an order of court: held, that he was entitled to a credit for this sum as part of the necessary or appropriate expenditures of his office. *Ib.*

21. In suit by a stockholder against a corporation and its officers, praying for their removal, and for an account and settlement of the affairs of the corporation, the decree, after a full hearing on the merits, was in accordance with the prayer, and also appointed a receiver to take charge of the property of the corporation until the further order of the court; collect money due or to become due it; sell certain stock and pay the proceeds in accordance with the decree, etc.: held, that this provision in the decree does not destroy its effect as a final decree, and that an appeal lies therefrom. *Neall v. Hall*, 16 Cal. 148.

22. A court of equity has no jurisdiction over corporations, for the purpose of restraining their operations or winding up their concerns. Such court may compel the officers of the corporation to account for any breach of trust, but the jurisdiction for this purpose is over the officers personally, and not over the corporation. Hence, in this case, it was error in the court below to appoint a receiver and decree a sale of the property and a settlement of the affairs of the corporation. *Ib.* 150.

## RECOGNIZANCE.

1. The respondents were bail in a recognizance, conditioned for the appear-

ance of M. to answer at court, upon an indictment found against him on the nineteenth of April, 1852. M. appeared at the proper time, which was the June term following, and on the seventeenth of June moved to quash the indictment, for causes assigned, which was ordered for the court. Another indictment, on the same charge, was found by the grand jury, then in session, at the same term, on the eighteenth of June, upon which, M. being called, made default. Afterwards, suit was brought upon the recognizance against the bail, and judgment obtained thereon: held, that the bail were entitled to relief against the judgment. *People v. Lafarge*, 3 Cal. 134.

2. Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found, or is pending. *People v. Smith*, 3 Cal. 272.

3. If the condition be to appear "when-ever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error; and a loose statement that the accused was called "in the court of sessions" is not sufficient. *Ib.*

4. The district attorney can bring suit against bail at any time after the adjournment of the term at which the recognizance was declared forfeited. *People v. Carpenter*, 7 Cal. 403.

5. Sureties on a bail bond cannot avail themselves in defense to an action thereon of an insufficiency of the justification of the undertaking. *Ib.*

6. A bail bond need not state in what court the defendant shall appear, as the law provides in what court he shall be tried. *Ib.*

7. Where the defendants were sureties in a recognizance for the appearance of one H., who was charged with the crime of receiving two mules alleged to have been stolen, and an indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the same crime mentioned in the recognizance. *People v. Hunter*, 10 Cal. 503.

8. Where an assignment of a note and mortgage has been made to the plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them, as such assignees, to institute suit on

the note and mortgage, and a decree of foreclosure in such case, with directions to pay the money into court to await the further decree of the court, is proper, or at least, there is no error in such a decree to the prejudice of the defendants. *Hunter v. Leran*, 11 Cal. 12.

9. A judgment entered on the forfeiture of a recognizance is the property of the State, and the legislature may release the same, in such form and on such conditions as it thinks proper to prescribe. *People v. Bircham*, 12 Cal. 54.

10. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for non-appearance—the sureties cannot defend on the ground that the judgment of forfeiture was erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

11. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.* 386.

RECORD.

On APPEAL, see APPEAL, V, 1; see RECORDER, COUNTY; REGISTRATION.

RECORDER, CITY.

1. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise v. Carghill*, 4 Cal. 122.

2. The recorder of the city of San Francisco has a right to punish for the crime of assault and battery, as fixed by the act of April 18th, 1850. *People v. Ah King*, 4 Cal. 307.

3. Fines properly imposed in the court of a mayor or recorder of a city, or before any municipal officer of the corporation,

## Recorder, County.—Redemption.

must be paid into the treasury of the city or other corporation. *People v. City of Sacramento*, 6 Cal. 425.

4. The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. *Hopkins v. Delaney*, 8 Cal. 87.

5. City recorders are not within article six, section two, of the constitution, inhibiting judicial officers, except justices of the peace, from taking fees. *Curtis v. Sacramento County*, 13 Cal. 292.

## RECORDER, COUNTY.

1. In the absence of any statute regulation requiring a record of the selection of a homestead or indicating any mode in which the intention to dedicate property as a homestead, shall be made known, the filing of a notice in the recorder's office of the county could have no legal effect, and would not be conclusive on purchasers or creditors. *Cook v. McChristian*, 4 Cal. 26.

2. A deed recorded January 30th, 1850, by a person acting as recorder, by virtue of an election by the people, without any authority of law, is not properly recorded. *Smith v. Brannan*, 13 Cal. 115.

3. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Francisco, are void. *Chapin v. Bourne*, 8 Cal. 295.

4. A verification to an answer is in form and substance an affidavit, and may be taken before a county recorder. *Pfeiffer v. Rhein*, 13 Cal. 648.

5. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgment taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No seal]—the conclusion of the acknowledgment being: "In witness whereof I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal:

held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

6. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*

See REGISTRATION.

## REDEMPTION.

1. A subsequent judgment creditor having a lien has a right to redeem real estate sold by foreclosure of a previous mortgage in the hands of the purchaser. The statute should be beneficially construed. *Kent v. Laffan*, 2 Cal. 596.

2. Where land was sold at sheriff's sale, the proceeds of which did not cover the whole judgment, a party redeeming must pay the amount of bid, with statutory interest, and the residue\* of the judgment constituting the lien. *Vandyke v. Herman*, 3 Cal. 298.

3. Without express written authority, neither the mayor or the commissioners of the funded debt of San Francisco, or any or either of them, by virtue of their office or otherwise, are authorized to redeem under the code, lands of the city sold under execution against her, nor can the city attorney ratify their act of redemption by plea after suit brought. *People v. Hays*, 4 Cal. 146.

4. The commissioners of the funded debt are not successors in interest, judgment debtors or judgment creditors, and therefore not statutory redemptioners, nor are they so in their individual capacity as citizens or tax payers. *Ib.* 148.

5. A payment to the sheriff for the redemption of land sold under execution cannot be made in certified checks; it must be in cash. *Ib.*

\* The amendment of 1880 to the code of practice abrogates this provision, and permits the redemption by the payment only of the amount bid.





## Redemption.

and a mortgage was placed on the same premises February 21st, 1856, and a suit was brought subsequent to the execution and record of the mortgage to enforce the mechanic's lien, in which suit the mortgagees were not made parties, and under the decree rendered in such suit a sale was made, and after the expiration of six months, no redemption being had, a deed was executed to the assignee of the sheriff's certificate: held, that the right of the mortgagees to redeem the premises by paying off the incumbrance of the mechanic's lien was not affected by the decree and the proceedings thereunder, and that the purchaser of the premises upon a decree of foreclosure of the mortgage, having received his deed upon such purchase, was entitled to the same right to redeem. *Whitney v. Higgins*, 10 Cal. 553.

20. A party entitled to redeem has a right to have ascertained the price at which his interest was sold, in order that he may redeem. *Raun v. Reynolds*, 11 Cal. 20.

21. The equitable right to redeem property sold under a decree of foreclosure held by subsequent incumbrancers is merged into a statutory right, not by any force given to the language of the decree, but by the fact that they have had their day in court and an opportunity of setting up any equities they possessed. After the decree they stand as to their right of redemption in the same position as ordinary judgment debtors. *Montgomery v. Tutt*, 11 Cal. 317.

22. The payment by a judgment debtor of the judgment, after a sheriff's sale, extinguishes the lien, and the fact that he takes a transfer of the certificate and the sheriff's deed, instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarthy v. Christie*, 13 Cal. 81.

23. Time is not given for the purpose of enabling the debtor to make a profit out of the estate, but for the purpose of enabling him to raise the money to redeem. *Harris v. Reynolds*, 13 Cal. 517.

24. The redemption system is a highly artificial plan, devised with care by the legislature, and introducing new and specific rules in respect to judicial sales. *Ib.*

25. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale

to the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Ib.*

26. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity as between him and defendant in execution pay the taxes assessed while he is so in possession. If the owner does not pay them the statute requires the party in possession to pay. *Kelsey v. Abbott*, 13 Cal. 619.

27. A party claiming title of property by virtue of statutory redemption, must show strict compliance with the statute. *Haskell v. Manlove*, 14 Cal. 57.

28. To entitle a judgment creditor having a lien to redeem, he must serve upon the officer a copy of the docket of the judgment; a copy of the judgment is not sufficient. *Ib.*

29. If a party claim a sheriff's deed, as having redeemed property as successor in interest of the judgment debtor, his offer to redeem must have been made in that character. *Ib.* 58.

30. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to enable the holder to redeem as such successor, at least, not until the expiration of the six months. *Ib.*

31. Where a redemptioner under the statute pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 240.

32. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptionee. *Ib.*

33. Under our statute a redemptioner is not required to pay interest on the purchaser's bid, over and above the eighteen per cent., nor is he required to pay interest on the whole judgment of the purchaser, but only on the excess over and above the bid. *Ib.* 241.

34. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. *Ib.*

## Redemption.

35. From sales under trust deeds to convey there is no equity of redemption, for there is no forfeiture. Performance of a trust carries out the contract of the parties. *Koch v. Briggs*, 14 Cal. 263.

36. The statutory lien of a judgment upon the real estate of a judgment debtor attaches only upon property in which such debtor has a vested legal interest. *People v. Irwin*, 14 Cal. 434.

37. A owes B a debt; to secure it, A and C jointly mortgage to B a piece of land owned by them in common. Subsequently A mortgages his undivided interest in the land to secure a debt to D. B forecloses against A and C and buys in the whole land, not making D a party. The time of statutory redemption having expired, B gets a sheriff's deed: held, that D as subsequent mortgagee may redeem A's but not C's interest in the land, and that the sale is final as to C's interest, D not being a necessary party to the foreclosure. *Kirkham v. Dupont*, 14 Cal. 563.

38. The redemption money of A's interest would be the amount of B's mortgage debt, with interest, etc., less one-half of the purchase money of the whole foreclosure sale. *Id.* 566.

39. A subsequent mortgagee would have a right to redeem premises from a sale under a judgment upon mechanic's liens by paying the money justly due, interest, costs, etc., he not having been party to the suit by the lien holder. *Gamble v. Voll*, 15 Cal. 510.

40. The redemption act of 1859 is in substitution of the act of 1851, and applies to sales made after the passage of the act of 1859, though made upon judgments rendered before. *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 522.

41. The fact that judgments were recovered before the act of 1859 does not vest in the holders of them the right to redeem from a sale made after the passage of the act upon any terms different from those prescribed by the act. If the right to redeem under the act of 1851 were an incident to any judgment rendered while that act existed, it was a portion of the remedy which might be taken away by the legislature at any time before the right had become vested by the party availing himself of it. *Id.*

42. The right to redeem under the stat-

ute, and the mode of asserting the right, are mere creatures of the statute. The right is given to a judgment creditor, and if before a party becomes a judgment creditor the law be repealed, he has no claim to redeem, because he does not belong to that class of persons for which the remedy is furnished. *Id.* 523.

43. The right to redeem land is no part of the contract of indebtedness. It is a new privilege given by statute. It is a provision made by statute for a future contract, by pursuing which a purchase of land may be made. But as this provision is only a matter out of which rights may grow, the provision may be repealed at any time before a party avails himself of it. *Id.*

44. The legislature may give a particular privilege, or a right to contract on certain terms, or in certain circumstances, but it may repeal the provision, or deny the right, as a general rule, as fully and completely as it can give them; or it may alter the terms at its pleasure, subject only to this: that it cannot repeal or alter so as to affect those contracts which have been made during the existence of the act authorizing them. *Id.* 524.

45. The statutory regulations as to redemption are mere provisions of sale, governing the course of the process and its effects. They do not touch the contract of indebtedness, which stands, as it stood before, a valid obligation to pay money, with the sanctions furnished by law for its enforcement. And a sale without any right of redemption is a valid and sufficient remedy for the enforcement of the contract. *Id.*

46. An act denying a right of sale for the enforcement of the contract would probably be such a vital assault upon the obligation as practically to destroy it, and therefore be unconstitutional. But a repeal of a right of redemption—in other words, an act making a sale absolute instead of conditional—would not impair the contract. *Id.* 525.

47. A debtor in default has no vested right to have his property sold in a particular way; and third persons, not parties to the contract, have no vested right to purchase the property of a common debtor sold at the instance of another creditor. *Id.*

48. The doctrine of *Whitney v. Hig-*

## Redemption.—Reference.

*gins*, 10 Cal. 554, as to equitable right of redemption in favor of certain persons not made parties to a mortgage foreclosure, applied to a peculiar state of facts. *Id.* 526.

49. Where plaintiffs, owners of certain judgments and decrees, had both the equitable and statutory right to redeem property sold, and exercised their right under the statute by redeeming from D., who had purchased under his own foreclosure, and then D., as assignee of other judgments, redeemed from plaintiffs: held, that plaintiffs did not lose their equitable right of redemption from the fact that they also asserted their statutory right—the subsequent redemption by D. leaving their claims unsatisfied. *Id.* 527.

50. Plaintiff purchased certain property under a sale on a decree foreclosing a mortgage executed by one Pender, to which decree all persons in interest were parties, among them defendants here. The interest of defendants Wemple and Pender was foreclosed in the usual form. Plaintiff seeks to enjoin a sale of the premises under a decree in favor of Wemple against Pender, to enforce a mechanic's lien. Plaintiff was not a party to the suit of *Wemple v. Pender*, and has not yet got a sheriff's deed: held, that injunction does not lie; that plaintiff is but the purchaser of an equity, the decree of foreclosure not cutting off the rights of the mortgagor, Pender; that he, being entitled to possession until the sheriff's deed, and also having the equity of redemption, could dispose of this right, and it might, under our statute, be sold for his debts; that if he chose to recognize the validity of Wemple's lien, or its enforcement, or sale under judgment, plaintiff cannot complain—his rights not being affected by the proceedings, as he was not a party. *Pender v. Wemple*, 16 Cal. 106.

51. The proceedings for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, are unknown to our system, so far, at least, as the owner of the estate is concerned. *Goodenow v. Ewer*, 16 Cal. 468.

52. A tenant of the mortgagor is not interested either in the claim secured nor in the estate mortgaged—that is, in the title pledged as security. He has not succeeded to such estate, or to any portion of

it. He does not stand in the position of a purchaser. The estate remains in his lessor; he has only a contingent right to enjoy the premises. The right of the lessor to possession ends with the deed by which the sale of the premises is consummated; and the tenant's right to possession depends upon that of the lessor, and goes with it; and the tenant having notice, actual or constructive, of the mortgage, need not be made party to the foreclosure. *McDermott v. Burke*, 16 Cal. 590.

53. Possibly, a court of equity would, under some circumstances, allow a tenant for years to redeem the premises sold on foreclosure, if he applied within a reasonable period after becoming acquainted with the proceedings. *Id.*

## REFERENCE.

1. A reference is a substitution for a jury, and a judgment should be had upon their report as upon a verdict, and a motion to set aside the report of referees is necessary before the appellate court be required to examine the report and set the same aside. *Gunter v. Sanchez*, 1 Cal. 48.

2. The finding of referees, like the verdict of a jury, ought to be final. *Gunter v. Sanchez*, 1 Cal. 49; *Walton v. Minturn*, 1 Cal. 362.

3. When the action is brought for the balance of an account, and the answer avers payment by a promissory note, and the plaintiff replies that he was induced to receive the note by fraud, the court held that it was one of those cases that the party was entitled to a trial by jury and it could only be referred by consent of the parties. *Seaman v. Mariani*, 1 Cal. 336.

4. The report of a referee should be taken advantage of by filing written objections to the entry of judgment thereon, or by a motion for a new trial, setting forth the grounds of the alleged error. *Porter v. Barling*, 2 Cal. 73.

5. The consent of a party to an order of reference must be in writing or entered on the minutes. *Smith v. Pollock*, 2 Cal. 94.



## Reference.

6. It seems that a stay of proceedings, granted on an appeal from an order of reference, is proper. *Ib.*

7. Our statute concerning referees is in aid of the common law remedy by arbitration, and does not alter its principles. *Tyson v. Wells*, 2 Cal. 130.

8. Exception must be taken to the rulings of a referee during the trial, and certified to by him. *Ib.*

9. If there be no exception taken to the ruling of a referee, and the rule of law by which he arrived at his conclusions be not disclosed, the court cannot disturb the report, and an order granting a new trial in such case will be reversed. *Tyson v. Wells*, 2 Cal. 130; *Grayson v. Guild*, 4 Cal. 125.

10. Referees have no power to allow parties to alter or amend pleadings after a case has been submitted to them. *De la Rira v. Berreyesa*, 2 Cal. 196.

11. Referees should exclude items barred by limitation if objected to. *Ib.*

12. Hearsay and irrelevant testimony should be excluded by referees. *Ib.*

13. A mandamus lies to compel the judge of a district court to enter judgment on the report of a referee. *Russell v. Elliot*, 2 Cal. 246.

14. The court may order a reference to ascertain the damages sustained by reason of an injunction issued without cause. *Ib.*

15. A party filing an undertaking to obtain an injunction, is deemed to have waived the right to insist on a trial by jury, and consented that the damages may be ascertained in the mode prescribed by the statute and an order of reference, is no violation of the constitutional right to trial by jury. *Ib.* 247.

16. An order of reference cannot be made without the consent of the adverse party, unless the statute requires it. *Benham v. Rowe*, 2 Cal. 261.

17. If a report of a referee contain sufficient on which to base a judgment, it is the duty of the court to enter judgment in accordance with the report, so far as concerns the matter referred, and not entertain any objection thereto except on a motion for a new trial, when the report can be set aside. *Headley v. Reed*, 2 Cal. 324.

18. If the report of a referee is not made immediately after the close of the

testimony, it is deemed excepted to. *Ib.* 325.

19. A report of a referee can only be set aside on account of fraud, gross error of law or fact apparent on its face. *Ib.*

20. A referee has no right to bring in and file an amended report, and the case must be reviewed with reference to the original report. *Ib.*

21. The report of a referee under the code has the same legal effect as the award of an arbitrator. *Headley v. Reed*, 2 Cal. 325; *Grayson v. Guild*, 4 Cal. 125.

22. Where an entry was made upon the minutes, that "the parties came by their attorneys, and defendant by his attorney moved the court that the cause should be referred." That is a reference by oral consent in open court, entered on the minutes. *Bates v. Visher*, 2 Cal. 357.

23. A jury was waived by the parties and the cause submitted to the court. The trial made some progress, when on motion of the plaintiff's attorney, the case was referred "to ascertain the damages sustained by plaintiff:" held, that the case having been submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts in the report. *Geeseka v. Brannan*, 2 Cal. 519.

24. The statute does not require the referee to be sworn, consequently the imposition of an oath by the court would be of no effect other than to put it in their power to commit moral perjury without being amenable to the law. *Sloan v. Smith*, 3 Cal. 407.

25. Judgment is entered as a matter of course on the report of a referee, and the only mode to take advantage of error is to move to set the judgment aside, as on motion for a new trial. *Ib.*

26. The report of a referee, like the finding of a court, should state the facts found and the conclusions of law. Without this he parties would be remediless and their rights concluded in many cases by the arbitrary decision of a referee. *Lambert v. Smith*, 3 Cal. 409.

27. A case was submitted to a referee to find the interest of R. and the value of such interest in a vessel and cargo. He found such interest and value in the ship but not in the cargo, and reported that he was unable, for want of evidence, to find

## Reference.

the value of R.'s interest in the cargo: held, that this was equivalent for the purpose of legal adjudication of finding no value whatever. *Montefiori v. Engels*, 3 Cal. 434.

28. A stipulation to refer the whole matter is a waiver of any objection that the motion for a new trial and to set aside the award was not made within the statute time. *Heslep v. City of San Francisco*, 4 Cal. 2.

29. An order of court is necessary to constitute a reference under the code, and no reference would be good, as such, without an order. *Ib.* 4.

30. A reference or arbitration, in which there is no order of court or agreement filed with the clerk or entered on the minutes, is a voluntary withdrawal of the case from the jurisdiction of the court, by which it loses all control over the case and has no authority to enter judgment upon the finding, except by consent of parties. *Ib.*

31. *Smith v. Pollock*, 2 Cal. 94, holding that a reference could not be had without the consent of the parties, applies to cases at common law in which the party was entitled to a jury trial, and does not extend to cases in equity. *Smith v. Rowe*, 4 Cal. 7.

32. The court may order a reference in equity cases without consent of parties. *Ib.*

33. When a case is referred to a referee, under the statute, to hear and determine the issues of fact and of law, and report the same to the court, and he makes his report wherein no errors of law or fact occur, and no exceptions are taken, the court below should not set aside the report and grant a new trial. *Grayson v. Guild*, 4 Cal. 125.

34. The report of a referee is the same as an award of an arbitrator. *Ib.*

35. When a report of a referee has been erroneously set aside, and a new trial granted, from which action the plaintiff appeals, the supreme court will correct both errors at the same time in a chancery case. *Ib.* 126.

36. Where the report of a referee disclosed some hesitation and doubt in arriving at conclusions of fact, and after the report had been made up, but before it was filed, the defendant applied to the referee for leave to introduce newly discovered evidence, which was refused from a doubt

as to his power, he at the same time intimating to the court, in a supplemental report, that if the newly discovered evidence had been adduced on the trial, the result would probably have been different, it was held under the circumstances to be error to refuse a new trial. *Hoyt v. Saunders*, 4 Cal. 347.

37. A court can interfere and set aside the report of a referee, upon the same ground as it will proceed to set aside the verdict of a jury. *McHenry v. Moore*, 5 Cal. 92.

38. The report of a referee upon conflicting evidence must be treated in the light of a verdict of a jury, and will not be disturbed in this court upon an appeal from an order refusing to grant a new trial in the court below. *Ritchie v. Bradshaw*, 5 Cal. 229.

39. The report of a referee cannot be attacked except for error or mistake of law apparent on its face, or by motion for a new trial upon exceptions taken at the trial or the evidence certified. *Goodrich v. City of Marysville*, 5 Cal. 431.

40. The facts found in the report of a referee are conclusive in the absence of the testimony, or where the testimony is not properly brought before the court. *Ib.*

41. A trial before a referee should be conducted in the same manner as before a court, and the evidence should be embodied in a bill of exceptions and certified by the referee. *Ib.*

42. It is error for the court to set aside the report of a referee upon an examination of testimony which was not properly before it. *Ib.*

43. If the order of reference fails to direct a return of the evidence to the court, the party objecting to the report must see that such testimony as he relies on is properly certified. *Ib.*

44. It would be a gross abuse of discretion for a court to set aside a report of a referee, correct in all its parts, without any other apparent reason than the mere volition of the judge. *Ib.* 433.

45. When a referee admits the testimony of a witness against the objection of the defendant, such testimony cannot, after the case has been submitted, be thrown out, without first giving to the adverse party the opportunity of otherwise supplying the excluded testimony. *Monson v. Cooke*, 5 Cal. 436.

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46. Though a plea would be bad upon demurrer, yet if no objection be taken at the time, and the case be submitted to a referee, the defect of the plea is not sufficient to set aside his report. *Ritchie v. Davis*, 5 Cal. 454.

47. An order setting aside the report of a referee appointed to take an account, is merely interlocutory, and is not the subject of an appeal before final judgment or decree. *Johnston v. Dopkins*, 6 Cal. 84; *Baker v. Baker*, 10 Cal. 528.

48. An order of court directing a referee "to ascertain and report the amount of disbursements and expenses made with or under the direction and authority of the court," by a receiver or custodian of money in the hands of the court, is too narrow to do him justice, and should be so enlarged as to allow him for all reasonable and proper expenses incident to the receivership. *Adams v. Haskell*, 6 Cal. 477.

49. Trials before a referee are conducted in the same manner as before courts; and exceptions must be taken to the rulings of the referee, in the progress of the trial, in the same manner as they must be taken before a court, and such exceptions must be embodied in the report of the referee, or made part thereof by his proper certificate. *Phelps v. Peabody*, 7 Cal. 52.

50. Where a party failed to obtain the proper certificate of a referee, relying on the verbal assurance of the attorney on the other side, that he would agree to a statement, such party cannot be considered free from fault or negligence, and he cannot enjoin in equity the judgment against him. *Ib.* 53.

51. The fact that the referee in the proceedings supplementary to execution was the clerk of the attaching creditor, is not any considerable evidence of fraud, when the limited duties of the referee are considered. *Adams v. Hackett*, 7 Cal. 201.

52. The order of a referee in the proceedings supplementary should state simply that the property described should be applied towards the satisfaction of the judgment, in such manner as the court should direct. *Ib.* 202.

53. Where an action is tried by the court without a jury, or the whole case is referred to a referee, judgment follows, as a conclusion of law upon the facts found, and the time within which notice of the motion should be made dates from the

entry of the judgment. *Peabody v. Phelps*, 9 Cal. 224.

54. Upon facts found, whether by report of the referee or special verdict of a jury, the direct action of the court must be invoked before judgment can be entered. Hence, the time within which the notice of motion to set aside the report or verdict must be given, should date from the filing of the report, or the rendition of the verdict. *Ib.*

55. The time within which a notice of motion must be filed to set aside the report of a referee, and a statement be prepared for that purpose, will depend on the character of the reference; whether it be special to report the facts, or general to report upon the whole issue. In the former case, the report has the effect of a special verdict; in the latter, it stands as the decision of the court, and judgment may be entered thereon, exceptions taken and rendered, as if the action had been tried by the court. *Ib.*

56. When the alleged error consists in the final conclusion of law or facts drawn from the testimony, and the evidence is certified to the court by the referee, the proper course is to move to set aside the report, and for a new trial. *Branger v. Chevalier*, 9 Cal. 362.

57. An order of reference cannot go beyond the pleadings of the parties, and when the referee excludes proper, or admits improper evidence, or does any other act materially affecting the rights of either party, during the progress of the trial before him, then such party should except, and see that the exception is truly stated in the report. *Ib.*

58. The whole issue in divorce cases cannot, by stipulation of parties, be referred; and where a reference is had, the referee cannot pass upon the testimony. If he make any statement or finding of facts, the court is obliged to disregard it, and base its decree only upon the legal testimony taken. *Baker v. Baker*, 10 Cal. 527.

59. The referee in divorce cases, under the statute, is simply a master to take testimony. *Ib.*

60. An order setting aside the finding of a referee in a divorce case, and sending the case back to the referee for further testimony, is interlocutory in its character, and not the subject of appeal. *Ib.* 528.

## Reference.—Registration.

61. Where a reference is had to take an account, it is within the discretion of referees to open the case, after it had been once closed, for the purpose of receiving additional testimony. The exercise of such discretion, except in cases of gross abuse, will not be reviewed on appeal. *Marziou v. Pioche*, 10 Cal. 546.

62. The finding of the referee is conclusive as to the facts on conflicting evidence. *Knowles v. Joost*, 13 Cal. 621.

63. Failure to appear and prosecute a motion to set aside the report of a referee, and for new trial, is an abandonment of motion, and the order made denying the motion for such failure to appear is not the subject of review on appeal. *Mahoney v. Wilson*, 15 Cal. 43; *Frank v. Doane*, 15 Cal. 303; *Green v. Doane*, 15 Cal. 304.

64. Notice of motion for new trial given one day before judgment rendered, and six days after filing the report of the referee to whom the case had been sent to find the facts, is ineffectual for any purpose. If the trial terminated with the filing of the report, the notice was not in time; if it continued, in contemplation of law, until the entry of the judgment, the notice was premature, and the proceedings on the motion are void. *Mahoney v. Caperton*, 15 Cal. 314.

65. Where a party gets into possession of property, as a water ditch, under a sheriff's suit on foreclosure of mortgage, and the judgment on which such sale was made is afterwards reversed by the judge of the supreme court, and restitution of the property ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. It would be impracticable for a jury to settle the account, at least, without great delay and embarrassment. *Raun v. Reynolds*, 15 Cal. 470.

See ARBITRATION.

## REGISTRATION.

1. A prior recorded mortgage has priority of lien over a subsequent recorded mortgage, where the second mortgagee

had notice of the existence of the first incumbrance; and this was so, as well before as since the enactment of the statute by which the common law was adopted in California. *Woodworth v. Guzman*, 1 Cal. 205.

2. Whether there was any officer of San Francisco authorized to record mortgages previous to the passage of the act of the legislature establishing recorders' offices, passed April 4th, 1850, with the effect of making them constructive notice to subsequent purchasers or mortgagees: query. *Id.*

3. The object of laws which require deeds and mortgages to be recorded, is to prevent imposition upon subsequent purchasers and mortgagees in good faith, and without notice of prior deed or incumbrance, but not to protect them when they have such notice. *Id.*

4. A court of equity will, as against the mortgagor, correct a mistake in the description of the mortgaged premises, as a matter of course; and a person claiming under the mortgagor, and having notice of a prior lien upon the premises, is in no better condition than the mortgagor himself. *Id.*

5. The evident intention of the statute providing for the proof and registration of conveyances, is to protect subsequent purchasers without notice, either actual or constructive. *Call v. Hastings*, 3 Cal. 183.

6. The act of 1851, section twenty-one, gives to papers properly recorded the like effect as the originals, but it does not dispense with proof of execution. *Powell v. Hendricks*, 3 Cal. 430.

7. The statute requires the seal of the officer taking the acknowledgment to be attached as preliminary to filing the deed for registration; and without conforming strictly to the statute, the registration will not be of such a character as to charge constructive notice. *Hastings v. Vaughn*, 5 Cal. 318.

8. A certificate of acknowledgment of a deed, in the words "Before me personally appeared A B, to be the individual, etc.," is bad, and the record of the conveyance on such a certificate imparts no notice to third parties.\* The omission might as well be supplied by the words "claiming"

\*The statute of 1860, p. 179, authorizes a defective acknowledgment to be corrected by proceedings before the county judge; and the statute of 1860, p. 337, makes defective acknowledgments notice hereafter, the same as if the defect did not exist, so far as not to impair the obligation of contracts.



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or "representing," as by "known" or "proved." There is no averment that the party making the acknowledgment is the person who executed it upon the personal knowledge of the officer. *Wolf v. Fogarty*, 6 Cal. 225; *Kelsey v. Dunlap*, 7 Cal. 162; *Henderson v. Grewell*, 8 Cal. 584; *Fogarty v. Finlay*, 10 Cal. 244.

9. The registration act abolished all constructive notice of unrecorded conveyances, but it did not do away with notice in fact. Possession, therefore, is not constructive notice of title, but it may be admitted in evidence along with other facts, to establish fraud or actual notice. *Mesick v. Sunderland*, 6 Cal. 315; *Stafford v. Lick*, 7 Cal. 489.

10. The intention of the registration act of this State was to protect the purchaser of the legal title against latent equities or mere executory agreements, and to abolish the presumption of notice arising from possession. *Mesick v. Sunderland*, 6 Cal. 315.

11. Section twenty-one of the act of March, 1851, giving to copies of papers from the county recorder's office the like effect as evidence as originals, if it can be obtained merely fixes the value of the copy as evidence when it is necessary to be introduced from the loss of the original. *Macy v. Goodwin*, 6 Cal. 582.

12. The twenty-fifth section of the act concerning conveyances, making the record of conveyances notice, is limited by its terms in its operation to subsequent purchasers and mortgagees. *Dennis v. Burritt*, 6 Cal. 672.

13. If, however, the recording act imparts notice to prior purchasers or mortgagees, it is but constructive notice, and insufficient to charge a prior mortgage with fraud in releasing portions of the mortgaged premises, retaining a lien on the balance, (of which part had been sold after the mortgage) but before his releases, so as to justify a court of equity to set the act aside. *Ib.* 673.

14. Where the defendant bought the property in question and recorded his deed, but by mistake the number and description of the lots were omitted in the record, and plaintiff subsequently bought the same lots of the same grantor, and afterwards the common grantor of both procured the record of defendants' deed to be amended by interlineation of the description: held,

that the plaintiff had no notice of the previous conveyance of the property to defendant. *Chamberlain v. Bell*, 7 Cal. 294.

15. The design and intention of the registration act was to give constructive notice of the facts which appeared upon the face of the record. *Ib.*

16. As to the implied notice arising from the possession of a party under an unregistered deed, it is a question of bad faith, and it should be left to the jury whether the subsequent purchaser had actual notice or such means of notice as to make his negligence a species of fraud. *Bird v. Dennison*, 7 Cal. 305.

17. The grounds on which registry acts are based are, that the party who fails to record his deed places it in the power of his grantor to commit a fraud upon others, and the law holds him responsible as assisting the fraud. *Ib.*

18. The penalty for failing to record conveyances declared in the statute must be limited to conveyances, as defined by the statute, and cannot by implication be extended to instruments for the recording of which it makes no penalty. *Ib.* 307.

19. The forty-first section of the registration act requires conveyances made before the passage of the act to be recorded, and the penalty of failing to do so is the same as with conveyances made after the act is passed. *Stafford v. Lick*, 7 Cal. 486.

20. This section of the act is neither in violation of the constitution of the United States nor of this State, as it does not impair the obligation of contracts, but merely establishes what shall be constructive notice to third parties; nor does it divest vested rights, but only introduces a rule for the subsequent protection of the rights of parties. *Ib.* 487.

21. A party holding under an assignment of a recorded lease containing a mortgage clause, is bound to know the contents thereof, and is therefore subject to the mortgage, although the instrument is recorded in the book of leases, there being a privity of estate. *Barroilhet v. Battelle*, 7 Cal. 454.

22. Alcalde grants of beach and water lots in San Francisco not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Fran-

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cisco, are void. *Chapin v. Bourne*, 8 Cal. 295.

23. The object of the law requiring the record of entry on lands under school land warrants, was to give notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void as to a subsequent locator with actual notice. *Watson v. Robey*, 9 Cal. 54.

24. This provision is like that of the act concerning conveyances, which requires the record of certain instruments. A party cannot complain that he was injured by a failure to record in the proper office, when he knew the fact without the record. *Ib.*

25. The registration of a deed upon condition precedent is sufficient to put a subsequent purchaser on inquiry as to the performance of the conditions. *Brannan v. Mesick*, 10 Cal. 108.

26. The purpose of a certificate of acknowledgment is to entitle the instrument to be recorded and to be admitted in evidence without further proof. *Fogarty v. Finlay*, 10 Cal. 245.

27. If a notary does not faithfully perform his duty, but is guilty of gross and culpable negligence in taking an acknowledgment, he is responsible to the party injured for the damages resulting from his negligence. *Ib.*

28. The true construction to be given to the registration act is, that the failure of a grantee to record his deed does not absolutely and without exception avoid the deed as to third persons. The failure to register only protects bona fide purchasers for a valuable consideration. *Hunter v. Watson*, 12 Cal. 374.

29. The registration act only protects purchasers; creditors, as such, are not included within its provisions. *Ib.*

30. A deed recorded January 30th, 1850, by a person acting as recorder, by virtue of an election by the people without authority of law, is not properly recorded. *Smith v. Brannan*, 13 Cal. 115.

31. The question as to the necessity of recording mining claims, reserved. *Partridge v. McKinney*, 13 Cal. 159.

32. No law authorizes a recorder or clerk of a county to record a copy of a deed in the Spanish language, so as to make it evidence without further proof. *Wilson v. Corbier*, 13 Cal. 167.

33. All the title which a vendor of land

has at the time of his deed, passes to the vendee, as against volunteers or donees, even though the deed under which the vendor holds be unrecorded. *Snodgrass v. Ricketts*, 13 Cal. 362.

34. The omission in the record of a deed to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient, if it appear from the record that the instrument copied is under seal as for instance, where the deed purports to be under seal, and to be signed, sealed and delivered in the presence of the notary before whom it was acknowledged. *Smith v. Dall*, 13 Cal. 512.

35. Under the mechanic's lien act, it is not necessary that the account to be filed in the recorder's office should remain in the office after it is recorded. *Mars v. McKay*, 14 Cal. 128.

36. The registry act was not intended to protect judgment creditors; it was only intended to protect subsequent purchasers and mortgagees in good faith and for a valuable consideration. *Pizley v. Huggins*, 15 Cal. 132.

37. A subsequent purchaser of property mortgaged, with actual notice of the mortgage, cannot object to the defects in the registry thereof. *De Leon v. Higuera*, 15 Cal. 495.

38. A certified copy of a deed from the county recorder's office contained in the margin of the *acknowledgment* taken before a notary, and in the place where his seal is usually found, the words "no seal" thus: [No Seal]—the conclusion of the acknowledgment being, "In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

39. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Ib.*



3. The second of a foreign bill of exchange, drawn here, payable at sight, was presented to the drawee, and payment being refused, it was duly protested. Afterwards, and before suit was brought, the first of exchange was paid to the holder with interest and protest fees: held, that the drawer was released from payment of damages for the dishonor of the second of exchange. *Page v. Warner*, 4 Cal. 396.

4. A release of the endorser of a note by the endorsee, such endorsee being a secret partner of the maker, will not release the maker. *Tomkinson v. Spencer*, 5 Cal. 293.

5. The entering of a discharge of a mortgage by the mortgagee does not of itself discharge the debt, but only the security. *Sherwood v. Dunbar*, 6 Cal. 54.

6. A release of one joint debtor is a release of the others, but it must be a technical release, under seal. *Armstrong v. Hayward*, 6 Cal. 186.

7. A receipt given to one joint debtor on a note for a part payment, coupled with the words "which is in full on his part on the within note, and the said A B is hereby discharged from all obligations on the same," is not such a release as will discharge the others. *Id.*

8. Neglect to sue a contractor for his breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento v. Kirk*, 7 Cal. 420.

9. A voluntary release of the property levied on by the plaintiff in execution, could not revive the obligation on the mortgage given to secure the judgment. *People v. Chisholm*, 8 Cal. 30.

10. A part payment of a demand of one of two debtors will not discharge such debtor making the payment from the payment of the balance. His obligation is to pay the whole. *Griffith v. Grogan*, 12 Cal. 324.

11. Where the vendee of a lot of wheat released his vendor from all damages, by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige v. O'Neal*, 12 Cal. 496.

12. Nor would the nonpayment of the consideration expressed in the release affect the instrument as a valid release.

The obligation to pay the consideration was created by the acceptance of the release, and is not dependent upon the contingency of a recovery in the action. *Id.*

13. If much time intervenes between demand and notice in transfers after maturity of bills of exchange and promissory notes, the question may arise whether the delay has not released the endorser after maturity. *Thompson v. Williams*, 14 Cal. 163.

## REMITTITUR.

1. The supreme court has jurisdiction in a cause until the remittitur is sent down and filed, and if any order is made before it is sent down, the court still has jurisdiction. *Grogan v. Ruckle*, 1 Cal. 194; *Mateer v. Brown*, 1 Cal. 231.

2. Where a case is remitted from the supreme court to a district court, the clerk of the latter may issue an execution for the costs accrued thereon without the order of the district court; the clerk of the supreme court, on entering up the judgment, adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are sufficient awarding of costs for the clerk below to issue execution thereon. *City of Marysville v. Buchanan*, 3 Cal. 213.

## RENT.

1. Indebitatus assumpsit for rent will not lie in favor of a stranger for the purpose of trying his title, or by one of two belligerent parties claiming the land, this action depending not upon the validity of plaintiff's title, but upon a contract express or implied. *Sampson v. Shaeffer*, 3 Cal. 201.

2. The thirteenth section of the act concerning forcible entries and unlawful detainers was intended to make the nonpayment of rent work a forfeiture of the estate of the tenant; but the statute must be pursued strictly, and the rent must be demanded on the day it becomes due, and at a late hour of the day. *Chipman v.*



*Emeric*, 3 Cal. 283; *Gaskell v. Trainer*, 3 Cal. 339.

8. Under our code it is competent for a party to recover real property, with damages for withholding it, and the rents and profits, all in the same action, and as one cause of action. *Sullivan v. Davis*, 4 Cal. 292.

4. To enable a party to recover rent *eo nomine*, he must show that the defendant's possession is by virtue of some express or implied agreement. *Ramirez v. Murray*, 5 Cal. 223.

5. No action for rent will lie where the possession is adverse and tortious, for such possession excludes all idea of a contract. *Ib.*

6. A demand of rent at any time during the term when the same might be due, will be sufficient diligence to hold the party who has guaranteed its payment. *Booy v. Tewksbury*, 5 Cal. 286.

7. A conveyance by a lessee of the remainder of his unexpired term, though it employs words ordinarily used in a demise, and contains a reservation of rent, and the right of reëntry upon covenants broken, is not an underletting or sublease, but is considered in law as an assignment of his whole interest, as there remains in him no reversion of the estate. *Smiley v. Van Winkle*, 6 Cal. 606.

8. The sale of the equity of redemption of mortgaged premises, and assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dowey v. Latson*, 6 Cal. 616.

9. The collection of the rents and profits by the creditor purchasing can be no more a fraud upon the mortgagee than would be their application by the mortgagor to the payment of his debts. *Ib.*

10. The mortgagor having the right to sell the rents and profits, or to apply them to the payment of his debts, except as against a creditor who is hindered, delayed or defrauded thereby, the mortgagee cannot complain, as he is not such a creditor. *Ib.*

11. A purchaser of land at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor, before the expiration of the six months allowed for redemption, and as often as the rent becomes due under the

terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 46.

12. Where the plaintiff had obtained judgment in another court for a quarter's rent under a lease: held, that in an action of forcible entry, for nonpayment of another quarter's rent, under the same lease, between the same parties, the plaintiff could introduce the former judgment as evidence on all the points identical in the two cases. *Love v. Waltz*, 7 Cal. 252.

13. Where the plaintiff leased to B. a lot for ten years, at a monthly rent payable monthly, at the end of the term B. to have two-thirds of the appraised value of the house to be by him erected, and the lease also contained this clause: "and it is further agreed," etc., "that the brick house now being erected," etc., "shall always be and remain as the same is hereby declared to be, mortgaged as security for the payment of the monthly rent herein stipulated:" held, that it was a mortgage, and that it might be foreclosed on the nonpayment of the first or any month's rent. *Barroilhet v. Battelle*, 7 Cal. 452.

14. And where such lessee completed the building, and subsequently mortgaged the lease to S. and afterwards assigned the lease to T. for further security, and T. entered as tenant and paid rent, there being back rents due from the original lessee: held, that T. was bound to know the terms of the lease and the mortgage therein contained; that the plaintiff had a right to foreclose, and sell the reversionary interest of the original lessee, to wit: two-thirds of the value of the house at the end of the term; that T., provided she paid the rent, would have the right of possession until the end of the term, the acceptance of rent from her having waived the forfeiture of the lease. *Ib.*

15. A judgment rendered for use and occupation should not draw any interest whatever. *Osborn v. Hendrickson*, 8 Cal. 33.

16. Where the owner of mortgaged premises leases the same for a term of years, and the rent is paid in advance by the tenant: held, that the purchaser under the mortgage sale can require the tenant to pay the rent over again to him. *McDevitt v. Sullivan*, 8 Cal. 597.

17. After sale, and before the term of redemption has expired, the purchaser is entitled to collect the rents. *Ib.*

18. Where a tenant finds that there are adverse claimants to the property, he should file a bill of interpleader, making all the adverse claimants parties thereto, and offer to pay the rents into court to abide the ultimate decision of the case. *Ib.*

19. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes, by operation of law, trustee of the surplus for the mortgagor. *Pierce v. Robinson*, 13 Cal. 120.

20. In an action for mesne profits, plaintiffs offered in evidence the record of an action by defendant against a third person for the use and occupation of the same premises, for a time prior to the time sued for in this action, in which defendant under oath fixed the value at a certain sum, together with evidence that the value of the use and occupation was as great in the one case as the other: held, that the evidence was admissible as a solemn admission by a party to the record in relation to a particular fact; that such admissions are not irrelevant, whether made directly or indirectly. *Shafter v. Richards*, 14 Cal. 126.

21. The jury found for the plaintiff in ejectment, and awarded damages for the rents and profits, and had the objection been taken to the instruction given with reference to these damages, it would have been tenable: but no such objection was taken, and the point is to be regarded as waived. *Stark v. Barrett*, 15 Cal. 372.

22. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that

the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 90.

23. The supreme court will not set aside the findings of the court below on conflicting proofs, especially in regard to the value of rents, or damage to property, both being of uncertain ascertainment. *Paul v. Silver*, 16 Cal. 75.

24. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. *Goodenow v. Ewer*, 16 Cal. 472.

25. From rents so received, the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.*

See LANDLORD AND TENANT, LEASE.

## REPLEVIN.

1. Where a sheriff is notified before levy that a third person owns the property, the taking is tortious, and no demand is necessary to be proven in the ac-

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tion of replevin. *Ledley v. Hays*, 1 Cal. 161.

2. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given, by pleading his own misfeasance. *Turner v. Billagram*, 2 Cal. 522.

3. A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Turner v. Billagram*, 2 Cal. 522.

4. Where a replevin bond substantially conforms to the act, and no variation is pointed out, the assignees of the defendants can maintain an action upon it. *Wingate v. Brooks*, 3 Cal. 112.

5. In an action on a replevin bond, the fact that the defendant had commenced his action before a tribunal incompetent to try the matter in dispute is no defense; and the plea that the title to the property so replevined is in him bad. *McDermott v. Isbell*, 4 Cal. 114.

6. A defendant in replevin, who recovers judgment, the jury failing to find the value of the property to exceed two hundred dollars, is, nevertheless, entitled to his costs, where the plaintiff's complaint states its value at a sum exceeding that amount. *Edgar v. Gray*, 5 Cal. 267.

7. An officer attaching goods under civil process is entitled to notice of the claim of a third party to the goods, and a demand for them, or he is not liable in damages to such party for such seizure and detention. *Daumiel v. Gorham*, 6 Cal. 44; *Taylor v. Seymour*, 6 Cal. 514; *Killey v. Scannell*, 12 Cal. 75.

8. Where the defendant in a replevin suit, failed to claim the return of property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against the plaintiffs for costs, which were paid: held, that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390; *Nickerson v. Chatterton*, 7 Cal. 570.

9. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Nickerson v. Chatterton*, 7 Cal. 570.

10. If the proper judgment be taken in the alternative, and the defendant fails to

discharge the judgment, the sureties can only be required to pay the value of the property, and the amount of the damages and costs. *Ib.* 571.

11. Where the plaintiff, in replevin, gives the statutory undertaking, and takes possession of the property in suit, and is afterwards nonsuited, and judgment entered against him for the return of the property, and for costs: held, that his sureties are liable for damages sustained by defendant, by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 8 Cal. 448.

12. The facts upon which a trial by jury would have been found in the original replevin suit are, by a nonsuit therein, left to the jury called in the suit on an undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. *Ib.*

13. The rule that when property converted has a fixed value, the measure of damages is that value with legal interest, from the time of its conversion; when the value is fluctuating, the plaintiff may recover the highest value at the time of its conversion, or at any time afterwards. *Douglass v. Craft*, 9 Cal. 563; *Dorsey v. Manlove*, 14 Cal. 555.

14. The failure of the defendant to appear on the trial of an action of replevin when the cause is called, is a waiver of a jury, under the 179th section of the code. *Waltham v. Carson*, 10 Cal. 180.

15. In an action of replevin by W., it appeared on trial that the property sued for belonged to him and one F., a third party, and the jury returned a general verdict for the defendants, and the court gave judgment for a return of property to the defendants: held, that there was no error in the judgment. *Waldman v. Broder*, 10 Cal. 379.

16. The legal effect of finding for the defendants, on the question of the plaintiff's right to the property, was to entitle the defendants from whom the property was taken to its restoration. *Ib.*

17. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the dam-

## Replevin.

ages, but the property was not restored. Plaintiff then brought an action of trover to recover the value; defendants plead the former recovery as a bar: held, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not having been satisfied. *Nickerson v. California Stage Co.*, 10 Cal. 521.

18. The judgment in the action of replevin was between the parties conclusive evidence of the plaintiff's title to the chattel in question, and it only remained for the court, in this action, to determine its value. *Ib.*

19. Nor is it necessary to the right of the plaintiff to recover in this action that the value of the property in the replevin suit should have been found, and an alternative judgment for the return of the property or the payment of its value. *Ib.*

20. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of an undertaking, as required by section 102 of the code. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the 18th February, 1855, executions in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, and subsequently sold the property and paid the proceeds into court. H. then brought this suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods of M. J. *Hunt v. Robinson*, 11 Cal. 277.

21. The effect of the replevin bond is simply to give the party the possession of the property, pending the litigation. The title is not changed. *Ib.*

22. The primary object of the replevin suit is the recovery of the thing itself. The value is received only in the alternative that the property is not returned. *Ib.*

23. In an action on replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Ib.*

24. Where the property seized by a sheriff is in the possession of a stranger to the execution, it is not sufficient as a justification of the seizure to prove the execution only; the judgment upon which it was issued should also be proved. *Paige v. O'Neal*, 12 Cal. 495.

25. In an action to recover personal property, to enable the defendant to obtain the value of the property on judgment of dismissal against the plaintiff for failure to appear, the answer must contain some allegation or prayer, relative to the change of possession from defendant to plaintiff. The judgment of return or value is in the nature of a cross judgment, and must be based upon proper averments. *Gould v. Scannell*, 13 Cal. 431.

26. A safe in the possession of McC., belonging to W., F. & Co., for whom, as also for plaintiff, he was agent, contained six thousand dollars in coin. Of this sum four hundred dollars belonged to W., F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized eighteen hundred dollars of the money in his safe as his property, and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: held, that this amounted to a segregation of the eighteen hundred dollars from the mass of coin in the safe, so as to sustain replevin by plaintiff. *Griffith v. Bogardus*, 14 Cal. 412.

27. In an action to recover the possession of personal property, with damages for its detention, the judgment may be for more than the value as alleged in the complaint, if it be within the ad damnum of the writ. The value of the property is only one predicate of the recovery. *Coghill v. Boring*, 15 Cal. 218.

28. Where goods are seized by the sheriff on an execution against G., and the owners of the goods so in the sheriff's hands assign them to plaintiff, who replevies them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose in action, but a sale of specific goods. *Ib.*

29. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dis-





## Res Gestæ.—Resignation.

jections. The complaint should state the death of F.; his leaving a last will and testament; the appointment therein of the plaintiffs as executors; the probate of the will; the issuance of letters testamentary thereon to the plaintiffs; and their qualification and entry upon the discharge of their duties as executors. *Id.*

## RES GESTÆ.

1. The declarations of an agent or servant are admissible in evidence against the principal, only when they form a part of the res gestæ; and the declarations of a bar keeper to a third person as to the contents of a package left by a guest in the charge of an inn keeper, when not made in any way in the discharge of his duty as bar keeper, are not admissible in an action against an inn keeper to prove the contents of the package. *Mateer v. Brown*, 1 Cal. 224; see *Gerke v. California Steam Navigation Co.*, 9 Cal. 256.

2. The declarations of an agent, when but the bare narration of an act which had already taken place and was fully ended, do not form a part of the res gestæ and are inadmissible in evidence against his principal. *Innis v. Steamer Senator*, 1 Cal. 461.

3. The declarations of a vendor of personal property after the sale, are not good to impeach the title of the vendee, and if offered as a part of the res gestæ, clear and unequivocal possession by the vendor must be shown. *Visher v. Webster*, 13 Cal. 61.

4. Defendant killed deceased while he was in the act of injuring a mining claim. On the trial, defendant offered to show that he was the owner and in the lawful possession of such claim at the time of the killing. The court refused testimony on this point: held, that defendant has a right to prove his ownership of the claim, for the purpose of showing his mental condition; the motive which prompted his action, and determining the character of the offense; that the ownership was part of the res gestæ and should have been admitted, subject to instructions from the

court as to its legal effect, though when admitted it may not have amounted to a justification. *People v. Costello*, 15 Cal. 355.

5. The declaration of deceased made at the time of procuring the weapon was admissible as part of the res gestæ and illustrative of the transaction; that it showed the purpose for which the weapon was procured, and that this purpose was an item of proof upon the question which of the two parties first assaulted, this being the point to which the testimony was offered. *People v. Arnold*, 15 Cal. 481.

See AGENCY, EVIDENCE.

## RESIGNATION.

1. The legislature having elected a State printer, who resigned, and a State printer was during the session of the legislature appointed by the governor, and he resigned after the adjournment and during the recess, whereupon the governor appointed another person to fill the vacancy supposed to exist: held, that this second appointment as well as the first one, was irregular and void. *People v. Fitch*, 1 Cal. 536.

2. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections; and the proclamation of the governor, required by statute, is necessary to the validity of a special election. *People v. Porter*, 6 Cal. 28; *People v. Weller*, 11 Cal. 65; *People v. Martin*, 12 Cal. 410; *People v. Rostorough*, 14 Cal. 187.

3. An election which was ordered by the board of supervisors, to fill a vacancy in the office of county judge occasioned by the resignation of the incumbent, without proclamation of the governor, is invalid; and the office being vacant, can be properly filled by the appointment of the governor. *People v. Porter*, 6 Cal. 68; *People v. Martin*, 12 Cal. 411.

See ELECTION, OFFICE.

## RETURN.

1. A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and collusion. *Egery v. Buchanan*, 5 Cal. 56.

2. A sheriff failing to pay over money collected on execution, should be prosecuted for a false return. *Id.*

3. The return of an attachment cannot be amended so as to postpone the rights of creditors attaching subsequently, but before the correction. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 25.

4. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient prima facie to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

5. The title of a purchaser of real estate on execution at sheriff's sale does not depend upon the return of the officer of the writ. *Cloud v. El Dorado County*, 12 Cal. 133.

6. A sheriff, under his general powers, cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, endorses it on the execution, and then returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 666.

See ATTACHMENT, EXECUTION, SUMMONS.

## REVENUE.

1. The common council of Sacramento, by resolution, made an appropriation to the mayor of the city of \$10,000, reciting meritorious services (but such as were within the line of his official duty) as the consideration, which was exclusive of his salary, which was regularly paid. The mayor died the day the appropriation was passed, and did not accept it formally: held, that the appropriation could not be recovered in an action at law. *Heslep v. City of Sacramento*, 2 Cal. 581.

2. The revenue act of May, 1853, does

not violate that provision of the State constitution, which provides that all laws of a general nature shall be uniform in their operation. By a uniform operation, it was intended that laws of this character should as near as possible affect persons and property alike. A perfectly equal tax law is impossible from the very nature of the subject. *People v. Coleman*, 4 Cal. 55.

3. The act of May 1st, 1854, which creates the office of State printer, and requires the controller to draw his warrants on the treasury for such sums as may be due the State printer, is not a specific appropriation. *Redding v. Bell*, 4 Cal. 333.

4. The revenue act provided that the board of supervisors or courts of sessions shall levy, in addition to a State tax, a tax, not to exceed fifty cents on each one hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. Under this provision, the courts of sessions of Sacramento levied a tax of fifty cents for county purposes, twenty-five cents for funded tax, &c.: held, that the words of the revenue act, authorizing a tax of fifty cents on each one hundred dollars for county purposes, ought not to be restricted to the current expenses of the year as an appropriation, leaving the scrip holders of the county to look for payment to the tax collected for the floating debt. *McDonald v. Griswold*, 4 Cal. 352.

5. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler v. Bates*, 7 Cal. 137.

6. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854, allowing payment in warrants, was thereby repealed. *Scofield v. White*, 7 Cal. 401.

7. The act authorizing the county recorder of Yuba county to be paid out of the county treasury for certain specified services, contains no words which raise the presumption that he was to be allowed a preference over other creditors. *People v. Williams*, 8 Cal. 100.

## Revenue.—Reward.

8. Though the legislature can make such disposition of accruing revenue as it deems proper, a construction of a statute which would impair the rights of third parties will always be unwillingly adopted, in the absence of express words to that effect. *Ib.* 101.

9. The revenue act of 1854 made the sheriff ex officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff except when he acts as collector of foreign miners' licenses: held, that the bond in suit, entered into in 1856, must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes, except foreign miners' licenses, are covered by the bond. *People v. Edwards*, 9 Cal. 292.

10. The power of appropriation which the legislature can exercise over the revenues of the State, for any purpose which it may regard as calculated to promote the public good, it can exercise over the revenues of a county, city or town for any purpose connected with their past or present condition, except as such revenues may, by the law creating them, be devoted to special purposes. *People v. Burr*, 13 Cal. 351.

11. To an appropriation within the meaning of the constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity, that funds to meet the same should be at the time in the treasury. *People v. Brooks*, 16 Cal. 28.

12. The provision in the constitution, that "no money shall be drawn from the treasury, but in consequence of appropriations made by law," means only that no money shall be drawn, except in pursuance of law. *Ib.*

13. The act of April 13th, 1854, amendatory of the act concerning the office of controller, and providing that no warrants shall be drawn, except there be "an unexhausted specific appropriation" to meet the same, means only that the controller shall not draw a warrant for a specific object, when he has already drawn for the full amount of the appropriation made for that object; and this act does not qualify the right of Estill, or those re-

presenting him, to warrants for the monthly installments, as they respectively become due, under the contract between him and the State, relative to the State prison and its convicts. *Ib.*

See TAXATION.

## REVERSAL.

See APPEAL, JUDGMENT.

## REWARD.

1. A municipality appropriated, by resolution, the sum of \$10,000 to their mayor, for meritorious services in quelling a riot, exclusive of his salary which was paid. The mayor died from wounds received in the riot before he formally accepted the appropriation: held, that the same could not be recovered by his executor at law. *Heslep v. City of Sacramento*, 2 Cal. 480.

2. An agreement by one who has lost property by fire or theft, to pay a certain sum to any one who will secure the arrest and conviction of the criminal, is not a nude pact; but may be enforced by a person performing the service. *Ryer v. Stockwell*, 14 Cal. 136.

3. In such cases, the offer of a reward or compensation by public advertisement, either to a particular person or class of persons, or to any and all persons, is a conditional promise; and if any one to whom such offer is made shall perform the service before the offer is revoked, such performance is a good consideration, and the offer becomes a legal binding contract. Until performance, the offer may be revoked at pleasure. *Ib.* 137.

4. When the reward was for such information as would lead to the arrest and conviction of the criminal, there could be no claim for the money until trial and conviction. The statute of limitation begins to run from that time, and the limitation would be four years, as on a written contract. *Ib.*



## RIVERS.

See WATERCOURSES.

## ROADS.

See STREETS AND HIGHWAYS.

## SACRAMENTO.

1. The common council of the city of Sacramento, by resolution, made an appropriation to the mayor of the city of \$10,000, reciting meritorious services (but such as were within the line of his official duty) as the consideration, which was exclusive of his salary which had been regularly paid. The mayor died the same day the resolution was passed, and did not formally accept the appropriation: held, that the appropriation could not have been recovered by action at law. *Heslep v. City of Sacramento*, 2 Cal 281.

2. The recorder of the city of Sacramento has no jurisdiction in cases of forcible entry and unlawful detainer. *Cronise v. Carghill*, 4 Cal. 122.

3. The city of Sacramento declared to be the capital of the State. *People v. Bigler*, 5 Cal. 24.

4. Fines properly imposed in the court of a mayor or recorder of a city, or before any municipal officer of a corporation, must be paid into the treasury of the city or other corporation. There is no statute which alters the rule as to the city of Sacramento. *People v. City of Sacramento*, 6 Cal. 425.

5. It was not the intention of the legis-

county of Sacramento was created. *People v. Mullins*, 10 Cal. 21.

6. An indictment found by the grand jury of the county of Sacramento, on the sixth day of May, 1858, is good, as such jury was properly empaneled as of the county of Sacramento. *Ib.*

7. The title of the government to the lands of Sacramento city passed to Sutter by his grant; an estate vested in him, subject it is true, to be defeated by the action of the Mexican government, by direct rejection, or in case of noncompliance with its conditions, by proceeding to that end. Neither of these proceedings was had under the Mexican government, and therefore at the date of the cession of California to the United States, his title remained in full force. *Ferris v. Coover*, 10 Cal. 618.

8. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided that when the council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement, within ten days after the last publication, it shall not be made, and a protest was presented more than ten days after the last publication of such notice: held, that such protest was not presented in time, and was therefore ineffectual; further held, that it must appear that one-third of the owners in value of the adjacent property united on it. *Burnett v. City of Sacramento*, 12 Cal. 82.

9. A stage company, engaged in carrying passengers to and from Sacramento city, is liable to pay to the city a license tax, under the provisions of section 22 of "an ordinance authorizing and regulating the issue of licenses and the collection of a license tax." *City of Sacramento v. California Stage Co.*, 12 Cal. 138.

10. Prior to the consolidation act, the recorder of the city of Sacramento was entitled to collect the same fees as justice of the peace for services in criminal cases: but he was bound to pay them over to the city treasurer. *Curtis v. Sacramento*

cemetery, in which it was provided that the board should appoint a person to superintend the cemetery "annually in October, who shall hold office for the term of one year," and further, that the board, at their first meeting after the passage of the ordinance, should appoint a superintendent to hold office "until October next, and until his successor is appointed and qualified." Defendant was so appointed July 8th, 1858, and held the office until December, 1859, the board having failed to appoint his successor before that time, when relator was appointed: held, that relator is entitled to the office; that the failure to appoint in October, 1858 and 1859, did not exhaust the power of the electoral body—the time named being directory, and not of the essence of the power. *People v. Murray*, 15 Cal. 222.

12. In ejectment for land within Sutter's fort, in the city of Sacramento, if the petition of Sutter soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition named "New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof, that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing Sutter's fort and the enclosures and settlements around it, was known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850, and that the premises in dispute were within his enclosures at the fort; the evidence would be prima facie, if not conclusive evidence that the premises were covered by the grant. *Morton v. Folger*, 15 Cal. 283.

13. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only \$3,000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for money paid by them into the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento v. Bird*, 15 Cal. 295.

14. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento v. Crocker*, 16 Cal. 122.

15. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Id.*

16. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on certiorari. *Robinson v. Supervisors of Sacramento County*, 16 Cal. 211.

17. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the power conferred by the act. *Id.*

18. In ejectment for land in Sacramento county, claimed under Sutter's grant, the grant by Micheltorena to Leidesdorff in October, 1841, is competent evidence, to show that the tract of country now embraced by that county is included within the boundaries of the grant to Sutter. *Cornwall v. Sutter*, 16 Cal. 429.

19. For land within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant, although no official survey and measurement have yet been made by the officers of government, and although it may appear, when such survey and measurement are made, that there exists, within the exterior limits of the general tract, a quantity exceeding the eleven leagues. *Id.*

20. Until such official measurement, no individual can complain, nor be permitted to determine, in advance, that any particular locality will fall within any surplus over and above the specified quantity, and thereby justify its forcible seizure and detention by himself. *Id.*

21. The evidence in this case, showing

that the land within Sacramento county was in possession of Sutter, by permission of the former government, for years previous to the cession to the United States; that it was subjected by him to such uses as he desired; that he had absolute control over it, without disturbance by any one, exercising the rights of a proprietor, to the knowledge of the government, and with its recognition of their existence; that he asserted ownership of the land, under the grant from Alvarado, and that for years after the conquest and treaty his claim and possession was unquestioned; his title, whether it be regarded as a legal or equitable one, is sufficient, under these circumstances, to enable him, and those holding under him, to recover or maintain possession in the courts of the State, at least, until the United States intervene, and determine, through the appropriate departments, that his claim, under his grant, shall be satisfied by land elsewhere selected. *Ib.*

22. The words in the petition of Sutter—"not including, in said eleven leagues, the land which is periodically inundated with water in winter," and the words in the grant, "without including the lands inundated by the impulse and currents of the rivers"—mean the land which is regularly inundated during the winter, and refer only to what are known as *tule lands*. No other lands will meet the terms of the petition. *Ib.* 430.

### SALARY.

See COMPENSATION, V., WAGES.

### SALE.

- I. In general.
- II. By the Probate Court.
- III. On Foreclosure.
- IV. Of a Vessel.
- V. On Execution.
- VI. Caveat Emptor.

#### I. IN GENERAL.

1. There is no such thing as market overt in sales known to our laws. *Rogers v. Huie*, 1 Cal. 436.

2. A consignment of goods was made to defendants as partners: after the dissolution of the partnership, two sales of a portion of the merchandise were made, one by each partner, who severally received the money: held, that the partnership continued for the purpose of fulfilling the engagements, and that the defendants were jointly liable. *Johnson v. Kellogg*, 3 Cal. 346.

3. It is error to admit evidence of the value of goods, in an action against a factor to compel him to account, where no charge of fraud, nonperformance or negligence is made. The strict measure of damages in such case is the net proceeds of sale. *Lubert v. Chauviteau*, 3 Cal. 463.

4. A complaint is insufficient, which alleges an indebtedness and sets forth an account, but does not allege the sale or delivery of the articles to the defendant, nor show in what place or in what manner the indebtedness accrued, whether on account of the defendant or that of another. *Mereshon v. Randall*, 4 Cal. 326.

5. Where a party makes a purchase from an innocent agent, who afterwards parts with the money of his principal, and it afterwards turns out that such purchase avails the purchaser nothing: held, that no right of legal complaint will lie against the agent. *Engels v. Heatley*, 5 Cal. 136.

6. C. sold a lot of lumber to B., and A., who claimed it, notified B. that the lumber belonged to him and brought an action to recover the price: held, that the notice and form of action recognized the right of C. to sell the lumber. *Argenti v. Brannan*, 5 Cal. 353.

7. A sale of property, however fraudulent as to creditors, is good as between the parties to the sale. *Montgomery v. Hunt*, 5 Cal. 368.

8. The purchase of property by a factor in his own name makes him to all the world the apparent owner, and as far as affects the rights of third parties, his power is unlimited. He has the right to sell or pledge. *Leet v. Wadsworth*, 5 Cal. 405.

9. A warranty will not be implied, ex-

## In general.

cept in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. *Moore v. McKinlay*, 5 Cal. 473.

10. There is no warranty in the following words of a sale note: "We have this day sold you the shipment of seeds for arrival." *Ib.*

11. The right of the enjoyment of possession to public lands may descend among the effects of a deceased person to the executor or the administrator, and the right of the deceased be conveyed by a regular sale to another.\* *Grover v. Hawley*, 5 Cal. 486.

12. R. being in insolvent and embarrassed circumstances, sold certain property to the plaintiff, in order to discharge certain debts which were liens upon his homestead, for the purpose of saving it for himself, of all which the plaintiff was aware at the time he made the purchase: held, that the sale being with the direct intent of benefit or advantage to the seller, and to the injury of the creditors, is fraudulent and void as to such creditors. *Riddell v. Shirley*, 5 Cal. 489.

13. A sale under such circumstances, except to a creditor in payment of his debt alone, and free from knowledge of or collusion with the object of the debtor, must be considered a fraud in fact and in law. *Ib.* 490.

14. A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this, though delivery be made before levy is made by the creditors. *Chenery v. Palmer*, 6 Cal. 122.

15. Where the court below, sitting as a jury, found that a sale was not made in good faith, and was without consideration, but failed to find as a fact a fraudulent intent, and entered judgment accordingly in favor of a subsequent purchaser: held, to be error. *Gillan v. Metcalf*, 7 Cal. 139.

16. A bill of sale not under seal\* is insufficient to convey a mining claim. *McCarron v. O'Connell*, 7 Cal. 153; *Clark v. McElvy*, 11 Cal. 160.

17. Contracts for the sale of land were, under the Mexican law, and by the custom of California, required to be in writing, and although all the forms prescribed were not strictly followed, still it was nec-

essary that the instrument should contain the names of the parties, the things sold, the date of the transfer, and the price paid. *Hayes v. Bona*, 7 Cal. 159; *Staford v. Lick*, 10 Cal. 17.

18. If the purchasers from parties said to have been insolvent bought in good faith, it is immaterial how many prior liens may have attached on the property; they are entitled to what remains after the liens are satisfied, or they would have the right to pay the liens and keep the property; and a court of equity would not interfere in such a case. *Kinder v. Macy*, 7 Cal. 207.

19. Where the plaintiff sold a number of bales of drillings to A. for the purpose of making sacks, deliverable to A. as fast as he needed them for manufacturing, and A. agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A., the title vested in him complete. *Hewlett v. Flint*, 7 Cal. 265.

20. Where the plaintiff bought eight hundred sacks of flour on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vendor: held, that the delivery was sufficient, and the sale valid. *Curtwright v. Phoenix*, 7 Cal. 282.

21. Testimony showing a fraudulent design in a vendor of goods is admissible under the allegations of an answer charging that the sale was made to defraud creditors, although it does not connect the purchaser with the fraud, or show that he was cognizant of such a fraudulent design. *Landecker v. Houghtaling*, 7 Cal. 392.

22. Such testimony would not of itself vitiate the sale to an innocent purchaser, without notice and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case whether the purchaser participated in the fraud. *Ib.*

23. Every sale of property and personal chattels is good, as between the par-

\*The statute of 1860, p. 175, permits bills of sale of mining claims without seal to pass the title.



## In general.

ties, and cannot be attacked as fraud, except by a creditor who has obtained judgment and taken out an execution which has been returned unsatisfied in whole or in part. *Thornburgh v. Hand*, 7 Cal. 565.

24. It makes no difference whether the misrepresentations were made willfully or ignorantly, or that the action against the purchaser was brought in the name of the sheriff. *Webster v. Haworth*, 8 Cal. 26.

25. To estop a party from claiming goods as against the creditor of a third party, it must appear that he stated to the creditor himself that he had sold the article to the third party, and that the creditor parted with some right or advantage on the faith of the information. *Goodale v. Scannell*, 8 Cal. 29.

26. Parol evidence is inadmissible to show that a bill of sale included property not described therein. Where a bill of sale is defective in such particular it can only be altered by a direct proceeding in chancery for the purpose of reforming it. *Osborn v. Hendrickson*, 8 Cal. 32.

27. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as warehousemen at a regular charge and their receipt given for the goods on storage, the vendors doing business as commission merchants and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart v. Scannell*, 8 Cal. 83.

28. The declarations and acts of a vendor before a sale are competent testimony to show a fraudulent intent on his part, in a suit to impeach the sale on the ground of fraud. *Vischer v. Webster*, 8 Cal. 113; *Hove v. Scannell*, 8 Cal. 327.

29. Where a person clearly insolvent purchases goods from another on credit and conceals the fact of his insolvency from the vendor, he is guilty of such fraud as vitiates the sale. *Seligman v. Kalkman*, 8 Cal. 214.

30. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself. *Hove v. Scannell*, 8 Cal. 327.

31. A sale of personal property to be valid against creditors must be accompanied by an actual and continued change of possession. *Whitney v. Stark*, 8 Cal. 517.

32. Where the purchasers from a com-

mon vendor are equally innocent or equally at fault, the first purchaser is entitled to the goods. *Vance v. Boynton*, 8 Cal. 560.

33. Where a sale of personal property is void as to subsequent purchasers, must be determined under the fifteenth section of the statute of frauds. *Ib.* 561.

34. Where H., the owner of barley which he has piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked "V" and piled up in another part of the corral and employs a third person to take care of the same for him, and H. afterwards sells and delivers the same to B.: held, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. *Ib.*

35. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor and crediting the purchasers with their respective lots: held, that there was a sufficient delivery of possession without a separation of the various lots. *Horr v. Barker*, 8 Cal. 608.

36. Where M. made a bill of sale to G. of forty-two barrels of vinegar then in possession of G. as keeper for the sheriff, as collateral security for a debt due G., and G. subsequently gave back the bill of sale to M. without any liquidation of the debt or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant to recover the same: held, that M. had no title to the property upon which he could recover in such an action, as the mere act of handing back the bill of sale to M. did not revert the title in him. *Middleworth v. Sedgwick*, 10 Cal. 393.

37. F. sold to V. P. certain goods, the possession of which V. P. retained for two or three days, when he leased the premises in which the goods were and delivered the goods to F., his vendor, and one M., who, after carrying on the business in connection with F. for a few days, retired, leaving F. in the exclusive possession of the property, which possession continued until the goods were seized by L. as con-

## In general.

stable, under an execution against F: held, that the sale of the goods to V. P. was void as to creditors and the goods were subject to the execution against F. *Van Pelt v. Littler*, 10 Cal. 394.

38. In the fall of 1856, L. rented of W. a portion of his brick yard for the purpose of making bricks; L. subsequently made a kiln of bricks and left them in W.'s charge and possession for him to sell for L.'s benefit. In January, 1857, L. made and delivered a bill of sale of the bricks to R. and informed W. of the same, but there was no change of possession under the bill of sale. J., the defendant, as constable, seized the bricks under a process against L. and sold them as the property of L: held, that L.'s sale to R. was a fraud as against the creditors of L., and that defendant was justifiable in taking the bricks and selling the same. *Richards v. Schroeder*, 10 Cal. 431.

39. H. and S. were the owners of a mule team, which they used in hauling quartz rock to their quartz mill; the team was driven by one L., an employee. K. and S. sold the team to H., executing a bill of sale and delivering the team by the discharge of L., the driver, who was immediately employed by H., and saying to H. "there is the team." K. and S. then hired of H. the team at eight dollars per day, and put it in the same business of hauling quartz rock as before, and with L. the same driver; team was kept and fed at K. and S.'s stable as before the sale: held, that there was no such actual and continued change in the possession of the property, under H.'s purchase, as to take the case out of the operation of the statute of frauds. *Hurlburd v. Bogardus*, 10 Cal. 519.

40. A bill of sale for a mining claim, not under seal and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. Such a bill only passes an equity, which is subject to the legal title or any superior equity. *Clark v. McElvy*, 11 Cal. 160.

41. The mere passive acquiescence of the other partners or tenants in common in a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Waring v. Crow*, 11 Cal. 372.

42. Where the defendant, intending to deceive the plaintiff, got from him a bill of sale for goods, under the representation that it was only to serve as a temporary security for the compliance by the plaintiff to furnish certain securities on previous indebtedness, and at this time intended to refuse to receive such security or give plaintiff the advantage of such new contract, the possession of such goods thus obtained was fraudulent and the bill of sale void. *Butler v. Collins*, 12 Cal. 461.

43. If A sells his property to B in consideration of so much money, to be paid by B to C, though the money is to be paid by or out of a sale of the goods, the contract is not void. There is no difference in such a case between paying to A and paying to A's order or creditor. *Wellington v. Sedgwick*, 12 Cal. 474.

44. Where a sheriff having an execution against S. and M., levied it upon certain goods, the property of S. and M., and placed them in the hands of W. as keeper, and subsequently the execution was quashed, and between that time and the issue and levy of a new execution W., who still remained in possession of the goods, purchased the goods of S. and M.: held, that such purchase is valid, and vested the property in W. *Id.* 475.

45. A sale of personal property without delivery is not absolutely void, but only so as to creditors and subsequent purchasers. *Vischer v. Webster*, 13 Cal. 61.

46. Plaintiff had two stacks of hay, and contracted to sell to defendant one stack, together with enough off the other stack to make sixty tons. The price was to be eighteen dollars per ton; and the hay was to be baled by plaintiff, and piled up in a corral, and then he was to be paid. Plaintiff had sixty-two tons and four hundred and thirty pounds of hay baled, and piled up in the corral, the surplus over sixty tons being by mistake of the man employed to bale. The bales were of different weights. Plaintiff then went to the house of defendant, and told him that the hay was baled and piled in the corral, and that there were two tons and some hundreds of pounds over the sixty bales piled up together, and asked defendant whether he would take the surplus. Defendant said he would be over soon and see about taking the surplus. Defendant then paid plaintiff two hundred dollars. Plaintiff

## In general.

sues for nine hundred and nineteen dollars balance due on the hay. The court instructed the jury that if they believed from the evidence it was the understanding of the parties, that upon the payment of the two hundred dollars by defendant the right and possession was deemed to have accrued to defendant to take the quantity bought as baled and stacked up in the corral, the plaintiff is entitled to recover, even though the bargain was not concluded as to the excess: held, that the instruction was right; that the question was, whether there had been a delivery, and any agreement of the parties upon the subject was legitimate matter for the jury; that the fact that the hay purchased by defendant was mixed with other hay belonging to plaintiff made no difference, if defendant agreed to accept it in that condition, and to consider it as delivered—the contract for delivery would be fully executed. *Smith v. Friend*, 15 Cal. 126.

47. On the above facts, defendant asked the court to instruct the jury that "if plaintiff sold to defendant sixty tons out of sixty-two tons and four hundred and thirty pounds of hay, the same being in bales of different and unequal weights, and containing different quantities, and all being in the same pile, there was no delivery without division had." The instruction was refused: held, that the refusal was not error, because the instruction assumed that there could not have been a delivery, whatever may have been the understanding of the parties, until the exact quantity contracted for was segregated and set apart for the defendant. *Id.*

48. A bill of sale of "all the goods and merchandise and property we own, have or had an interest in, in a store in Nevada, county of Nevada, formerly occupied by Bailey Gatzert, and now in the possession of the sheriff of Nevada county. Said goods were forwarded by us to Bailey Gatzert, Nevada," contains a sufficient description of the goods. *Coghill v. Boring*, 15 Cal. 218.

49. To enable a vendor of goods to rescind the sale he must offer to return the notes given for the goods; but this offer can be made at or any time before the trial. *Id.*

50. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at

Stockton, claiming that the trees were not paid for, and not subject to W.'s debts for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State is in law insolvent, without reference to any property in another State:" held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson v. Paige*, 16 Cal. 79.

51. Plaintiff also asked this instruction: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:" held, that this proposition is not strictly correct; that if the trees bargained for were put on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Id.*

52. An entire contract is indivisible—the whole must stand or fall together. But a contract made at the same time, for different articles, at different prices, is not an entire contract, unless the taking of the whole is essential from the character of the property, or is made so by the agreement of the parties, or unless it is of such a nature that a failure to obtain a part of the articles would materially affect the objects of the contract, and thus have influenced the sale, had such a failure been anticipated. *Norris v. Harris*, 16 Cal. 256.

53. A sale of nine slaves for a gross sum is an entire contract. There being no means afforded for determining the price of each one, the agreement is implied that the whole are to be taken or none. *Id.*

54. Where, in a bill of sale of all the cattle of a certain estate, estimated at 7,000 head, a total price being fixed, it was stipulated that the vendee, on arriving in Texas where the cattle were, might choose to take all the cattle of the estate without counting them, in which event he was to notify the agents of the vendors of his choice, and pay an additional \$4,000; but if a count was had, and the cattle exceeded or fell short of the estimated num

In general.—By the Probate Court.

ber, the excess or deficiency should be paid for at the rate of eight dollars per head; and no count was ever made, and no notification ever given by the vendee that he took the cattle without a count: held, that the vendor, on the facts, cannot recover the \$4,000; that the only obligation of the vendee, in the first instance, is to receive the cattle and pay for any excess over the estimated number, if counted; that his liability for the \$4,000 depended entirely on his choice to take the cattle without a count, and that this choice was a mere privilege, to be exercised or not, at his option. *Id.* 257.

55. The vendor, after waiting a reasonable time for the vendee to make his choice, he neglecting or refusing to make it, could fix his liability by making the count himself. *Id.*

56. The doctrine of election has no application here. That doctrine applies only to cases where the party upon whom rests the performance stands in the same position to both alternatives presented, and is bound to indicate his choice between them. Here, the vendee was bound to choose only in the event he desired to take the cattle without a count. If he did not so desire, he was not required to give notice to that effect. His obligation to pay for any excess was absolute, without any expression of choice; but his obligation to pay the \$4,000 was conditional, dependent solely upon the indication of his desire to dispense with the count. *Id.* 258.

57. Where the doctrine of election is applicable, the right of election, upon failure of the party upon whom the performance rests to indicate his choice, passes to the other side, as in this way only can the obligation become absolute and determinate. *Id.*

58. Defendant owed B., and to secure the debt, made a bill of sale to him of a wagon and team, and delivered possession. Bill of sale absolute on its face; but there was an agreement between defendant and B., that B. should keep the property until the profits thereof had paid him about \$1,000, or until he had been otherwise paid, when the property was to be delivered back to defendant. After this, L., a teamster of B., was directed by him to drive a horse and mule of the team in a wagon to a mill in the neighborhood. L. drove the team to Sacramento instead of the mill.

Creditors of defendant there levy on the wagon and animals. Defendant is indicted for larceny; and, after proof on the trial seeking to connect him with driving the team to Sacramento, and its seizure there, he offered to go into a statement of accounts between himself and B., to show that the debt to B. had been paid before L. took the property. Ruled out, on the ground that this matter "must be settled in another court:" held, that the court erred; that the facts sought to be introduced were competent, as tending to explain the transaction, and show the intent with which defendant took the property, or as showing whose property it was, or the general or particular title to it; that all the facts connected with the title and the taking should go to the jury, who can try the question whether the indebtedness had been paid. *People v. Stone*, 16 Cal. 371.

See STATUTE OF FRAUDS.

## II. BY THE PROBATE COURT.

59. A sale of property under an order of the probate court is a judicial act, and therefore not within the statute of frauds. Caveat emptor is the rule also in these sales. *Halleck v. Guy*, 9 Cal. 197.

60. Where the terms of the sale were one-half of the purchase money cash, and the remainder in ninety days, with interest from date of sale at the rate of one per cent. per month, and the purchaser elected to pay the whole amount down: held, that the purchaser is entitled to a reduction for the interest on one-half. *Id.*

61. If an administrator's sale be void or voidable, the lien of the administrator continues, and it would seem equitable that the purchaser who has paid the debts of the estate, should have a lien upon the estate for the purchase money. *Haynes v. Meeks*, 10 Cal. 120.

62. The sale being a proceeding in rem, there may not be any sufficient reason for holding the sale void by reason of a defective notice. *Id.*

63. W. died, leaving a widow and three minor children. The widow administered, and, as administratrix, presented a petition to the probate court, stating that she had agreed to sell the real estate of the intest-

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ate to the plaintiff for \$3,000, and to procure an order of the court for the sale, asking the court to confirm this agreement; and asking further, that, if the court should refuse so to confirm, then for a general order of sale upon the petition, which sets up other facts usual in such cases. The court made an order to show cause, etc., and at the same time appointed a guardian for minor and absent heirs, who, on the same day, consented to a decree of sale. No service of the order to show cause was made on the heirs. This decree confirms the agreement with plaintiff, directs a deed to be made to him, and afterwards proceeds to order a rule upon the heirs to show cause why a sale at public auction should not be made. Afterwards a second decree of sale was made in the usual form: held, that this agreement for a private sale did not render the decree of the court for a public sale void; that, although this agreement could not bind the estate, yet it was not against public policy and void. *Stuart v. Allen*, 16 Cal. 498.

64. Held, further, to make such agreement void as against public policy, the necessary effect of it must be to contravene some positive right or duty; that the duty of the administratrix is not necessarily inconsistent with an agreement to ask an order of sale upon consideration that a purchaser will give an agreed sum at the sale; that so far as her own interest was concerned, there was no objection to such an arrangement, and if the sale was to be public, probably no good reason exists for holding that the administratrix should not provide or assure herself in this way that, if sold, the property would bring a reasonable price, before proceeding to take steps to have the sale ordered—the propriety of ordering the sale and confirming it afterwards being still left to the court, uninfluenced by any such agreement. *Ib.*

65. Held, further, that the decree is not void because of the defect in the petition, which prays not simply for a decree of sale—the proper course—but seeks, as its main object, the confirmation of the agreement for a private sale to plaintiff; that, though the petition was demurrable for this cause—asking, as it did, what the court could not grant—yet, as the petition presented all the facts necessary to give the court jurisdiction of the matter of sale,

it was sufficient to support the decree when attacked collaterally. *Ib.* 499.

66. Held, further, that the decree and proceedings are not void on the ground of inconsistency, in this: that the first order confirms the agreement with plaintiff, and then requires the parties to show cause why the land should not be sold; and the second decree orders the property to be sold, as usual in such cases; that this course was an irregular and improper exercise of jurisdiction; but that these irregularities and defects must be corrected on appeal, and cannot be indirectly attacked. *Ib.*

67. The court had no power to confirm this private sale, and the order to that effect was void; but this act of the court, though an assumption of power, did not divest it of its rightful powers. It had power to order a sale of the land, and this power was exercised by its final or second decree. *Ib.* 500.

68. The power of the probate court to order a sale of the real estate of the deceased results from the fact that the personal estate in the hands of the administrator is insufficient to pay debts. *Ib.*

69. To the exercise of jurisdiction, in ordering a sale of real estate, it is not necessary that there should be a literal compliance with the directions of the statute. A substantial compliance is enough. Nor is it essential that there should be in the petition itself, and without reference to any other paper or thing, a statement of these facts. The main fact required is the averment of the insufficiency of personal assets, and mere formal defects in the mode of statement would not affect the jurisdiction. *Ib.*

70. So far as the question of jurisdiction is concerned, it is immaterial whether the statements of the petition be true or not; the jurisdiction rests upon the averments of the petition, not upon their proof. *Ib.*

71. Where the petition for the sale of real estate, after setting out the debts, proceeds, "that the personal property of said estate, which will appear by reference to the inventory now on file, is not more than is sufficient for the use and support of the family of said decedent, and is wholly insufficient to pay said indebtedness, and that it is necessary to sell real estate to pay the same;" and after giving



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some further matter, concludes: "Petitioner further alleges, that the inventory heretofore filed gives a description of all the real estate of which the said intestate died seized, and the condition and value thereof, which said inventory is made a part of this petition": held, that the petition contains a sufficient averment as to the "amount of personal estate that has come to his hands, and how much thereof, if any, remains undisposed of," within the statute; that the reference to the inventory makes, for all purposes of the reference, the inventory a part of the petition, and the amount of the personal estate is shown by the inventory, as is also the value. *Ib.* 502.

72. The question argued by Justice Baldwin, in *Gregory v. McPherson*, 13 Cal. 562, as to the necessity of setting forth—in a petition by an executor to sell real estate—as a jurisdictional fact, the amount of personal estate that has come to his hands, is still open in this court—that case not being authority, because the justices deciding it did not concur in the grounds of their judgment, as appears in the report. *Ib.*

73. The prayer of the petition in this case is in the alternative, and, therefore, the petition, as a pleading, was defective, but this defect does not go to the jurisdiction of the court; but if the true construction of the petition be that it prays for a sale only in the event that the agreement with plaintiff is not confirmed, still, perhaps, even then, the jurisdiction of the court would not be affected. *Ib.*

74. Query, whether, under the act of 1851, relative to the estates of deceased persons, in the petition for the sale of real estate, which shows that the personal estate, whether disposed of or not, is insufficient to pay the debts, it be essential also to aver how much of the personal estate has been disposed of; or whether the sole jurisdictional fact is that required by the one-hundred and fifty-fourth section of the act, making the one hundred and fifty-fifth and one hundred and fifty-sixth sections thereof mere modes to give effect to the substantive power conferred in section one hundred and fifty-four, and hence—like other statutory means to carry out a power—merely directions to the court in the exercise of its jurisdiction, and not conditions to the existence of the jurisdiction. *Ib.*

75. In this case, the petition and inventory referred to therein are to be regarded as one paper, so far as concerns a statement of the facts which they contain; and when the petition states that the personal property of the estate, which will be shown by the inventory, is insufficient, this averment, though informal and indirect, is equivalent to saying that the personal estate mentioned in the inventory is still on hand, and therefore undisposed of. The statement is of a fact existing at the time of the filing of the petition—and that fact is, that the property of the estate is shown by the inventory, and is insufficient to pay the debts, etc.; and if it be the property of the estate, it has not been disposed of. *Ib.* 503.

76. In cases of this sort, where titles to real estate will be injuriously affected by holding probate courts to great strictness of proceeding, a fair and liberal construction should be given to their acts, whenever it can be legally done. *Ib.* 504.

77. Taking the petition and inventory together, in this case, the description of the real estate is not so defective as to render the sale void upon its face. To require an accurate or exact description is too strict a rule. *Ib.*

78. Where upon petition by the administrator to sell real estate of the deceased to pay debts, the usual order for minor and absent heirs to show cause, etc., was entered, and on the same day a guardian ad litem was appointed for such heirs, who on the same day appeared, and consented to an order of sale, which was accordingly then made: held, that this order of sale is not void on the ground that the order to show cause, etc., was not served on the minor heirs, and that the guardian was appointed and the order to show cause was made on the same day. *Ib.*

79. The statute is silent as to the time when the guardian ad litem is to be appointed; and the order of sale is not void because a copy of the order for the minor heirs to show cause was not served on such heirs before said appointment. *Ib.*

80. After the guardian ad litem in this case had appeared and consented to an order of sale, the court had jurisdiction over the subject and the parties. At what time, after this, the court should act on the petition, was within its discretion. *Ib.*

By the Probate Court.—On Foreclosure.

81. Query, whether the various circumstances of this case, the irregularities, the price for which the property was sold, its real value, its consideration, the effect of these things upon the sale, entitle the infant heirs to come into a court of equity to set aside the sale. *Ib.*

82. The point decided here is, that the objections made to the sale are not sufficient to render it void upon the face of the proceedings. *Ib.*

### III. ON FORECLOSURE.

83. Where a power of sale is contained in a mortgage, and under a sale by virtue of such power the mortgagor becomes the purchaser, the equity of redemption still attaches to the property in favor of the mortgagor, and he may redeem. *Benham v. Rowe*, 2 Cal. 407.

84. Where a sale was irregularly made under a power contained in a mortgage, and the bill filed by the mortgagor did not ask to have it set aside, the sale must stand. *Ib.* 408.

85. But where such sale was not made in cash, but for currency of less value, the mortgagor is clearly chargeable with the highest market value of the lot sold, to be credited to the account of the mortgagor. *Ib.*

86. The sale of the equity of redemption of mortgaged premises, and the assignment of the rents thereof until foreclosure and sale to a creditor, cannot operate as a fraud upon the mortgagee, whose rights are secured and may be enforced by foreclosure. *Dewey v. Latson*, 6 Cal. 616.

87. A mortgagor, after the sale of the mortgaged premises under a decree in a suit to foreclosure the mortgage, has the right to the use and possession of the mortgaged premises until the execution of the sheriff's deed, but he possesses no right to despoil the property in its fixtures. The deed of the sheriff takes effect by relation at the date of the mortgage, and passes fixtures subsequently annexed by the mortgagor. *Sands v. Pfeiffer*, 10 Cal. 265.

88. Under a decree of foreclosure and sale, H. had come into possession of the mortgaged premises. Subsequently, on appeal to the supreme court, the decree

was reversed, with direction that the sale under it be set aside, that defendants in the suit be restored to the property sold, and that the court below should proceed to dispose of the case in pursuance of the principles of the opinion. The court below, on filing the remittitur, entered a decree setting aside said sale, restoring defendants to possession, directing plaintiff to deliver up possession; awarding a writ of restitution, in case of refusal, vacating the credit given on the decree of foreclosure—the plaintiff having bought in the property—and ordering an account of the rents and profits and the premises while in the hands of H., with an injunction pending the account: held, that the order of the court below for an account of the rents and profits was right; that the general direction by this court to the court below, to proceed in pursuance of the principles of the opinion of this court, was mere formality, neither giving authority, nor limiting the powers of the court below; that without such direction that court could only act in subordination to the principles declared by this court; that the question of rents and profits being left open by this court, indicated that it was to be passed upon by the court below; that there is no distinction as to the right to have the corpus of the property restored on reversal of the decree under which it was sold, and the restoring of the rents and profits received from its use; and that the restitution of both is essential to making the party whole. *Raun v. Reynolds*, 15 Cal. 468.

89. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Ib.* 469.

90. The party so in possession, under sheriff's sale, is in no better position than if it be entered directly under the mortgage to enforce which the sale was made; and having received the proceeds of the

property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though

#### IV. OF A VESSEL.

92. A sale of a vessel of the United States at sea, to a foreigner, forfeits her national character, unless the new owner pursues all the requisites of the law to ob-

the purchase money. *People v. Hays*, 5 Cal. 68.

100. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy v. Hermance*, 5 Cal. 75.

101. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against an officer; but it is not sufficient to set aside or avoid a sale. *Smith v. Randall*, 6 Cal. 50.

102. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money on the ground that he is entitled to it as oldest judgment and execution creditor, especially where there is a contest as to the priority of his lien. *Williams v. Smith*, 6 Cal. 91.

103. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption. *Harlan v. Smith*, 6 Cal. 174.

104. A party who purchases stock of an incorporation sold under execution, knowing they were under hypothecation, is chargeable with notice of the fact, and takes subject to the claim of the pledge. *Weston v. Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

105. Great inadequacy of consideration paid for land is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof on execution at a constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

106. A purchaser at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of six months allowed for redemption, as often as the rent becomes due, under the terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 46.

107. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey v. Dunlap*, 7 Cal. 162.

108. Tenants in common, or partners, have a right to acquire their cotenant's or copartner's interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter v. Laffan*, 7 Cal. 593.

109. Where a party purchased real estate at an execution sale upon the faith of the representations of a judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 8 Cal. 25.

110. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch v. Sullivan*, 8 Cal. 197; contra *Hart v. Burnett*, 15 Cal. 616. See *Holladay v. Frisbie*, 15 Cal. 634; *Wheeler v. Miller*, 16 Cal. 125.

111. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray v. Hawes*, 8 Cal. 568.

112. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up as a defense that no sufficient notice of the sale was given. *Harvey v. Fisk*, 9 Cal. 94.

113. The title to real estate sold under execution does not pass until the execution and delivery of the sheriff's deed. *Anthony v. Wessel*, 9 Cal. 104.

114. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. *Knight v. Fair*, 9 Cal. 118.

115. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 9 Cal. 142.

116. Where parties claim under a deed executed by the sheriff upon a sale on execution, they are chargeable with notice of defects in the judgment upon which the execution issued. *Wells v. Stout*, 9 Cal. 497.

117. An execution issued under a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Id.*

118. A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. *Alverson v. Jones*, 10 Cal. 12.

119. A complaint against a sheriff and his sureties for selling under execution the

homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against plaintiff J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of the plaintiffs, and averring in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. *Kendall v. Clark*, 10 Cal. 18.

120. No damage can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing.

127. In such case the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale is dangerous as a precedent, and liable to great abuse in practice. *Ib.*

128. The registration act only protects purchasers' creditors as such, are not included within its provisions. But a judgment creditor purchasing at his own sale without notice is a bona fide purchaser within the act. *Hunter v. Watson*, 12 Cal. 377.

129. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer



# SALE.

On Execution.

ant W. on his sheriff's deed; that defend-  
ant claiming title through foreclosure of  
the first mortgage, and being in possession,  
cannot be dispossessed by B. *Brown v.*  
*Winter*, 14 Cal. 84.

133. A certificate of the sheriff of the  
purchase of property, as that of the de-  
fendant in execution, is not sufficient to  
entitle the holder to redeem as such suc-  
cessor, at least, not until the expiration of  
the six months. *Haskell v. Manlove*, 14  
Cal. 58.

134. On mandamus by the assignee of a  
sheriff's certificate of the sale to compel  
execution of a deed, the question whether  
such certificate is not merged in a deed  
made to the assignee of the execution  
debtor after the sale cannot be tried. The  
right to the deed is the only matter in con-  
troversy. *People v. Irwin*, 14 Cal. 436.

135. Where a party to a judgment has  
obtained any advantage through the judg-  
ment, he must restore that advantage to  
the other party if the judgment be after-  
wards reversed. *Reynolds v. Harris*, 14  
Cal. 679.

136. If, on sale under judgment, the  
plaintiff buys in the property, he must re-  
store it to the defendant on reversal of the  
judgment. Otherwise, as to a stranger, a  
bona fide purchaser without notice. He  
is not within the rule. But to constitute  
himself such a purchaser, he must show  
that he has paid the purchase money, and  
also that he is the purchaser of the legal  
title, not of a mere equity. And a pur-  
chaser at execution sale is not clothed  
with the legal title until he receives a sher-  
iff's deed. *Id.* 680.

137. An assignee of a judgment and of  
the sheriff's certificate of a sale thereun-  
der stands in the same position as his as-  
signor, the plaintiff, after the judgment  
has been reversed, and the sale will be set  
aside and the property restored to the de-  
fendant where no loss or injury will be  
done the assignee. *Id.* 681.

138. Defendant, as coroner and acting  
sheriff, levied on and advertised for sale  
all the right, title and interest of T. in cer-  
tain horses and cattle in the hands of  
T., as partners. Receiver appointed in a suit  
not entitled to  
sale, unless th  
ble; and that  
showing of the

erty and defendant's insolvency. *Mor-*  
*Ord*, 15 Cal. 206.

139. The municipal lands to which the  
city of San Francisco succeeded as a pub-  
blo were held in trust for the public use  
of the city, and were not, either under the  
old government or the new, the subject of  
seizure and sale under execution. *Hart*  
*v. Burnett*, 15 Cal. 616.

140. The proviso in the act of March  
26th, 1851, granting certain beach and  
water lot property in San Francisco to the  
city, that the city shall pay into the State  
treasury, within twenty days after their  
receipt, twenty-five per cent. of all moneys  
arising in any way from the sale or other  
disposition of the property, is not a condi-  
tion, either precedent or subsequent, an-  
nexed to the grant; and the property men-  
tioned in the act is not devoted by the  
grant of the State to any specific public  
purposes, or made subject to the perform-  
ance of any trusts by the city. The inter-  
est of the city is absolute, qualified by no  
conditions and subject to no specific uses.  
It is a leviable interest, subject to sale  
under execution. *Holladay v. Frisbie*,  
15 Cal. 636; *Wheeler v. Miller*, 16 Cal. 125.

141. *Smith v. Moras*, 2 Cal. 524, decid-  
ing that the city's interest in this beach  
and water lot property can be sold on ex-  
ecution against the city, not to be disturb-  
ed; but any rights which "the commis-  
sioners of the funded debt of the city of  
San Francisco," under the act of May 1st,  
1851, may possess in this property are not  
passed on. *Holladay v. Frisbie*, 15 Cal.  
637.

142. A purchaser of beach and water  
lot property at a sheriff's sale, in August,  
1851, on execution issued upon a judg-  
ment recovered in January, 1851, against  
the city of San Francisco, acquired a title,  
if the judgment became a lien upon the  
property sold previous to the act of  
1st, 1851, and the conveyance fr-  
commissioners of the sinking f-  
*v. Miller*, 16 Cal. 125.

143. In this case  
not show that t  
such lien, th  
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er

On Execution.—Caveat Emptor.—San Francisco in general.

144. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ackley v. Chamberlain*, 16 Cal. 182.

See EXECUTION.

## VI. CAVEAT EMTOR.

145. Caveat emptor applies in sales of real estate, where there is no fraud, warranty, &c. *Salmon v. Hoffman*, 2 Cal. 141.

146. Ordinarily, the maxim of caveat emptor applies to judicial sales, but it has many limitations and exceptions. *Webster v. Haworth*, 8 Cal. 26; *Halleck v. Guy*, 9 Cal. 197.

147. A bill of sale for a mining claim, not under seal and without warranty, which only purports to convey to the vendee the right, title and interest of the vendor, will not pass the title, although the vendor is in possession at the time, if such possession is without title. The doctrine of caveat emptor applies to all such cases. *Clark v. McElroy*, 11 Cal. 160.

148. The doctrine of caveat emptor applies only to sales made upon valid judgments; and is usually invoked with reference to sales upon execution issued against the general property of a judgment debtor. In these latter cases, a defect of title is no ground for interference with the sale, or a refusal to pay the price bid. The purchaser takes upon himself all the risks as to title, and bids with full knowledge that in any event he only acquires such interest as the debtor possessed at the date of the levy, or the lien of the judgment; and that he may possibly acquire nothing. *Boggs v. Hargrave*, 16 Cal. 564.

149. A somewhat different rule prevails in cases where particular property is the subject of sale, by a specific adjudication; as where the interest of A. in a certain tract is decreed to be sold. To the validity of a decree of this character, the presence of A. is essential; and when present,

the decree binds him and is effectual, by the sale it orders, to transfer his estate. A valid decree in a mortgage case operates upon such interest as the mortgagor possessed in the property at the execution of the mortgage. That interest may not constitute a valid title; it may not, in fact, be of any value; and the purchaser takes that risk. To that extent the doctrine of caveat emptor applies even in those cases, and in all cases of adjudication upon specific interests, but no further. The interest specially subject to sale, whatever it may be worth, a purchaser may be entitled to receive; it is for that interest he makes his bid and pays his money. *Id.*

## SAN FRANCISCO.

I. In general.

II. Land in San Francisco.

### I. IN GENERAL.

1. There was no officer in San Francisco who, according to the Mexican law, was authorized to record mortgages, and unless there was, a mortgagee was not bound by the rule of notice to subsequent encumbrancers. *Woodworth v. Guzman*, 1 Cal. 205.

2. Alcaldes in San Francisco were empowered to perform the functions of judges of first instance, in those districts where there were no such judges. *Mena v. Leroy*, 1 Cal. 220.

3. The common council of the city of San Francisco has no authority under the charter of the city, of 1850, to impose a penalty of one per cent. per day for the nonpayment of an assessment. *Weber v. City of San Francisco*, 1 Cal. 456.

4. The recorder of the city of San Francisco has the right to award the punishment for the crime of assault and battery affixed by the statute on crimes and punishments. *People v. Ah King*, 4 Cal. 307.

5. The thirty-second section of the charter of 1855, of the city of San Francisco, was designed as a check upon the city gov-

ernment under that charter, leaving the previous indebtedness to stand as a matter the legislature could not interfere with. *Soule v. McKibben*, 6 Cal. 143.

6. The limitation fixed by that section upon the amount of indebtedness that could be lawfully incurred by the city, refers only to indebtedness under the charter, not computing the previous debt, funded or unfunded. *Ib.*

7. Where the city ordinance authorizes the making of a contract by certain committees on behalf of the city, "subject to confirmation by the common council for said city," a confirmation by joint resolution, and not by ordinance, is sufficient. *San Francisco Gas Co. v. City of San Francisco*, 6 Cal. 191.

8. The rejection of the plaintiff's claim against the city by the board of examiners only denies him the privilege of funding it, but does not impair the obligation of the contract or plaintiff's right to prosecute it. *Ib.* 192.

9. There is no constitutional inhibition against incorporating a portion of the inhabitants of a county as a city, or creating a county out of the territory of a city. *People v. Hill*, 7 Cal. 103; *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

10. The act consolidating the city and county of San Francisco is not unconstitutional. *People v. Hill*, 7 Cal. 104; *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 572.

11. The consolidation act of the city and county of San Francisco gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 438.

12. The act of 1851, creating the board of fund commissioners of San Francisco, was a law authorizing a contract between the city and her creditors, who surrendered the old indebtedness and took a new security bearing a different rate of interest. This transaction was in the nature of a new contract, and the law authorizing it entered into and became part thereof, and cannot be altered or amended so as to im-

13. The provision of the consolidation act of 1856, requiring that the sinking fund created by the act of 1851 should be first exhausted by the redemption of certificates of stock before the treasurer should make payment annually of the sum of fifty thousand dollars, set apart by the first act for the payment of interest and for the sinking fund, are unconstitutional. *Ib.*

14. The recorder of the city of San Francisco is authorized by law to take acknowledgments of mortgages and conveyances. *Hopkins v. Delany*, 8 Cal. 87.

15. An account audited against the city of San Francisco, but not paid at the time the consolidation act went into effect, need not again be audited to entitle it to payment. *Knox v. Woods*, 8 Cal. 546.

16. The salaries of teachers, under the consolidation act, should be paid in the same manner as other claims against the treasury. *Ib.*

17. An act of the legislature authorizing and directing the board of supervisors of the city and county of San Francisco to audit and allow the claim of a judgment creditor is not unconstitutional, as being judicial in its character. *People v. Supervisors of San Francisco County*, 11 Cal. 211.

18. The board of supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit of the board, are alike immaterial. *People v. Supervisors of San Francisco County*, 12 Cal. 301.

19. The act of 1858, amendatory of the act of May 1st, 1851, authorizing the "funding of the floating debt of the city of San Francisco and to provide for the payment of the same, is constitutional." The amendment, that the commissioners may purchase stock at five per cent. above par, does not affect injuriously the creditors under the act of 1851. *Thornton v. Hooper*, 14 Cal. 11.

20. An indictment in the court of sessions, in San Francisco, may be entitled either as of the county of San Francisco or as of the city and county of San Francisco. *People v. Mullins*, 10 Cal. 21; *People v. Beatty*, 14 Cal. 571.

21. The place of pilot in the port of

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22. The fire department of San Francisco is not a mere voluntary association, but is a branch of the municipal government of that city. *People v. Board of Delegates of the San Francisco Fire Department*, 14 Cal. 497.

23. An assistant prosecuting district attorney appointed by the board of supervisors of the city and county of San Francisco, under the act of April 23d, 1858, (238) is not limited in his official action to any particular class of cases. The true construction of the statute is, that he shall be prosecuting attorney in the police court and shall assist the district attorney in the discharge of his various duties. *People v. Magallones*, 15 Cal. 428.

24. One of these duties is the prosecution of charges before the grand jury, and if the assistant may perform the duty, he must be deemed to be clothed with the powers and privileges necessary for that purpose. While acting for the district attorney, his acts possess the same validity and must be regarded in the same light as if done by that officer in person. *Id.* 429.

25. It is no objection to an indictment found in said court of sessions, that such assistant prosecuting district attorney was present during the session of the grand jury while the charge embraced in the indictment was under consideration. *Id.*

26. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury to be used as the city sees fit. *Argenti v. City of San Francisco*, 16 Cal. 263.

27. The provision in section five, article three of the charter of 1851, as to not creating liabilities beyond \$50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. *Id.* 264.

28. The legal effect of this provision is

entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Id.*

29. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Id.* 274.

30. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes, and that the treasurer must pay from that fund and no other. *Id.*

31. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and they would not constitute any authority to

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the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 275.

32. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent \* \* the proposals to be opened and awarded by the street commissioners, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committee of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioners. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services rendered and materials furnished, or for

money received by defendant to his use: held, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committee of the two boards converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Ib.* 277.

33. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for is only a designation of the sources upon which the city relies for payment. *Ib.* 282.

34. In this case, the city having discharged the assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

35. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts, has no application to cases of this character. *Ib.*

36. The doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

37. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to



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her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *Ib.*

38. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. *Ib.*

39. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her, or be under her control. *Ib.*

40. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of implied contract. *Ib.*

41. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.*

42. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.* 284.

43. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for instance, upon the issuance of bills of credit. *Ib.*

44. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin v. City of San Francisco*, 16 Cal. 286.

45. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they were given. *Ib.*

46. These warrants, with few exceptions, do not comply in their form with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriations under which they were issued, and the date of the ordinances making the same. *Ib.* 287.

47. The act of April 21st, 1860, relative to pilots in the port of San Francisco, did not legislate out of office pilots licensed under acts repealed by the act of April 21st, whose terms of office had not expired when this act went into operation. *People v. Abbott*, 16 Cal. 365.

48. In *quo warranto* for an alleged usurpation of the office of pilot for the port of San Francisco, the complaint avers that defendants hold, use, exercise, usurp and enjoy the office without a license, and also contains allegations as to the right of relator to the office: held, that these allegations as to the right of relator cannot be reached by general demurrer, the complaint being good as against the defendants; that they are not interested in the question as to the right of relator, but only in the determination of their own right to the office. *Ib.*

## II. LANDS IN SAN FRANCISCO.

49. *If San Francisco was a pueblo under the Mexican government, that was a fact which should be established by proof, and of which courts cannot and ought not to take judicial notice, and the land in con-*

## Lands in San Francisco.

troverſy ſhould be ſhown to be within the pueblo limits. *Woodworth v. Fulton*, 1 Cal. 307 ; overruled in *Payne v. Treadwell*, 16 Cal. 232.

50. Lands lying within the corporate limits of San Francisco, and which had not been granted by the Mexican government or its officers previous to the conquest of the country by the American forces, conſtitute a part of the public domain of the United States, and cannot be granted away except under the authority of Congress. *Woodworth v. Fulton*, 1 Cal. 307 ; overruled in *Cohas v. Raisin*, 3 Cal. 450 ; *Welch v. Sullivan*, 8 Cal. 199 ; *Hart v. Burnett*, 15 Cal. 616.

51. Mexican juſtices of the peace had authority before the war to make grants of land in San Francisco. *Reynolds v. West*, 1 Cal. 327.

52. What is termed the “ſwinging of lots,” a measure adopted in purſuance of a reſolution of a public meeting in San Francisco, cannot change the location of premises actually granted, or impair the right of a grantee therein. The taking of a part of a lot from an individual for the purpoſe of a public ſtreet, though it may, perhaps, give him claim on the public for compensation, does not confer upon him the right to encroach to the ſame extent on the land of his neighbor. *Ib.*

53. Whether driving piles in a ſtreet extended into the bay of the city of San Francisco is an obſtruction to the free uſe of the ſtreet by the public, is a queſtion of fact for the jury to paſs upon. *City of San Francisco v. Clark*, 1 Cal. 386.

54. The city of San Francisco could not take property in the poſſeſſion of another for the purpoſe of a public ſlip without paying an adequate compensation, where the title is not in the city. *Gunter v. Geary*, 1 Cal. 465.

55. The act of the city in creating a ſinking fund commiſſion, and the deed executed to them of all the property to the city, is void from want of power in the city, and becauſe ſaid deed is within the ſtatute of frauds. *Smith v. Morſe*, 2 Cal. 557.

56. In a plan of the city, the ſurvey into blocks, lots and ſtreets extended into the tide waters in front of the city, the object of which was to reach a ſufficient depth of water on the land line for the convenience of ſhipping. *Eldridge v.*

*Cowell*, 4 Cal. 87 ; *Wood v. City of San Francisco*, 4 Cal. 193 ; *Minor v. City of San Francisco*, 9 Cal. 45.

57. It was neceſſarily anticipated that the water lots would be filled up to a level ſuitable for building or land carriage. *Eldridge v. Cowell*, 4 Cal. 87.

58. Without expreſs authority, neither the mayor nor the commiſſioners of the funded debt of San Francisco, nor any or either of them, by virtue of their office or otherwiſe, are authorized to redeem under the code lands of the city ſold under execution againſt her, nor can the city attorney ratify their act of redemption by plea after ſuit brought. *People v. Hays*, 4 Cal. 146.

59. The act of March 26th, 1851, which requires the city of San Francisco to deposit in the office of the ſecretary of ſtate a map of the water lot property, granted to the city by the ſame act, does not make ſuch map concluſive evidence of the extent of ſaid property, as the boundaries are completely ſpecified in the act, and the queſtion of what was the water line of the city at the date of the act is one of fact. *Cook v. Bonnet*, 4 Cal. 398.

60. Where a party ſues for a lot in the former pueblo of San Francisco, and deſtroyſ his title from the city, he is prima facie entitled to recover. *Seale v. Mitchell*, 5 Cal. 402.

61. A ſale of land in the city of San Francisco by a portion of the board of commiſſioners of the funded debt does not paſs a legal title upon which ejectionment can be maintained. *Leonard v. Darlington*, 6 Cal. 123.

62. The charter of San Francisco provides that no ordinance or reſolution ſhall be paſſed except by a majority of all the members elected. The number of members elected being eight : held, that an ordinance paſſed by a vote of four in the affirmative to three in the negative for the ſale of city lands was not paſſed by a majority of all the members elected, and was therefore void. *City of San Francisco v. Hazen*, 5 Cal. 171.

63. Where an ordinance for the ſale of the city property was paſſed without the majority required by the charter, and before the ſale another ordinance was legally paſſed, appropriating a portion of the proceeds to ariſe from the ſale : held, that the ſecond ordinance was a ſufficient

recognition of the first to render the sale valid and binding on all parties. *Holland v. City of San Francisco*, 7 Cal. 375; overruled in *McCracken v. City of San Francisco*, 16 Cal. 622.

64. The charter of the city of San Francisco provides that when the common council think proper to open or improve a street, etc., notice shall be given, and if no protest be made as provided, then the council shall proceed with the improvement: held, that when an ordinance had passed to give the required notice, which was given and no protest made, the full discretionary power of the council had been exercised, and it became binding as a contract between the city and the property holders to make the improvement, the remaining acts on the part of the city being mere ministerial duties on the part of its officers. *Lucas v. City of San Francisco*, 7 Cal. 473.

65. The act of the twenty-seventh of March, 1851, granted to the city of San Francisco certain beach and water lot property in San Francisco for ninety-nine years. The sale to defendant of a portion thereof by the State board of land commissioners, under the act of May 18th, 1853, granted nothing but the State's reversionary interest. *Chapin v. Bourne*, 8 Cal. 296.

66. The Leavenworth alcalde grants could not pass title or affect the beach and water lot property in San Francisco, except so far as conceded by the act of March 26th, 1851, and upon a compliance with the requisitions thereof. *Ib.*

67. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession and under the control of the recorder of San Francisco, are void. *Ib.*

68. The confirmation of the title of the city of San Francisco, by the board of United States land commissioners, and the dismissal of the appeal by the attorney general, have settled that no title to lands within the limits of that city can hereafter be acquired from the United States. *Norton v. Hyatt*, 8 Cal. 540.

69. The regulations of forbidding grants to be made within two hundred varas of the water line of the bay, had reference only to a portion of the present city front. *Ib.*

70. Where the owner of a lot neglects for three days after notice from the superintendent of public streets of said city, to repair the street in front of his lot, the superintendent has the right to make a contract for that purpose; and an action will lie in the name of the party performing the work against the owner of the lot adjacent for the amount. *Hart v. Gaven*, 12 Cal. 477.

71. The legislature had the right to provide, in the act known as the consolidation act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. *Ib.*

72. The act of March, 1851, commonly called the San Francisco water lot act, should be construed favorably to the city, and includes all land within the boundaries fixed by the survey referred to in the act, and there is nothing in the act of May, 1851, which indicates any intention on the part of the legislature to exclude the public slips from the act of March, 1851. *Hyman v. Read*, 13 Cal. 451.

73. The ayuntamiento of San Francisco, in 1850, by an order, authorized its alcalde to grant to plaintiff "a quantity of land in conformity with the survey of the town as near as possible to the location of" certain other lots which the plaintiff was to surrender to the town. The alcalde accordingly conveyed by deed to plaintiff a lot which had been previously granted by the town to one Gerke: held, that an action for the breach of covenants of warranty in this deed will not lie against the city. *Findla v. City of San Francisco*, 13 Cal. 535.

74. The board of commissioners of the old sinking fund of 1850, created by an ordinance of the city of San Francisco, had no power to sell the real estate of the city, the ordinance being void. But this decision has no application to the board of commissioners of the funded debt, organized after the dissolution of the first board of the sinking fund commissioners. *Heydenfeldt v. Hitchcock*, 15 Cal. 514.

75. San Francisco was at the date of the conquest and cession of California, and long prior to that time, a pueblo, entitled to and possessing all the rights which the law conferred upon such municipal organ-

izations. *Hart v. Burnett*, 15 Cal. 616; *Payne v. Treadwell*, 16 Cal. 225.

76. Such pueblo had a certain right or title to the lands within its general limits; and the portions of such lands which had not been set apart, or dedicated to common use, or to special purposes, could be granted in lots by its municipal officers to private persons in full ownership. *Hart v. Burnett*, 15 Cal. 616.

77. The authority to grant such lands was vested in the ayuntamiento, and in the alcaides or other officers who at the time represented it, or had succeeded to its "powers and obligations." *Ib.*

78. The official acts of such officers in the course of their ordinary and accustomed duties, and within the general scope of their powers, as here defined and explained, will be presumed to have been done by lawful authority. *Ib.*

79. These municipal lands to which the city of San Francisco succeeded, were held in trust for the public use of that city, and were not, either under the old government or new, the subject of seizure and sale under execution. *Ib.*

80. This property and these trusts were public and municipal in their nature, and were within the control and supervision of the State sovereignty, and the federal government had no such control or supervision. *Ib.*

81. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of this sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Ib.*

82. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sales under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. *Ib.*

83. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Ib.*

84. It is not clear that the order of the board of supervisors of the city and county of San Francisco, repealing the

Van Ness ordinance, before the passage of the act of 1858 confirming it, destroyed the power of the legislature to give due effect to the provisions of that ordinance. *Ib.*

85. Assuming that this repealing order was effectual to defeat the rights claimed to have vested under the ordinance, then the property claimed would belong to the city, and plaintiff here could not recover. *Ib.*

86. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant. *Holladay v. Frisbie*, 15 Cal. 634; *Wheeler v. Miller*, 16 Cal. 125.

87. Nor does the proviso create a trust in the city in favor of the State, so far as the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the State. The interest of the city in the property is a legal estate for ninety-nine years. When the property is once sold or disposed of by the city, it is not charged with the payment of the percentage in the hands of the grantee or purchaser. This is a duty devolving on the city, with which the grantee or purchaser has no concern. *Ib.*

88. If there be any trust created by the proviso, it is only a trust in the one-fourth of the proceeds which the city may receive, amounting only to a covenant on the part of the city, which in no wise qualifies the grant or affects the legal estate of the city in the premises. *Ib.*

89. The beach and water lot property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Ib.* 635.

90. The proviso to the act operates only as a covenant on the part of the city, that if she make any sale or other disposition of the property, and realize from such sale

## Lands in San Francisco.

or other disposition any moneys, twenty-five per cent. of the same shall be paid into the State treasury. On the other hand, if the property be disposed of without the receipt of any moneys by the city, no obligation arises in favor of the State. *Id.*

91. *Smith v. Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property, are not passed on. *Id.* 636.

92. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in her beach and water lot property, on the first day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same; and such parties can defeat the claim of plaintiff, who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Id.* 637.

93. The interest of plaintiff derived from a conveyance of the commissioners under the act of May 18th, 1853, is only to the reversion after the ninety-nine years designated in the act of March 26th, 1851. *Id.*

94. A purchaser of beach and water lot property at sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 125.

95. In this case, as the record does not show that the judgment ever became such lien, the decision giving title to the pur-

chaser must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Id.*

96. A grant by an alcalde of a town lot in San Francisco, after the conquest and cession of California, down to the incorporation of the city in April, 1850, will be presumed, until the contrary be shown, to be within the authority of such alcalde, and the lot granted will be presumed to be within the limits of the pueblo. *Payne v. Treadwell*, 16 Cal. 226.

97. The powers and authority which had been conferred by law upon municipal officers of the pueblo to grant pueblo lands were not suspended, ipso facto, by the war with Mexico or by the conquest, and the fact that such officers during the military occupation, and after the complete conquest and cession, were Americans, or held their office under American authority, did not change the powers and obligations which by the existing laws of the country belonged to such municipal officer. And the same presumptions attach to their grants of lots whether made before or after the conquest and cession. *Id.*

98. The question of the boundary lines of the pueblo should not be left to the jury to be determined by parol proof. *Id.* 228.

99. The center of the old presidio square is the initial point for a survey of the four square leagues to which the pueblo is entitled, and the survey is to be made, according to the ordenanzas de tierras y aguas, in all directions, i. e., north, south, east and west, so as to include in all the four square leagues—making up for deficiencies in one direction (where these exist by reason of water being reached, etc.) by including the quantity thus deficient in another line or lines. *Id.* 230.

100. According to these rules of measurement the fundo legal of the pueblo of San Francisco is bounded upon three sides by water; and hence the fourth line must be drawn for quantity east and west, straight across the peninsula, from the ocean to the bay. The four square leagues, exclusive of the military reserve, church buildings, etc.—constitute the municipal lands of the pueblo of San Francisco. *Id.*

101. Where the land granted by an alcalde is shown to be within the limits of the four square leagues thus measured,



the presumption attaches that it was pueblo land, grantable as such, and that the alcalde grant passed the title to the grantee. This presumption might be repelled by proof of an express assignment of the lands of the pueblo, which did not include the land granted by the alcalde, or by proof that this was land reserved as a fort site, etc., or proof of an anterior or better title to the land by grant from some officer or body authorized to make it. *Ib.* 231.

102. A plaintiff suing for a lot in San Francisco may rest his case, *prima facie*, upon an alcalde grant in the usual form, and no further proof of title will be required than proof that the land granted is situated within the four square leagues, measured from the center of the presidio square in the manner directed by the ordinances. *Ib.*

103. San Francisco having been constituted by a public political act of the former government a pueblo, courts will take judicial notice of its existence, powers and rights, and among these last, its general boundary and jurisdiction. *Ib.*

104. Where land, within the general limits of the pueblo of San Francisco, and also within the limits of the old "Mission," was granted to an individual by the governor and departmental assembly, in 1839-'40, before the "Mission" had been entirely secularized, it would seem to have been at the date of the grant exempt from the exercise of pueblo rights over it, and it must be presumed to be grantable, just as any other land previously occupied by the mission establishments, but not exclusively dedicated to pious uses. *Brown v. City of San Francisco*, 16 Cal. 457.

105. The charter of 1851 of the city of San Francisco vested the legislative power of the city in a common council, consisting of a board of aldermen and a board of assistant aldermen, each composed of eight members, and provided that no ordinance or resolution should be passed unless by a majority of the members elected to each board. On the 5th of December, 1853, the mayor of the city approved of what purported to be an ordinance passed by the common council, providing for the sale of certain slip property of the city. This ordinance is designated in the official book of the city ordinances as ordinance No. 481. At the time the ordinance was presented to the board of aldermen, there

was a vacancy in the board, occasioned by the resignation of one of its members, so that there were but seven members in office. Of these seven, four members voted for the ordinance and three against it: held, that the ordinance not having received a majority of the entire board—of the constituted members—was never passed, but was in fact rejected. *McCracken v. City of San Francisco*, 16 Cal. 616.

106. The alleged ordinance No. 481 authorized and required the mayor and joint committee on land claims of the city to sell the property specified at public auction to the highest bidder, at such time and place as they might think advisable, after not less than ten days' advertisement. The sale was advertised for December 26th, 1853. Within one hour previous to the sale the common council passed an ordinance, designated in the official book as ordinance No. 493, appropriating certain proceeds of the intended sale: held, that this recognition of the existence of ordinance No. 481, and the appropriation of a portion of the sale, did not constitute an adoption and approval of what had been previously done or might be subsequently done according to the terms of that ordinance, so as to give validity to the sale which took place. *Ib.*

107. The only authority the common council possessed to sell city property was derived from the thirteenth section of article three of the charter, and this section provides for the sale of property in one way only, to wit: by the passage of laws, which term is synonymous with ordinances, when applied to acts of municipal corporations. This mode of selling the property, having been pointed out by the charter, was restrictive—no other mode could be followed. *Ib.* 619.

108. The only way in which the common council could give validity to a sale was by passing a law directing it. Ordinance No. 493 does not purport to provide for any sale, but simply assumes that an ordinance ordering a sale had already passed; but this assumption could impart no vitality to the alleged ordinance No. 481. The common council could pass a law or ordinance only in one way, and that was by voting for it. *Ib.* 620.

109. The land directed by the terms of ordinance No. 481 to be sold, was set apart and dedicated as a public dock by

an ordinance passed in 1852, and while this dedicating ordinance remained in force, no sale could be legally had. In dedicating the land to public use, the common council exercised powers purely of a governmental nature, and not those of a mere property holder. It was by legislation that the dedication was made, and only by legislation could the public franchise be destroyed. *Ib.*

110. The distinction taken between the powers of a municipal corporation, when acting in its political and governmental character, and when acting with reference to its private property, has no application to the question involved in the case at bar. Its powers, whether regarded as political or governmental, or those of a mere private corporation, could be exercised only in conformity with the provisions of the charter. The legislature could impose such restrictions as it thought proper, and it saw fit to require the formalities of legislation for the disposition of the city property, as it did for the imposition of taxes, the regulation of the fire department, and matters connected with the general welfare of the city. *Ib.* 621.

111. *Holland v. City of San Francisco*, 7 Cal. 361; distinguishable from this case in this: that there, the fact that the property had been previously dedicated to public use as a public dock was not presented; but that case is not law, and is overruled, so far as it holds that ordinance No. 493 recognized and adopted ordinance No. 481, so as to render the subsequent sale valid and binding upon all parties. *Ib.*

112. Admitting that ordinance No. 493 did adopt and pass No. 481, it did so only within one hour previous to the sale. But this ordinance directs the sale upon ten days' previous advertisement. The authority to sell upon ten days' notice was not therefore pursued, and the sale without such notice was void. *Ib.* 622.

113. Ordinance No. 505 of the city of San Francisco, passed January 10th, 1854, by which the mayor and land committee were authorized to pay out of moneys in their hands, arising from the sale ordered by ordinance No. 481, the salaries of the members and officers of the police for the months of November and December of the previous year, does not ratify ordinance No. 481 because appropriating the proceeds of the sale. It assumes that ordinance No. 481 was valid, and there is nothing in the appropriation from which an intention to ratify can be implied. If the intention to ratify under some circumstances could be thus implied, the implication would be of no avail in the present case, as the common council were at the time laboring under the mistaken impression that ordinance No. 481 had become law. Ratification, to be effective, must be made with full knowledge of all the facts relating to the act ratified. To entitle any proceedings of the common council to the slightest consideration as evidence of ratification, it must be shown that those proceedings were taken with full knowledge that the ordinance had never passed, and that the sale thereunder was an absolute nullity. *Ib.* 625.

114. Inasmuch as by article six, section six, of the charter of San Francisco of 1851, the common council could authorize a sale of city property at public auction only, ratification of a previous sale is impossible. The object of the ratification is to vest in the previous purchaser the title; but at public auction there would be no certainty of this, for at the auction every one would be at liberty to bid, and the property would fall to the highest bidder. *Ib.* 626.

115. The city of San Francisco is not estopped from denying the sale made under ordinance No. 481, and asserting title to the property sold. The matters relied upon by way of estoppel, with the exception of ordinance No. 493, occurred after the sale, and could not have influenced the plaintiff in his purchase. Ordinance 493, directing an appropriation of a portion of the anticipated proceeds, was passed within one hour of the sale, and it nowhere appears that the same was ever brought to the notice of the plaintiff. Nor does it appear that there was any fraud or intention to deceive on the part of the common council. They acted, in passing ordinance No. 493, and in the subsequent use of the proceeds, upon the impression that a valid ordinance authorizing the sale had been passed. *Ib.* 627.

116. The doctrine of estoppel, as laid down in *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 280, controls the question here. *Ib.*

117. Even if the city would be estopped

from denying the sale, and from asserting title to the property sold, it does not follow that the plaintiff would be estopped from claiming a return of the money he paid. The doctrine of estoppel in pais is applied to prevent a wrong-doer from asserting claims against his declarations or conduct, not to prevent an innocent party from enforcing his rights. It is the wrong-doer who is estopped, upon the principle that he shall not take advantage of his own wrong. *Ib.*

118. The sale of the city's property in this case being without authority and void, the plaintiff is not required to surrender possession of the property before he can maintain an action to recover back the purchase money. *Ib.*

119. The fifth section of article three of the charter of 1851 of the city of San Francisco, as to the city's not incurring debts beyond \$50,000 under certain circumstances, is directory, and is not a limitation of the power of the common council as to the amount of debts and liabilities to be incurred. *Ib.* 628.

120. The section of the charter refers only to the acts or contracts of the city, and not to liabilities which the law may cast upon her. It was intended to restrain extravagant expenditures of the public moneys, not to justify the detention of the property of her citizens which she may have unlawfully obtained; and where, as in this case, plaintiff claims that the city has got his money without consideration—by mistake—and has appropriated it to municipal purposes, she is bound to refund; because the law—not her contract or permission—renders her liable. Her liability in this respect is independent of the restraining clauses of the charter; it arises from the obligation to do justice—to restore what belongs to others—which rests upon all persons, whether natural or artificial. *Ib.* 630.

121. The restriction contained in the fifth section of the charter can, in any view, only apply to liabilities dependent for their creation upon the volition of the common council, and hence does not include liabilities arising from torts, or trespasses, or mistakes. *Ib.* 631.

122. The sale of December 26th, 1853, under ordinance No. 481, being void, no title passed to the purchasers at that sale. The title to the property still exists in the

city, except where deeds have since been taken under the acts of 1858 or 1860. The property remaining can at any time be taken possession or be disposed of by the city in the same manner as any other property belonging to her, except where her right to assert her title has been barred by the statute of limitations; and that statute does not run in favor of parties who affirm that the title never passed from the city, and sue for the recovery of the purchase money. *Ib.* 632.

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## SAN JOSE.

1. Under the charter of the city of San José, an ordinance abolishing the salary of the office of street commissioner and substituting fees thereof instead, is legal and binding on the officer. *Wilson v. City of San José*, 7 Cal. 276.

2. Our constitution provided that San José should be the capital of the State until changed by law and a two-third vote of the legislature. The people, at an election, selected Vallejo, which was made the capital by law, after which a majority of the legislature may remove the capital; and Sacramento having been made the capital in this manner, it is not illegal or unconstitutional. *People v. Bigler*, 5 Cal. 29.

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## SCHEDULE.

1. The schedules in insolvency must state the name of each creditor if known,\* and if unknown, such fact must be stated. *McAllister v. Strobe*, 7 Cal. 431.

2. Where an insolvent was liable on a note made by S. to him, and endorsed by him to R., and by him over to M., and describes the same in his schedule, "To R. I am contingently liable for one thousand

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\* The amendment of April 27th, 1880, to the insolvent law of 1861, discharges the debt, whether imperfectly described or not described at all.

dollars and interest, as endorser for one S. upon a promissory note, made and executed by said S. to said R.:" held, that the description was insufficient for inaccuracy, and that his discharge in insolvency is no bar to a recovery on the note. *Ib.*

3. Where an insolvent was liable on a note, and describes the same incorrectly in his schedule: held, that the description was insufficient for accuracy, and that his discharge in insolvency is no bar to a recovery on the note. *McAllister v. Strobe*, 7 Cal. 431; *Judson v. Atwill*, 9 Cal. 478.

4. Where there is a misdescription of a note and a want of specification of the name of the real owner, or of any averment that his name is unknown, in the schedule of an insolvent, the proceedings in insolvency are no bar to a suit on the note, even if the insolvent did not know that the plaintiff was the real creditor. *Judson v. Atwill*, 9 Cal. 478.

5. If an insolvent does not know the name of the owner of notes executed by him, he must state this circumstance in the schedule. In the suit on the notes, the absence of such statement cannot be obviated by proof at the trial. *Ib.*

6. A defective statement in the schedule of an insolvent of certain promissory notes which constitute a portion of his debts and liabilities, does not invalidate the entire proceedings. If the statute as to the particularity with which debts and liabilities are required to be set forth by the insolvent is not substantially complied with, a creditor cannot be prejudiced by the decree of discharge in any suit which he may institute to enforce his claim. *Slade v. His Creditors*, 10 Cal. 485.

7. A note for five hundred dollars to the order of Alfred McCarty is insufficiently described in an insolvent's schedule, where he simply states "Alfred McCarty, borrowed money, April, 1855, five hundred dollars," and a discharge in such case is no bar to a suit on a note. *McCarty v. Christie*, 13 Cal. 81.

8. The want of a schedule of the property is sometimes regarded as a circumstance of fraud in the assignment, but the absence of a schedule has never, we believe, been held sufficient of itself to avoid a conveyance of this sort. *Forbes v. Scannell*, 13 Cal. 288.

## SCHOOL LAND WARRANTS.

1. The act of May 3d, 1852, providing for the disposal of 500,000 acres of land, granted by Congress to this State, is not in conflict with the act of Congress of 1841, providing for the location after they are surveyed. *Nims v. Palmer*, 6 Cal. 13.

2. The State has the most perfect right to determine what shall constitute evidences of title as between her own citizens to all lands within her boundaries, and Congress has no power to interfere therein. *Ib.*

3. The fact of the appellants having objected, in the court below, to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 112.

4. The act of May 3, 1852, makes no reservation of mineral lands, and there is no prohibition against locating school land warrants on any of the mineral lands in the State. *Ib.* 113.

5. The object of the law requiring the record of entry on lands under school land warrants, was to give them notice to subsequent locators and settlers, and a failure to record it in the proper office will not make the location and entry void as to a subsequent locator with actual notice. *Watson v. Robey*, 9 Cal. 54.

## SEAL.

1. A seal is sufficient when the impression is made upon the paper only, and not upon wax. *Connolly v. Goodwin*, 5 Cal. 221.

2. An impression upon paper constitutes a good seal, and this may be made as well by a pen as by a stamp; therefore a scrawl with the word seal written within it, or with the initials [L. S.], is sufficient. *Hastings v. Vaughn*, 5 Cal. 318.

3. The Mexican system knew nothing

of the common law doctrine of seals. A power of attorney executed while those laws were in force is therefore good without a seal. *Poston v. Rasette*, 5 Cal. 470.

4. A release of one joint debtor is a release of the others, but it must be a technical release under seal. *Armstrong v. Hayward*, 6 Cal. 186.

5. There is no particular sanctity about a sealed instrument which will estop a party from alleging fraud in the execution or in the obtaining of it; on the contrary, fraud is a legitimate defense at all times and in all proceedings, at least under our system. *Hopkins v. Beard*, 6 Cal. 665.\*

6. A bill of sale not under seal is insufficient to convey a mining claim. *McCarron v. O'Connell*, 7 Cal. 153; *Clark v. McElroy*, 11 Cal. 169.

7. The law imports a consideration to a sealed instrument from its seal. At common law a want of consideration could not be pleaded to a suit on a sealed instrument, the presumption of a consideration being absolute and conclusive. The statute of this State has not altered the presumption of a consideration which still accompanies the instrument, but only modified the rule so far as to allow it to be rebutted in the answer. *McCarty v. Beach*, 10 Cal. 463.

8. The objection to the want of a seal to a Mexican conveyance is not tenable. No seal was requisite under the civil law. *Stanley v. Green*, 12 Cal. 166.

9. The old and unmeaning distinction between sealed and unsealed instruments is done away with by our statute, and the consideration of a sealed bond may be impeached by the obligor, in the same manner as a promissory note by the maker. *Comstock v. Breed*, 12 Cal. 288.

10. We know of no authority which holds that a conveyance of interest in land must necessarily be under seal, and if it were so at common law, it does not follow that it is so required by our statute. *Ingoldsby v. Juan*, 12 Cal. 577.

11. The difference between instruments sealed and unsealed is, at this day, a mere unmeaning and arbitrary distinction made by technical law, unsustained by reason. By the common law, the equitable title to realty may be conveyed by instrument not under seal, if otherwise sufficient; and

this equitable title, accompanied by possession, is sufficient under our system to give the right of possession. *Ortman v. Dixon*, 13 Cal. 36.

12. Under our system, probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendant. *Id.*

13. In instruments not under seal, or not required to be executed with any particular formality, it is not important in what form the obligation of the party executing as agent or principal is expressed, if from the whole instrument the true character of it can be gathered. *Haskell v. Cornish*, 13 Cal. 47.

14. Where no words appear in the body of an instrument expressive of the intent to make it a sealed instrument, it will not be such even though the characters [L. S.] are added to the signature. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 231.

15. The omission in the record of a deed to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record. It is sufficient if it appear from the record that the instrument copied is under seal; as, for instance, when the deed purports to be under seal and to be signed, sealed and delivered in the presence of the notary before whom it is acknowledged. *Smith v. Dall*, 13 Cal. 512.

16. The execution of an appeal bond, the delivery of it to the clerk, filing it among the papers with the affidavit, and the actual suspension of proceedings, is prima facie as sufficient proof of delivery if delivery is essential, as if the instrument were sealed. *Dore v. Covey*, 13 Cal. 510.

17. It is no objection to a bill of sale for a mining claim that it is not under seal, whatever may be the effect of it in evidence. *Jackson v. Feather River Water Co.*, 14 Cal. 22.

18. A certificate of acknowledgment to a deed, with the private seal of the notary, dated September 23d, 1852, is good under the statute then in force. *Stark v. Barrett*, 15 Cal. 372.

19. A certified copy of a deed from the county recorder's office, contained in the margin of the acknowledgment taken before a notary, and in the place where his seal is usually found, the words "no seal"

\*The statute of 1860, p. 175, permits bills of sales of mining claims without seal to pass the title.



## Seal.—Seamen.—Segregation.

thus: [No Seal]—the conclusion of the acknowledgment being, "In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year," etc. The court below ruled out the copy of the deed as evidence, on the ground that the acknowledgment did not have the notary's seal: held, that the court erred; that the words "no seal," instead of implying that there was no seal affixed, were a mere note by the recorder of the place of the notarial seal, which he probably had no means of copying. *Jones v. Martin*, 16 Cal. 166.

20. A recorder, in certifying to copies of deeds from his office, need not transcribe the notarial seal to the acknowledgment—the certificate of acknowledgment in this case stating that the notary did affix his seal. *Id.*

21. If, as contended in this case, a judgment by default is void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

22. The deed to plaintiff of the land bought being signed by the mayor of the city and sealed with the corporate seal—the mayor being the legal custodian of the seal and it being affixed by his authority—is sufficient to entitle the deed to be read in evidence, and a party relying upon it need not go behind the seal for the purpose of showing authority for its execution. The seal is prima facie evidence that it was affixed by proper authority, and the deed is prima facie sufficient to pass the title. *McCracken v. City of San Francisco*, 16 Cal. 638.

## SEAMEN.

1. A British seaman, on board a British vessel, of which a British subject is mas-

ter, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a State court. *Pugh v. Gillan*, 1 Cal. 486.

2. Justices of the peace alone have power to try and commit deserted seamen under the acts of Congress, and commissioners of the United States courts can only arrest and commit for trial. *Ex parte Crandall*, 2 Cal. 144.

See ADMIRALTY.

## SECURITY.

See PLEDGE, SURETY.

## SEGREGATION.

1. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay and refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 44; *Taylor v. Seymour*, 6 Cal. 514.

2. Where the land sold under execution consisted of separate but adjoining tracts, but the sheriff and purchaser were ignorant of the subdivisions, and the defendant failed to inform the sheriff of the fact, or to direct a sale by parcels: held, that the sale of the land in gross was valid. *Smith v. Randall*, 6 Cal. 51.

3. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of seg-

regation of the flour, but that B was estopped by his receipt from denying his liability. *Adams v. Gorham*, 6 Cal. 71; *Goodwin v. Scannell*, 6 Cal. 543.

4. Where the plaintiff bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased, not separate it from the remainder; but the vendor subsequently sold the remainder and more to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiff, which was afterwards attached in a suit against plaintiff's vendor: held, that the sale and removal of all the flour except that bought by plaintiff, was a segregation of plaintiff's flour, vesting in him a clear title at the time of the seizure. *Horr v. Barker*, 6 Cal. 496.

5. Nor can the claim of a subsequent purchaser of flour from the same vendor, taking an order on the same storekeeper, embarrass the plaintiff's claim, there being no flour in store to meet the order in favor of such subsequent purchaser. *Ib.*

6. And where the plaintiff's action in such case was brought for the value of the flour, against another party claiming the flour, who had seized the same, the fact that plaintiff claims a less quantity of flour than he is really entitled to does not operate otherwise than as a waiver of his claim to such additional quantity. *Ib.*

7. The doctrine of segregation is not applicable to a man's property alone, in an action against a trespasser, and having claimed damages for a less quantity of flour than was his, it cannot be objected that his action must fail for want of segregation of the flour for which he claims from that which he does not claim, though it is his. *Ib.*

8. Where the plaintiff took a mortgage on 1,000 sacks of flour, and took the warehouseman's receipt therefor, and subsequently requested him to segregate a particular flour from a large quantity long to the mortgagor, and the houseman accordingly put plaintiff's on a pile of 1,196 sacks of the mortgage standing separate from the rest: it was a good segregation. *Payne*, 6 Cal. 659.

9. Where the plaintiff  
hundred sacks of flour,

warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterward attached as the property of the vendor: held, that the delivery was sufficient and the sale valid. *Cartwright v. Phoenix*, 7 Cal. 282.

10. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made in his books charging the vendor and crediting the purchasers with their respective lots: held, that there was a sufficient livery of possession without a sale of the various lots. *Horr v.*  
Cal. 608.

11. Where the vendor part of goods on storage, together and of the same separated from the large change the possession of goods of the vendor in party are sold, the is complete by delivering a new receipt on the balance.  
*Ib.*

12. The right to let  
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*Ib.* 60

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15. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, when the time allowed by law for the assessment extended to a day four days after the survey. *Palmer v. Boling*, 8 Cal. 388.

16. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, and to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman without making any separation of each lot from the common mass, but voluntarily leave the flour standing on the books of the warehouseman to the credit of each purchaser, for his proper number of barrels, it is a complete delivery to each purchaser and will pass the title to each. *Horr v. Barker*, 11 Cal. 403.

17. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser. *Ib.* 403.

18. A safe in the possession of McC. belonging to W. F. & Co., for whom, as also for plaintiff, he was agent, contained \$6,000 in coin. Of this sum four hundred dollars belonged to W. F. & Co., the balance to plaintiff. Defendant, as sheriff, under a writ against McC., seized \$1,800 of the money in the safe as his property and put it in a bag. Plaintiff then claimed the money as his, McC. being present and not objecting: held, that this amounted to a segregation of the \$1,800 from the mass of coin in the safe so as to replevin by plaintiff. *Griffith v. Bogardus*, 14 Cal. 412.

See DELIVERY, SALE, STATUTE OF FRAUDS.

## SENTENCE.

1. When judgment of death has been rendered against a prisoner by the court

of first instance, it was reversed by the supreme court, as well on the ground that it has no jurisdiction to pass sentence of death, as that numerous errors and irregularities appeared to have occurred at the trial, and in the proceedings. *People v. Daniels*, 1 Cal. 107.

2. It is no error for a court in a criminal case to set a day for pronouncing sentence in the absence of the prisoner. It is only requisite that he should be present when the sentence is pronounced. *People v. Galvin*, 9 Cal. 116.

3. After sentencing the prisoner, but before signing final judgment, the court had the prisoner brought before it, and amended the sentence by shortening the time: it was held not to be error. *People v. Thompson*, 4 Cal. 240.

See CRIMES AND CRIMINAL LAW.

## SESSIONS, COURT OF.

1. By the judiciary act of March 11th, 1851, the courts of sessions are vested with the power of taxation and appropriation for county purposes.\* *Thompson v. Rowe*, 2 Cal. 70.

2. No appeal lies from a judgment of a district court on an appeal from an order of the court of sessions† upon an application for a ferry license. *Webb v. Hanson*, 2 Cal. 134.

3. When the justices of the peace fail to elect from their number associate justices of the court of sessions on the first Monday in October, the county judge may appoint associates for the term, but the justices may convene at a subsequent time and select associates. *People v. Campbell*, 2 Cal. 137.

4. On an election by justices of the peace for associate justices of the court of sessions, the county judge and clerk are ex officio officers of this convention, but they have no authority other than that of presiding over and recording its proceedings,

\*This power, as conferred, declared unconstitutional in *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 20.

†The appellate jurisdiction of the district declared unconstitutional in *People v. Peralta*, 3 Cal. 373.

and the dissolution of the convention by the county judge is illegal. *Ib.*

5. The act of March 18th, 1850, grants an appeal to the district court from the court of sessions\* in the matter of a license to establish a ferry, but does not provide for an appeal from the judgment of the district court, which is therefore final and conclusive. *Webb v. Hanson*, 3 Cal. 68, 105.

6. There can be no appeal from the court of sessions to the district court. *People v. Peralta*, 3 Cal. 379.

7. The legislature possessed an undoubted right to transfer the criminal business of the court of sessions to the district court. *People v. Gilmore*, 5 Cal. 380.

8. All other than judicial functions conferred upon the courts of sessions or its officers are unconstitutional and void. *Burgoyne v. Supervisors of San Francisco County*, 5 Cal. 20, 22; *Phelan v. Supervisors of San Francisco County*, 6 Cal. 540; *Hardenburgh v. Kidd*, 10 Cal. 403.

9. Justices are not regarded by the constitution as supernumeraries to the court of sessions; they must, as necessary officers, begin with and continue through the trial. *People v. Ah Chung*, 5 Cal. 105; *People v. Barbour*, 9 Cal. 234.

10. The court of sessions has no appellate jurisdiction in either civil or criminal cases. Its jurisdiction is original, not appellate. *People v. Fowler*, 9 Cal. 87.

11. Where the sheriff as ex officio tax collector received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

12. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout the State, to transfer from the courts of sessions to the board of supervisors the general and special powers and duties of a civil character which had, before the pas-

sage of the act, been vested in such court. *People v. Bircham*, 12 Cal. 54.

13. An indictment for grand larceny found at a special term of the court of sessions is valid. Under the statute authorizing that court to hold special terms in certain cases, the court, when specially called, has the same powers as at a regular term. *People v. Carabin*, 14 Cal. 439.

14. An indictment in the court of sessions in San Francisco may be entitled either as of the county of San Francisco or as of the city and county of San Francisco. *People v. Beatty*, 14 Cal. 572; see *People v. Mullins*, 10 Cal. 20.

15. Fighting a duel with a fatal result is not murder within our statutes, but a special offense under the act of 1855. Over such offense courts of sessions\* have jurisdiction. *People v. Bartlett*, 14 Cal. 653.

16. Where the convention of justices of the peace, for electing two associate justices of the court of sessions, was presided over by the then acting county judge, his official acts at such convention were legal and valid—although it was afterwards determined that another person had been legally elected to that office; and a court of sessions, composed of said other person as county judge, and of the two associates elected by such convention, was legally organized. *People v. Wyman*, 15 Cal. 74.

17. On an indictment for murder the court of sessions is not bound to assign counsel for prisoner in empanneling the grand jury. *People v. Moice*, 15 Cal. 331.

18. Indictment and trial in the court of sessions in the city and county of San Francisco, for larceny, charged to have been committed within said city and county. The evidence tended to show that the offense was there committed, and the verdict was "guilty as charged in the indictment:" held, that the verdict was conclusive as to the offense being committed within the jurisdiction of said court. *People v. Magallones*, 15 Cal. 428.

19. It is no objection to an indictment found in said court of sessions, that an assistant prosecuting district attorney was present during the session of the grand jury, while the charge embraced in the indictment was under consideration. *Ib.*

20. It is irregular for one of the justices

\*The appellate jurisdiction of the district court declared to be unconstitutional in *People v. Peralta*, 3 Cal. 379.  
R. O.

\*The statute of 1866, page 31, amendatory of the criminal law vests the jurisdiction in the district courts.

composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not present during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed, should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, not here decided—but the practice is dangerous and disapproved of. *People v. Eckert*, 16 Cal. 113.

### SET-OFF.

See COUNTER CLAIM.

### SETTLERS.

1. The provision of the "settlers' act" of 1856, requiring the party recovering in ejectment to pay the defendant the value of his improvements, it seems is not in violation of the provision of the federal constitution, prohibiting States from passing laws impairing the obligation of contracts. All questions of property are within the jurisdiction of the respective States, and the individual members thereof in forming a government are not considered as contractors with such government, in the sense employed in the constitution of the United States. *Billings v. Hall*, 7 Cal. 6.

2. The settlers' act of 1856 does not discriminate between an innocent and a tortious possession, nor is it a mere attempt to avoid certainty of action by providing for an equitable adjustment of the whole subject in one suit. By its terms it applies to past as well as present cases. It takes from a party that which before was his; for if he refuses to pay for improvements put on his land, against his will, by a trespasser, he loses not only the improvements but the land itself. Such legislation is repugnant to morality and justice, and in violation of the letter and spirit of the

constitution. *Billings v. Hall*, 7 Cal. 9; *Welch v. Sullivan*, 8 Cal. 187.

3. Those who have settled in good faith upon lands, believing them to belong to the United States, without notice of an adverse title, ought to be protected; in fact, they are protected by the rules of law and equity. *Welch v. Sullivan*, 8 Cal. 202.

4. The eleventh section of the act of 1856, for the protection of actual settlers and to quiet land titles, only applies to actions brought to recover the possession of lands after the issuance of a patent. *Morton v. Folger*, 15 Cal. 208.

See LANDS, MINES AND MINING, II.

### SHERIFF.

- I. In general.
- II. The office of sheriff.
  1. The sheriff's bond.
  2. The elizor.
- III. The return.
- IV. The levy.
- V. Demand on a sheriff.
- VI. Sale by the sheriff.
- VII. Sheriff's deed.

#### I. IN GENERAL.

1. After the process of the court is finally and completely executed, from that moment the power of the sheriff under it and the authority of the court to enforce it, ceased. *Loring v. Illsley*, 1 Cal. 28.

2. Where an order of court directed the sheriff to seize certain specific property, and this property proved not to belong to the defendant in the suit, the sheriff was held liable to the owner. *Rhodes v. Patterson*, 3 Cal. 470.

3. The time provided by the statute in which a jury shall be returned by the sheriff is directory, and not mandatory. *Mowry v. Starbuck*, 4 Cal. 275.

4. The testimony of the sheriff is competent to disclose what transpires in the jury room. *Wilson v. Berryman*, 5 Cal. 46.

5. The statute penalties against sheriffs for the nonpayment of moneys collected on execution are only receivable where the sheriff, by his own return, admits the



collection of the money, but refuses to pay it over. *Egery v. Buchanan*, 5 Cal. 56.

6. In an action of trespass against the sheriff, where he is declared against personally and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. *Poinsett v. Taylor*, 6 Cal. 79.

7. In such a case it is not necessary to prove that the defendant directed his deputy to seize the particular property in question in order to hold the defendant liable. *Id.*

8. Where the sheriff wrongfully took possession of the goods, and thereby deprived the plaintiff of them, the fact that they were taken by the coroner, under a writ against the sheriff, before the latter had removed them, does not excuse his tort. *Squires v. Payne*, 6 Cal. 659.

9. Statutory penalties against a sheriff are only recoverable when by the return of the sheriff he admits the collection of the money, and refuses to pay it over, and not where his failure to pay over arises from his inability to decide between conflicting claims of different execution creditors. *Johnson v. Gorham*, 6 Cal. 196.

10. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same, and gave C in exchange a receipt for the same, and transferred it on the warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff was not liable to C in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams v. Gorham*, 6 Cal. 71; *Goodwin v. Scannell*, 6 Cal. 548.

11. Where the defendant, as sheriff, collects money on attachment more than sufficient to satisfy the attaching creditor, and after the expiration of his term of office, another attaching creditor attaches the surplus and seeks to make the sheriff liable therefor on his official bond: held, that the demurrer to the complaint was properly sustained, as there was no relation between the defendant and plaintiff to render defendant officially liable. *Graham v. Endicott*, 7 Cal. 146.

12. Where power is given to sue au-

thority exists to give an indemnity bond to the sheriff to retain property seized under attachment, it is an instrument necessary to carry the power to sue into effect. *Davidson v. Dallas*, 8 Cal. 258.

13. The application of an attaching creditor to compel the sheriff to pay over the proceeds of goods attached, there being conflicting claims between several attaching creditors, may be made by motion. If notice of the motion is not given by the party moving to the other attaching creditors, it is the duty of the sheriff to do so, if he wishes the decision to bind them. *Dixey v. Pollock*, 8 Cal. 573.

14. Where the sheriff as ex officio tax collector received taxes, and afterwards on being sued therefor, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

15. It is not necessary in an action against a sheriff to recover damages (in addition to the two hundred dollars imposed by law as a penalty) for a failure to execute and return process, that two suits should be brought. Damages and the penalty may be recovered in one suit. *Pearkes v. Freer*, 9 Cal. 642.

16. Where a writ of restitution has been awarded, and the sheriff refuses to execute the same, on the ground that the mine is in possession of certain persons not parties to the suit, who claim to hold under the corporation, the court will award a peremptory mandamus against the sheriff to compel him to execute the writ. *Fremont v. Crippen*, 10 Cal. 215.

17. In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure; the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owen*, 11 Cal. 23.

18. In the service of process the sheriff is responsible only for unreasonably or not reasonably executing it. He is not bound to start on the instant of receiving a writ

In general.—The Office of Sheriff.

to execute it, without regard to anything else. *Whitney v. Butterfield*, 13 Cal. 338.

19. Reasonable diligence in the execution of process depends upon the particular facts; whether, for instance, the writ be for fraud, or because defendant is about to leave the State, or remove his property, and the like. *Ib.*

20. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Ib.*

21. Where an indemnity bond is given to a sheriff to hold him harmless and pay any judgment which may be rendered against him, by reason of his seizure of certain property, his remedy at law on the bond is clear, for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. *White v. Fratt*, 13 Cal. 524.

22. A bond given voluntarily to the sheriff on delivery of the property attached is valid at common law. *Palmer v. Vance*, 13 Cal. 557.

23. Where a redemptioner under the statute pays to the sheriff an excess of money, under protest as to the excess, the payment is not compulsory. *McMillan v. Vischer*, 14 Cal. 240.

24. In such case the sheriff is the bailee of the redemptioner as to the excess, who may recover it back on demand, the money not having been paid over to the redemptioner. *Ib.* 241.

25. *Davidson v. Dallas*, 8 Cal. 277, commented on, and doubted, and the opinion intimated that the bonds in question were independent securities for the same object of holding the sheriff harmless in respect to the same act of retaining the vessel, and that they amount to an undertaking on his part to detain and hold the vessel, at the request of each of the creditors, Gilson and Dallas, and to a separate covenant by each of these obligors, in consideration of this agreement, to see him harmless from any consequences arising from such detention. The question, therefore, is left open for review. *Davidson v. Dallas*, 15 Cal. 78.

26. In an action against a sheriff for seizing and selling certain personal property, alleged to belong to plaintiff, under an execution against one Teal, it being

averred in the answer that the property belonged to Teal: held, that evidence tending to prove that it was the partnership property of Teal and plaintiff was proper, and that if they were partners, and as such owned the property, plaintiff could not recover. *Hughes v. Boring*, 16 Cal. 82.

27. Under the act of 1857, Ch. 236, regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid to the sheriff. *Edmondson v. Mason*, 16 Cal. 388.

## II. THE OFFICE OF SHERIFF.

28. Where it appeared that the claimant of the office had acted as sheriff, that being the office in controversy, that fact, together with the certificate of election, would raise the presumption that he had executed his bond and taken the oath of office. *People v. Clingan*, 5 Cal. 390.

29. A sheriff is a ministerial or executive officer solely, but there is no constitutional prohibition against his exercising the duties of tax collector, where the law consolidating the two offices was passed prior to his election. *Merrill v. Gorham*, 6 Cal. 43; *People v. Squires*, 14 Cal. 15.

30. Strictly speaking, there can be no vacancy in the office of sheriff caused by the death, removal or resignation of the incumbent; for upon the happening of such an event, the coroner by operation of law becomes sheriff. *People v. Phoenix*, 6 Cal. 93.

31. The coroner only holds the office of sheriff ex officio until the appointment of a new sheriff by the board of supervisors. *Ib.*

32. Though the appointment of a sheriff by a county judge be void, yet the acts of such sheriff as a de facto officer are good. *People v. Roberts*, 6 Cal. 215.

33. In an action by one claiming to have been elected sheriff against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 395.

34. The defendant being elected sheriff of the county of San Francisco in September, 1855, on July 26th, 1856, and after the consolidation act went into effect, one of the defendant's sureties applied to the county judge to be released from further liability; on the sixth of August the judge declared the office vacant by reason of the failure of defendant to file new bonds: held, that the county judge had no jurisdiction, the new law then in force vesting the power of approving the bonds of such officer in the county judge, auditor, and president of the board of supervisors. *People v. Scannell*, 7 Cal. 438.

35. In the construction of the act of April 29th, 1857, repealing the then existing law concerning ex-sheriffs as tax collectors, and requiring them to turn over the assessment rolls to their successors, taken in connection with the act of April 30th, excepting certain counties from the operation of the repealing law of the day previous, the supplementary statute must be taken as part of the repealing statute, and construed as passed at the same time. *Manlove v. White*, 8 Cal. 377.

36. On the election of a new sheriff the former sheriff must complete the execution of all final process which he had begun to execute before the expiration of his term of office. *People v. Boring*, 8 Cal. 407.

37. The duties of sheriff, as such, are more or less connected with the administration of justice; they have no relation to the collection of the revenue. *People v. Edwards*, 9 Cal. 292; *People v. Squires*, 14 Cal. 16.

38. A motion against a sheriff and his sureties, under the provision of the ninth section of the "act concerning sheriffs," passed April 29th, 1851, is a summary proceeding in derogation of the rules of the common law, and is penal in its character, and for these reasons the act must be strictly construed. *Wilson v. Broder*, 10 Cal. 488.

39. The remedy by motion against a sheriff and his sureties, to compel them to pay over money collected on execution, was only given for cases of intentional delinquency on the part of the sheriff, as a punishment for his willful or corrupt neglect of duty, and was not designated to embrace a case in which he declined to pay over money collected under circumstances of a bona fide, well grounded doubt of the authority of the party to demand it. *Ib.* 489.

40. A sheriff cannot maintain an action against a county for compensation for "taking care of the court house and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. *Stockton v. Shasta County*, 11 Cal. 114.

41. A sheriff, whose term of office has expired, has no right to collect the State and county tax, as unfinished business from the assessment list which came into his hands while in office. *Fremont v. Boling*, 11 Cal. 389.

42. The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. *Ib.*

43. There is no irreconcilable conflict between the amendatory act of 1853, and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement. *Ib.* 390.

44. The sheriff being ex officio tax collector of foreign miners' licenses, by an act of the legislature may be deprived of the office of tax collector before the expiration of term. *People v. Squires*, 14 Cal. 16.

45. The sheriff and his deputy are one person in law, so far as to make the former responsible for the acts of the latter, but not so far as to require of the sheriff impossibilities or to impose unconscionable exactions. *Whitney v. Butterfield*, 13 Cal. 342.

See ELECTION, OFFICE, VACANCY.

1. *The Sheriff's Bond.*

46. The consolidation act of San Francisco gave the officers named therein two days after the meeting of the board of supervisors in which to file new bonds. The meeting took place on the ninth of July, and the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 436.

47. A defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. *People v. Edwards*, 9 Cal. 292.

48. The revenue act of 1854 made the sheriff ex officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miner's licenses: held, that the bond in suit entered into in 1856 must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes except foreign miners' licenses are covered by the bond. *Ib.*

49. When the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action; but separate judgments are required. *Ib.* 293.

50. Plaintiff sued out an attachment against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the

sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss v. White*, 16 Cal. 68.

51. Sureties on the sheriff's official bond in this State stipulate for his official, not his personal dealings, and are entitled to stand on the precise terms of their contract. *Ib.* 69.

See BOND, II.

2. *The Elizor.*

52. The appointment of an elizor as a substitute sheriff by a judge having competent jurisdiction, the presumption of law is that he faithfully performed his duty. *Turner v. Billagram*, 2 Cal. 522.

53. In the event of the disqualification of the sheriff or coroner, a district court has the right to appoint an elizor, not only by statute but by virtue of its original jurisdiction. *Wilson v. Roach*, 4 Cal. 367.

54. In trespass against the sheriff, the court below, on plaintiff's motion, may order a special jury to try the case instead of the regular panel. The sheriff being interested ought not to summon a jury, and there being no coroner, an elizor may be appointed to summon the jury. *Pacheco v. Hunsacker*, 14 Cal. 124.

## III. THE RETURN.

55. Where the place where the summons was served was not stated, but it was directed to the sheriff of San Francisco, and was returned by him served, the court should have assumed that it was served within his jurisdiction. *Crane v. Brannan*, 3 Cal. 195.

56. A sheriff's return is not traversable, and a court will not permit it to be attacked collaterally, even if the officer is shown to have been guilty of fraud and

## The Return.—The Levy.

collusion. *Egery v. Buchanan*, 5 Cal. 56.

57. Where a sheriff fails to pay over money collected on execution, the action should be for a false return. *Ib.*

58. Courts cannot know an under officer, and the act and return of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

59. The term "appurtenances," used in the return of a levy by a sheriff, is too general, vague and indefinite to comprehend in its meaning any personal property as the subject of the levy; nothing, therefore, is passed by the sale. *Monroe v. Thomas*, 5 Cal. 471.

60. A sheriff has no right after making a return to amend it so as to affect rights which have already vested. *Newhall v. Provost*, 6 Cal. 87; *Webster v. Haworth*, 8 Cal. 26.

61. A description in a sheriff's return of city lots, by numbers, referring to the official city map, is sufficient. *Welch v. Sullivan*, 8 Cal. 186.

62. The return of an attachment cannot be amended by the sheriff so as to postpone the rights of creditors attaching subsequently, but before the correction. *Webster v. Haworth*, 8 Cal. 26.

63. The lien of an attaching creditor cannot be divested by the failure of the sheriff to make a proper return of the writ, and it is not necessary where the levy is made by posting a copy of the writ on the premises, that the return of the sheriff should show that the premises were at the time unoccupied. *Ritter v. Scannell*, 11 Cal. 248.

64. A mistake in the date of the sheriff's return may be corrected at any time. *Ib.* 249.

65. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 133.

66. Where the return of a sheriff states that he served defendants with a certified copy of the complaint, it will be presumed that the copy was certified by the clerk, and not by some one else. *Curtis v. Herrick*, 14 Cal. 119.

67. A defendant having no defense to an action cannot go into equity and enjoin a judgment by default on the ground that

the sheriff's return of service on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141.

See RETURN.

## IV. THE LEVY.

68. If the master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Loring v. Illsley*, 1 Cal. 31.

69. A being indebted to B, delivered to him merchandise as security for his debt, which he was to sell, and apply the proceeds to its payment. A sheriff levied upon the property as belonging to A: held, that the merchandise was not subject to seizure under an execution against A, without first paying the debt of B. *Swanson v. Sublette*, 1 Cal. 124.

70. A sheriff who levies an attachment by virtue of the process of the court, has not the right of property in the debt, and cannot maintain an action in his own name for the recovery of the debt. *Sublette v. Melhado*, 1 Cal. 105.

71. By the statute of 1850, personal property levied on by the sheriff must be actually seized and sold in presence of the purchaser. *Smith v. Morse*, 2 Cal. 556.

72. The assent of an ordinary agent, who had general charge of his principal's affairs during his temporary absence, will not justify the sheriff who holds an execution against a third person in levying upon property in the possession of the principal in her absence. *Fitch v. Brockman*, 2 Cal. 578.

73. Money in the hands of a sheriff, collected on execution, is not a debt due to the plaintiff in the execution, but is in the custody of the law until properly disposed of, and is not the subject of attachment or garnishment, nor can the sheriff attach money, collected on execution, in his own hands. *Clymer v. Willis*, 3 Cal. 363.

74. A sheriff, on the request of defendant, may levy on real estate, though there be personal property present amply sufficient to satisfy the execution. *Smith v. Randall*, 6 Cal. 50.

75. In an action against a sheriff for refusing to levy an attachment on certain



property as belonging to the attachment debtor, testimony that the property had been claimed by a third party, and the right of property tried before a sheriff's jury, and decided in favor of claimant, is irrelevant and inadmissible, when those facts have not been set up as new matter of defense in the answer. *Strong v. Patterson*, 6 Cal. 157.

76. An officer who seizes property in the hands of the debtor may justify under the execution or process, but when he takes property from a third person, who claims to be the owner thereof, on execution, he must show the execution; if on attachment, the writ of attachment; and, as we think, the proceedings on which it was based. *Thornburg v. Hand*, 7 Cal. 561.

77. The owner of property attached or levied upon as the property of another is not conclusively estopped from showing title in himself because he has given an accountable receipt for its delivery to the officer, although the receipt admits that the property is attached or levied upon as the property of the debtor, if he makes known to the officer his claim at or before the time the receipt is given. *Bleven v. Freer*, 10 Cal. 177.

78. An officer, in order to justify the seizure of property in the possession of a stranger to the writ, which he has executed, must plead specially such justification. He cannot justify under a general denial of the allegations of the complaint. *Glazer v. Clift*, 10 Cal. 304.

79. The presumptions are in favor of the regularity of the acts of the officer, and a return which simply states that the property was attached is sufficient prima facie to show a due and proper execution of the writ. *Ritter v. Scannell*, 11 Cal. 248.

80. T. commenced suit against I. by attachment; the writ was levied upon certain personal property by the plaintiff, H., as sheriff. M. I., wife of I., claimed the property, and brought her action of replevin under the code, which action was decided in favor of the sheriff. Other creditors attached the same property, which the sheriff sold and paid the proceeds into court. In an action on the replevin bond it was held that T. had a lien by attachment upon the goods, which continued even after the replevy by M. I. *Hunt v. Robinson*, 11 Cal. 272.

81. If the sheriff levies upon the property of a person not a party to the execution, he is responsible in an action at law. *Markley v. Rand*, 12 Cal. 277.

82. A deputy sheriff who seizes property under an attachment, is not authorized by virtue of his office to bind the sheriff by contract for the payment of a keeper to take charge of the property so attached. Special authority for this purpose must be shown. *Krum v. King*, 12 Cal. 413.

83. A sheriff who levies a writ of attachment upon personal property, in obedience to the commands of the writ, has no right to let the property go out of his hands except in due course of law, and if he does, and the debt is lost, he is responsible to the plaintiff in the attachment for the amount of the debt. *Sanford v. Borning*, 12 Cal. 541.

84. No parol instruction of the plaintiff in attachment or execution, respecting property seized by the sheriff under either writ, will discharge such sheriff from liability. The statute is express that such instructions must be in writing. *Id.*

85. The evident meaning of the language of the act embraces all acts done by the sheriff in respect to the execution of process, including the care and disposition of the property levied upon. *Id.* 542.

86. The mere fact that the judgment debtor (against whom execution had issued) was found upon the mining ground of plaintiff, did not justify the sheriff, who had the execution, in going on the ground and digging up the soil and taking the gold it contained. *Rowe v. Bradley*, 12 Cal. 230.

87. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued, and levied upon property of the principal sufficient to satisfy the same. After the levy, the sheriff, under the direction of the plaintiff in execution, took the principal's note for the amount of the judgment, and released the levy. Subsequently, a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff: held, that the release of the levy of the first execution and taking of the principal's note, discharged the surety. *Morley v. Dickenson*, 12 Cal. 563.

## The Levy.

88. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders, and assigned to the purchaser, unless a full and accurate description of the particular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy and announced at the sale. *Crandall v. Blen*, 13 Cal. 23.

89.\* Where one writ of attachment was placed in the sheriff's hands on Sunday, and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Whitney v. Butterfield*, 13 Cal. 340.

90. The mere omission of a deputy to inform the sheriff of having process in hand, is not such negligence as to charge the sheriff in case a writ last in hand was executed first. *Ib.*

91. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *White v. Fratt*, 13 Cal. 525.

92. In the case of conflict between the individual and firm creditors, equity has jurisdiction. No action lies against the sheriff for levying the execution of the individual creditor, and a sale to different purchasers might result in a loss of the property. *Conroy v. Woods*, 13 Cal. 634.

93. Attachment issues against H, and the sheriff proceeds with the writ to his store, which is locked and fastened front and rear by iron shutters. The sheriff with his deputy stand at the doors guarding all entrance. H now files his petition and schedule in insolvency, and the usual order of stay of proceedings is made. H returns to the store and advises the sheriff these things. The sheriff threatens to break open the store, when H gives him the key, and he enters and levies: held, that the sheriff had no right to levy, and

that the property vested in the assignee of the insolvent, subsequently appointed by relation from the filing of the petition and schedule. *Taffis v. Manlove*, 14 Cal. 51.

94. A ratification cannot defeat rights of third persons acquired between the act of the agent and the ratification by the principal, as attachments levied on property of a debtor after a sale by or to an agent. *Taylor v. Robinson*, 14 Cal. 401.

95. The sheriff under his general powers cannot take anything but legal currency in satisfaction of an execution, and where he takes a note, indorses it on the execution and then returns it satisfied, the return is not conclusive, and perhaps not prima facie evidence of satisfaction, unless it shows some authority for receiving the note. *Mitchell v. Hackett*, 14 Cal. 666.

96. Plaintiff sues the sheriff for seizing certain chattels claimed by plaintiff. Defendant justifies under a writ of attachment in the suit of F. v. C., and also under an execution issued upon a judgment had in that suit, setting up that plaintiff claimed the chattels by purchase from C., and that such purchase was fraudulent as to F., a creditor of C. After the evidence on both sides was closed, the court, on motion of plaintiff, struck out the attachment proceedings, judgment and execution, and all evidence justifying thereunder, on the ground that defendant had not proved all of the debt upon which the attachment issued: held, that this was error; that, had no debt been proved, the judgment and execution being introduced, with an offer to show a levy and sale thereunder, was enough, if not to justify the first seizure under the attachment, at least to diminish the damages, by showing that the property was appropriated by law to the proper purpose, to wit: paying C.'s debt, if it really were his property, or subject, as his, to the process because of the fraud. *Walker v. Woods*, 15 Cal. 69.

97. But even if any proof aliunde of C.'s indebtedness were required, when the attachment papers, affidavit, undertaking, etc., were regular on their face, the judgment was prima facie sufficient to admit the attachment papers in proof. *Ib.*

98. If, in justification by the sheriff under such attachment, judgment and execution, it be necessary to aver in the answer that the writs of attachment and execution were returned executed by the sheriff,

## The Levy.—Demand on a Sheriff.—Sale by the Sheriff.

still the omission of this averment, though it might have been ground of demurrer, was no ground for rejecting all evidence under such justification. *Ib.*

99. Plaintiff here cannot dispute the regularity of the proceedings in such attachment, unless they were void on their face. Defendant could show his attachment proceedings, the judgment, execution and levy, and then that the sale by C. to plaintiff was fraudulent. No proof of the indebtedness of C. to F. was necessary, after showing the affidavit, undertaking and attachment; and no irregularities—in justifying sureties and the like—could be availed of by plaintiff. *Ib.*

## V. DEMAND ON A SHERIFF.

100. Where a sheriff is notified before levy that a third person owns the property, the taking is tortious, and no demand is necessary to be proven in an action of replevin. *Ledley v. Hays*, 1 Cal. 161.

101. Where goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 44; *Taylor v. Seymour*, 6 Cal. 514.

102. Where no such notice or demand was proved, it was error to charge the jury "that the sheriff was a trespasser, and that they were to find the value of the goods." *Daumiel v. Gorham*, 6 Cal. 44.

103. In an action against a sheriff to recover property seized under process, or its value, by the owner, it is necessary that the plaintiff should show affirmatively notice and demand before bringing suit, otherwise he cannot recover in such action. *Killey v. Scannell*, 12 Cal. 75.

See DEMAND.

## VI. SALE BY THE SHERIFF.

104. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring v. Illsley*, 1 Cal. 29.

105. All the public streets of San Francisco running into the water, as laid down in the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public and exempt from executions against the city. *Wood v. City of San Francisco*, 4 Cal. 193.

106. The statute regulating sheriff's sales of real estate does not design to invest the purchaser with a title until six months after the sales. *Duprey v. Moran*, 4 Cal. 196.

107. The nature of the interest to be sold under a decree of sale is sufficiently ascertained by a lease which is referred to and described in the decree. *Gaskill v. Moore*, 4 Cal. 235.

108. A purchaser at sheriff's sale acquires no right whatever against the sheriff for property sold, unless at the time of the sale he pays down in cash the whole of the purchase money. *People v. Hays*, 5 Cal. 68.

109. The right of a party to have his title to land protected from a sale which may create a cloud upon it, upheld. *Guy v. Hermance*, 5 Cal. 75.

110. If the sheriff, before a sale of real estate under execution, neglects to give the proper notice, the statute gives an adequate remedy against an officer; but it is not sufficient to set aside or avoid a sale. *Smith v. Randall*, 6 Cal. 50.

111. A party who purchases stock of an incorporation sold under execution, knowing they were under hypothecation, is chargeable with notice of the fact, and takes subject to the claim of the pledge. *Weston v. Bear River and Auburn W. and M. Co.*, 6 Cal. 429.

112. A sale by a sheriff under execution, of a house claimed as a homestead by the defendant in execution, and ascertained by appraisalment to be worth over \$5,000 should not be made until an exact appraisalment of the value of the premises is obtained, so that the sheriff can convey a definite fractional undivided interest therein. *Gary v. Estabrook*, 6 Cal. 459.

113. Great inadequacy of consideration paid for land is sufficient to put the purchaser upon notice of a fraud by his vendor in the purchase thereof on execution at a constable's sale. *Argenti v. City of San Francisco*, 6 Cal. 679; *Hart v. Burnett*, 15 Cal. 608.

114. A purchaser at sheriff's sale can maintain an action for rent against the tenant in possession under the judgment debtor before the expiration of six months allowed for redemption, as often as the rent becomes due, under the terms of the lease existing when he purchased. *Reynolds v. Lathrop*, 7 Cal. 46.

115. The regularity of a sheriff's sale cannot be impeached by a stranger, or in a collateral proceeding. *Kelsey v. Dunlap*, 7 Cal. 162.

116. Tenants in common, or partners, have a right to acquire their cotenant's or copartner's interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter v. Laffan*, 7 Cal. 593.

117. Where a party purchased real estate at an execution sale upon the faith of the representations of a judgment creditor that his judgment was the first on the property, when in fact there were prior incumbrances on it of more than its value: held, that the purchaser should be relieved and the judgment creditor should be estopped from claiming an advantage resulting from his own misrepresentations. *Webster v. Haworth*, 8 Cal. 25.

118. The writ of venditioni exponas is a simple order of the court to sell property already levied on under execution. It confers no power to levy, and a recital in the return that the sheriff had levied and sold by virtue of the writ is an unimportant error, when it appears that the levy had been previously made under execution. *Welch v. Sullivan*, 8 Cal. 186.

119. After the adoption of the common law in 1850, the municipal and common lands of pasturage were liable to execution sale. *Welch v. Sullivan*, 8 Cal. 197; contra *Hart v. Burnett*, 15 Cal. 616. See *Holladay v. Frisbie*, 15 Cal. 684; *Wheeler v. Miller*, 16 Cal. 125.

120. A sale under a void judgment passes no title. If the judgment is merely voidable, the sale is good. *Gray v. Hawes*, 8 Cal. 568.

121. In an action against a purchaser at sheriff's sale for not paying the amount of his bid, it cannot be set up as a defense that no sufficient notice of the sale was given. *Harvey v. Fisk*, 9 Cal. 94.

122. The title to real estate sold under execution does not pass until the execu-

tion and delivery of the sheriff's deed. *Anthony v. Wessel*, 9 Cal. 104.

123. A purchaser at a sheriff's sale may have a lien upon the property prior to that of the redemptioner. *Knight v. Fair*, 9 Cal. 118.

124. The interest of a miner in his mining claim is property, and may be taken and sold under execution. *McKeon v. Bisbee*, 9 Cal. 142.

125. An execution issued under a judgment of the district court rendered in 1850, before the judgment was signed by the district judge, is void, and a sale under such execution passes no title to the purchaser. *Wells v. Stout*, 9 Cal. 497.

126. A sheriff may be enjoined from selling real property belonging to the wife under an execution against the husband. *Alverson v. Jones*, 10 Cal. 12.

127. A complaint against a sheriff and his sureties for selling under execution the homestead of plaintiffs, which sets out that the sheriff was in possession of a certain execution against plaintiff J. Kendall, and under color of said execution wrongfully and illegally entered upon and sold certain property, the homestead of the plaintiffs, and averring in the sum of two thousand dollars, the value of the property, is insufficient, as the same does not state facts sufficient to constitute a cause of action. *Kendall v. Clark*, 10 Cal. 18.

128. No damage can result from such a sale. If the property sold was a homestead, the sheriff's deed conveyed nothing. The purchaser at such sale could acquire no right to the property, nor could the plaintiff suffer any injury. *Id.*

129. A sheriff is not protected in the sale of personal property by the verdict of the jury in a trial of the right of property, under the provisions of section 218 of the code. *Perkins v. Thornburgh*, 10 Cal. 192.

130. A party may enjoin a sale of his property on execution against another for the other's debt. *Hickman v. O'Neal*, 10 Cal. 294.

131. The interest of one partner in the partnership chattels is the subject of levy and sale by the sheriff on an execution against one of the partners. *Waldman v. Broder*, 10 Cal. 380; *Jones v. Thompson*, 12 Cal. 198.

132. D. purchased a lot of land at sheriff's sale on execution, entered and improved the same. Afterwards D. removed

## Sale by the Sheriff.

the buildings. On that day the defendants in execution sold the premises to T., who then redeemed the lot, and then sued D. for the value of the buildings: held, that as there was no evidence that the buildings were attached to the premises sold, T. cannot recover. *Tyler v. Decker*, 10 Cal. 436.

133. The general statute defines the duties of the sheriff in respect to final process. It declares "that the sheriff shall execute the writ (of fieri facias) by levying, etc., and paying to the plaintiff or his attorney so much of the proceeds as will satisfy the judgment, etc., and if there be any excess he shall return the same to the judgment debtor. The acts are to be construed in pari materia. *Wilson v. Broder*, 10 Cal. 488.

134. Until a consummation of a sale of real property upon execution is made by a conveyance from the sheriff, the estate remains in the judgment debtor. Until then the purchaser possesses only a right to an estate, which may afterwards be perfected by conveyance. *Cummings v. Coe*, 10 Cal. 531.

135. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer to the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 133.

136. The sheriff can only seize and sell an interest and right of the judgment partner therein, subject to the prior rights and liens of the other partners and the joint creditors therein. *Jones v. Thompson*, 12 Cal. 198.

137. In such case the decree should not order a private sale of the firm property. The selling of cattle, sheep, etc., at private sale is dangerous as a precedent, and liable to great abuse in practice. *Jones v. Thompson*, 12 Cal. 200.

138. The registration act only protects purchasers. Creditors, as such, are not included within its provisions. But a judgment creditor purchasing at his own sale without notice is a bona fide purchaser within the act. *Hunter v. Watson*, 12 Cal. 377.

139. Contingent and complicated contracts cannot be levied upon and sold without being in the possession of the officer at the sale, to be exhibited to the bystanders and assigned to the purchaser, unless a full and accurate description of the par-

ticular interest and chose in action, with all of its conditions and covenants, and a full explanation of the facts determining the value of the chose, be given by the levy, and announced at the sale. *Orandall v. Blen*, 13 Cal. 23.

140. The payment by a judgment debtor of a judgment after a sheriff's sale extinguishes the lien; and the fact that he takes a transfer of the certificate and the sheriff's deed instead of a certificate of redemption, cannot divest the lien of a subsequent judgment. *McCarty v. Christie*, 13 Cal. 81.

141. The purchaser at sheriff's sale of a water ditch is entitled to the rents and profits thereof from the date of the sale till the expiration of the time for redemption, as well from the judgment debtor in possession as from his tenant. *Harris v. Reynolds*, 13 Cal. 516.

142. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Kelsey v. Abbott*, 18 Cal. 619.

143. S. & B. in 1854 execute a mortgage on their property to H. Subsequently they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interest to N., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1855, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff the purchaser, and in March, 1857, sheriff's deed to him: held, that the plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown v. Winter*, 14 Cal. 84.

144. A certificate of the sheriff of the purchase of property, as that of the defendant in execution, is not sufficient to entitle the holder to redeem as such successor, at least, not until the expiration of



the six months. *Haskell v. Manlove*, 14 Cal. 58.

145. Where a party to a judgment has obtained any advantage through the judgment, he must restore that advantage to the other party if the judgment be afterwards reversed. *Reynolds v. Harris*, 14 Cal. 679.

146. If, on sale under judgment, the plaintiff buys in the property, he must restore it to the defendant on reversal of the judgment. Otherwise, as to a stranger, a bona fide purchaser without notice. He is not within the rule. But to constitute himself such a purchaser, he must show that he has paid the purchase money, and also that he is the purchaser of the legal title, not of a mere equity. And a purchaser at execution sale is not clothed with the legal title until he receives a sheriff's deed. *Ib.* 680.

147. An assignee of a judgment and of the sheriff's certificate of a sale thereunder stands in the same position as his assignor, the plaintiff, after the judgment has been reversed, and the sale will be set aside and the property restored to the defendant where no loss or injury will be done the assignee. *Ib.* 681.

148. Where a party gets into possession of property, as a water ditch, under a sheriff's sale on a foreclosure of a mortgage, and the judgment on which such sale was made is afterwards reversed by the supreme court, and restitution of the property is ordered, the court below may, on motion, order such party in possession to account before a referee for the rents and profits received by him—that is, for the sales of water, etc. The right to such rents and profits being clear, the court will not, on a mere question of remedy, compel a direct suit for them. *Raun v. Reynolds*, 15 Cal. 469.

149. The common law method, in such cases, of an inquisition of damages by a sheriff's jury on the writ of restitution, would be impracticable, in estimating the rents and profits of a water ditch—involving, as the inquiry would, the receipts from sales of water every day for a long period, as also payments, expenses, etc.

if it be entered directly under the mortgage to enforce which the sale was made; and having received the proceeds of the property by way of sales of water, and appropriated the same to his own use, he cannot hold the property bound by the mortgage, and at the same time refuse to give the mortgagor the benefit of the amount so received. In equity he is not a purchaser, but a mortgagor; and though the sale was not set aside until after the receipts of the rents and profits, still, when it was set aside, the order took effect upon the relations of the parties as they existed before the sale—the mortgagor and the mortgagee have the same rights they had before. *Ib.* 471.

151. Defendant, as coroner and acting sheriff, levied on and advertised for sale all the right, title and interest of T. in certain horses and cattle in the hands of a receiver appointed in a suit between J. and T., as partners: held, that plaintiff was not entitled to an injunction restraining the sale, unless the injury would be irreparable; and that this must appear by a clear showing of the plaintiff's right to the property and defendant's insolvency. *Mpre v. Ord*, 15 Cal. 206.

152. The municipal lands to which the city of San Francisco succeeded as a pueblo were held in trust for the public use of the city, and were not, either under the old government or the new, the subject of seizure and sale under execution. *Hart v. Burnett*, 15 Cal. 616.

153. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition, either precedent or subsequent, annexed to the grant; and the property mentioned in the act is not devoted by the grant of the State to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses.

## Sale by the Sheriff.—Sheriff's Deed.

and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in this property are not passed on. *Holladay v. Frisbie*, 15 Cal. 637.

155. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if the judgment became a lien upon the property sold previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 125.

156. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

157. The lien of a judgment is purely the creature of statute, and in this State the statute only provides that a judgment shall become a lien from the time it is docketed upon the property of the judgment debtor "not exempt from execution," which means upon property not subject to forced sale. The homestead is not subject to such sale, either on execution or any other final process of the court. *Ackley v. Chamberlain*, 16 Cal. 182.

See EXECUTION.

## VII. SHERIFF'S DEED.

158. A deputy sheriff may execute a deed for land sold under execution; but in the name of his principal, otherwise it is decisive against the party claiming under it. *Leves v. Thompson*, 3 Cal. 266.

159. A claim of title by virtue of a sheriff's deed is insufficient without showing the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

160. A mandamus will not lie to compel a sheriff to make a deed of land to a purchaser at execution sale, who refuses to pay the purchase money on the ground

that he is entitled to it as oldest judgment and execution creditor; especially where there is an unsettled contest as to the priority of his lien. *William's v. Smith*, 6 Cal. 91.

161. It is error to decree that the sheriff should execute a deed to the purchaser on the foreclosure sale, the land sold being subject to redemption in six months. *Harlan v. Smith*, 6 Cal. 174.

162. Where the sheriff who made the sale of land under a writ partially executed by him while in office, dies before executing a conveyance, the law having failed to provide for the completion of the execution in such a case, the only remedy left to the purchaser is to apply to the court for the appointment of a commissioner or master to execute the conveyance. *People v. Boring*, 8 Cal. 407; *Anthony v. Wessel*, 9 Cal. 104.

163. The title to real estate sold at sheriff's sale does not pass until the execution and delivery of the sheriff's deed. *Anthony v. Wessel*, 9 Cal. 104.

164. A sheriff, who sells land under execution, and gives a certificate of the sale to the purchaser, and subsequently his term of office expires, is the proper person to make the deed. *Ib.*

165. Where parties claim under a deed executed by the sheriff, upon a sale on execution, they are chargeable with notice of the defects in the judgment upon which the execution issued. *Wells v. Stout*, 9 Cal. 497.

166. Where a sheriff's deed is executed by a deputy, in the name of a sheriff whose term of office had expired at the time of the execution of the deed, the authority of the deputy must be shown to authorize such deed to be read as evidence in an action of ejectment. *Cloud v. El Dorado County*, 12 Cal. 134.

167. In an action against a sheriff for special damages resulting from a refusal on the part of the sheriff to make and deliver to plaintiff a deed to certain premises purchased by plaintiff at sheriff's sale, where there is no allegation in the complaint of title, nor any averment that in case the deed had been executed, plaintiff would have been able to recover possession of the premises or the rents and profits: held, that such complaint is insufficient. *Knight v. Fair*, 12 Cal. 297.

168. On mandamus by the assignee of

a sheriff's certificate of sale to compel the execution of a deed, the question whether such certificate is not merged in a deed made to the assignee by the execution debtor after the sale cannot be tried. The right to the deed is the only matter in controversy. *People v. Irwin*, 14 Cal. 436.

169. Where a defendant in ejectment brought upon a sheriff's deed, executed upon a purchase made on a sale under a decree of foreclosure, and was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that suit adjudicated against him. *Clark v. Boyreau*, 14 Cal. 637.

170. The damages which a plaintiff can recover in an action of ejectment, for the use and occupation of the premises, are such as arise subsequent to the accruing of his rights of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Ib.*

## SHIPPING.

See ADMIRALTY, BILL OF LADING, CHARTER PARTY, VESSELS.

## SIGNATURE.

1. Courts will take judicial notice of the signatures of their officers as such, but there is no rule which extends such notice to the signatures of parties to a cause. When, therefore, the proof of service of process consists of the written admissions of defendants, such admissions, to be available in the action, should be accompanied with some evidence of the genuineness of the signatures of the parties. In the ab-

## SLANDER.

See LIBEL AND SLANDER.

## SLAVERY.

See NEGRO.

## SOLDIER.

1. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People v. Riley*, 15 Cal. 49.

2. A mere residence or sojourn in the country as a soldier does not make him a citizen, or prove him to be such. The rule as fixed by the constitution is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship—leaving the political status of the soldier where it was before. *Ib.*

3. A copy of a copy of a muster roll of United States soldiers is not admissible in evidence to prove a man to be a soldier. *Ib.* 50.

4. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. *Ib.*

## SOLE TRADER.

1. In an action against a femme sole trader, it is improper to join her husband

2. The effect of our statute is to make a femme sole of a married woman who is a sole trader, as to the particular business in which she is engaged. *Ib.*

3. In an action brought by a married woman concerning property belonging to her as a sole trader, the husband need not be joined. *Guttman v. Scannell*, 7 Cal. 458.

4. By the provisions of the sole traders' act, the legislature designed to afford to every married woman an opportunity of providing against the improvidence or misfortunes of her husband, by engaging in any legitimate calling, by protecting her earnings against her husband and his creditors, and enabling her, by her own energy and industry, to support herself and children. *Ib.*

5. So far from forbidding, the law, by the plainest implication, intends that the capital invested by the wife as a sole trader, to the extent of \$5,000, may be furnished by the husband. *Ib.*

6. If the husband at the time was insolvent, the transfer as to his creditors would be fraudulent and void. *Ib.*

7. The act does not confine sole traders to any particular trade or occupation, nor prohibit the husband from being employed by or acting for his wife in the business. *Ib.* 459.

8. The fact that the business was unsuited to the sex of the wife, and the employment of the husband therein, would be circumstantial evidence tending to establish fraud, but not conclusive evidence of it.

9. The right of the wife to acquire property by purchase, during the marriage, can only exist as an exception to the general rule as laid down by the act defining the rights of husband and wife, and this exception exists in the case of a sole trader by statute. *Alderson v. Jones*, 10 Cal. 12.

See HUSBAND AND WIFE, II, 7.

## SOVEREIGNTY.

1. The sovereign power may, in disposing of lands, annex such conditions to a grant as it sees fit; and in such a case a

restriction against alienation, inserted in a grant and authorized by law, will not be held void on the ground that it is against the policy of the law. *Suñol v. Hepburn*, 1 Cal. 274.

2. The State has an absolute right to control, regulate and improve the navigable waters within its jurisdiction, as an attribute of sovereignty. *Gunter v. Geary*, 1 Cal. 467.

3. The mines of gold and silver in the public lands are as much the property of the State, by virtue of the sovereignty, as are similar mines in the hands of a private proprietor. *Hicks v. Bell*, 3 Cal. 227.

4. The State, therefore, has the sole right to authorize them to be worked, to pass laws for their regulation, to license miners, and affix such terms and conditions as she may deem proper to the freedom of their use. *Ib.*

5. The United States, as owner of land within the limits of the State, only occupies the position of any private proprietor, with the exception of exemption from State taxation. *Ib.*

6. Each State is supreme within its own sphere as an independent sovereignty. *People v. Coleman*, 4 Cal. 49.

7. By well settled rules of construction, the right of the State to regulate commerce is concurrent with that of Congress, with the understanding always that all State regulations inconsistent with those of the federal government on this subject give way. *Ib.* 58.

8. The right of the State to lands under water, where the tide ebbs and flows, is founded upon her sovereign control over the easement, or right of navigation; where, therefore, the easement is destroyed, the right of the State ceases, except to prosecute for preposterous, and have the easement restored. *Guy v. Hermance*, 5 Cal. 74.

9. The federal government has not only the right of eminent domain, but the fee and the prime and uncontrolled right of disposition of the territory, all of which are attributes of sovereignty. *People v. Folsom*, 5 Cal. 377.

10. Sovereignty can never be in abeyance, and until there was some local government organized, either by the people of the territory or some other competent authority, the United States, upon the doctrine of necessity, succeeded to and repre-

sented the government of Mexico, as far as the same could be exercised, within the purview of the constitution. *Id.* 378.

11. The government of the United States, in the face of the notorious occupation of the public lands in this State by her citizens—that upon the lands they have mined for gold, constructed canals, built saw mills, cultivated farms, and practiced every mode of industry—has asserted no right of ownership to any of the mineral lands in this State. *Conger v. Weaver*, 6 Cal. 557.

12. Sovereignty is a unit that cannot in its very nature be divided. It must reside with only one party, and the highest ultimate right to determine the limits and powers of each, must belong to that government with which is found the supreme law of the entire nation. *Warner v. Steamer Uncle Sam*, 9 Cal. 720.

13. Money is not the species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. *Burnett v. City of Sacramento*, 12 Cal. 83.

See EMINENT DOMAIN.

## SPECIFIC PERFORMANCE.

1. A., the owner of a lot of land in San Francisco, requested B. to sell the same, and delivered to him the title deeds in order to enable him to effect a sale. B. agreed verbally with the plaintiff to sell the land to him, but A. refused to comply with the verbal agreement which B., his agent, had made with plaintiff: held, in an action by the plaintiff against A. to compel the execution of a deed or the payment of damages, that the agreement was void and could not be enforced, and that the defendant A. was not liable in damages. *Harris v. Brown*, 1 Cal. 100.

2. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been part performance of a verbal contract by the vendee. *Hoen v. Simmons*, 1 Cal. 121.

3. Where the terms of a verbal contract are reduced to writing, but the writ-

ten paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete and neither party will be bound by it. *Id.*

4. A party who seeks a specific performance of a verbal contract for the conveyance of real estate, should show that he has fully complied with the substance of the contract on his part. *Id.*

5. Where A. contracted verbally to convey to B. a certain lot of land for \$5,000, of which sum \$1,000 was to be paid down and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the \$4,000 had elapsed long before the commencement of the suit: held, the plaintiff not having paid or tendered the \$4,000 with interest, that a specific performance ought not to be decreed. *Id.*

6. The case of *Hoen v. Simmons*, 1 Cal. 119, deciding that a verbal contract of itself alone was insufficient under Mexican law to transfer the title to real estate, affirmed; but where a verbal contract of sale in presenti and the title deeds were delivered by the vendor to the vendee, and permission given to the vendee to enter and take possession of the land, and the vendee did accordingly take possession and make valuable improvements on the premises: held, that a specific performance of the verbal contract should be decreed. *Tohler v. Folsom*, 1 Cal. 210.

7. Where there has been such part performance of a verbal contract of sale by the plaintiff as to put him into a situation which would operate as a fraud upon him, unless the verbal agreement should be enforced, a specific performance of the contract will be decreed. *Id.* 213.

8. A party seeking to enforce a specific performance of a contract must show that he has acted in good faith. *Conrad v. Lindley*, 2 Cal. 175.

9. A party entering upon land under an agreement to purchase, and afterwards abandoning the purchase disclaiming the title of the vendor, forfeits the benefit of the agreement and cannot on subsequently tendering the purchase money claim a specific performance. *Id.*

10. On a bill for specific performance, defendant alleged fraud in the contract sued upon, but admitted payment of the consideration money under protest, affirming the fraud: held, that the receipt of



## Specific Performance.—Stare Decisis.

payment was no waiver of the defense and that defendant was not estopped from showing the fraud, and that it was error in the court not so to instruct the jury when requested. *Russell v. Amador*, 3 Cal. 402.

11. An unwritten contract for the sale of land is void, by the express declaration of the statute of frauds, and a court of equity has no power to enforce a specific performance of it. *Abel v. Calderwood*, 4 Cal. 91.

12. A court of equity is always chary of its power to decree specific performance, and will withhold the exercise of its jurisdiction in that respect, unless there is such a degree of certainty in the terms of the contract as will enable it at one view to do complete equity. *Morrison v. Rossignol*, 5 Cal. 66.

13. Lands held by no other tenure than possession may be legitimate subjects of control; and sometimes, in equity, chattel interests or personal property are made the subject of specific performance. *Johnson v. Rickett*, 5 Cal. 219.

14. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for his execution, but tender of the unpaid purchase money must be proven. *Goodale v. West*, 5 Cal. 341.

15. A court of equity will not enforce a specific performance of an agreement to convey lands, when the plaintiff shows no compliance, or offer of compliance on his part with the agreement, nor any excuse therefor, for any length of time from which he bound himself to perform. *Brown v. Covillaud*, 6 Cal. 571; *Pearis v. Covillaud*, 6 Cal. 621; *Green v. Covillaud*, 10 Cal. 324.

16. Courts of equity in this State possess power to enforce the specific performance of verbal contracts for the sale of land, in cases of part performance of such contracts. *Arguello v. Edinger*, 10 Cal. 158.

17. Nothing can be regarded as a part performance, to take a verbal contract for the sale of land out of the operation of the statute, which does not place the party in a situation which is a fraud upon him, unless the contract be executed. *Ib.*

18. It would be a fraud, which no court of equity could tolerate, to hold that the vendor of land, on a contract to convey,

receiving a portion of the purchase money and seeing the vendee expend large sums improving the property without objection, and not making any demand of the purchase money, should insist, because the vendee had not literally complied with the provisions of his contract on his part, on holding the whole contract forfeited, claim the land and the money paid and all the improvements, and deny all obligation on his part to comply with his engagements. *Farley v. Vaughn*, 11 Cal. 236.

19. In such a case, where there has been a compliance with a reasonable understanding of the contract, and no injury done by the want of an exact compliance, a specific performance will be decreed. *Ib.*

20. A bill quia timet, and to enforce the specific execution of a contract, lies only where there is no adequate remedy at law; but where damages resulting from the breach of such agreement are susceptible of precise admeasurement, equity will not take jurisdiction, unless there are some peculiar equitable circumstances. *White v. Fratt*, 13 Cal. 523.

21. Whether equity will enforce the specific performance of a contract depends, not upon the character of the property involved, as whether it be real or personal, but upon the inadequate remedy afforded by a recovery of damages in an action at law. *Duff v. Fisher*, 15 Cal. 381.

## STAGE COMPANIES.

See COMMON CARRIERS, CORPORATIONS.

## STARE DECISIS.

1. There is no principle which compels the observance of the doctrine of stare decisis, when a rule well settled and universally acquiesced in has been violated. *Cohas v. Raisin*, 3 Cal. 453.

2. In construing statutes and the constitution, the rule is almost universal to adhere to the doctrine of stare decisis. *Seale v. Mitchell*, 5 Cal. 403.

3. A rule once established and firmly adhered to, may work apparent hardship in a few cases, but in the end will prove more beneficial than if constantly deviated from. *Giblin v. Jordan*, 6 Cal. 418.

4. When a case has been once taken to an appellate court and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Weston v. Bear River and Auburn W. and M. Co.*, 6 Cal. 429; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Navigation Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

5. The judge who from petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years has settled the rights of property, should be regarded as the common enemy of mankind and unworthy of the high trust which had been confided to him. *Welch v. Sullivan*, 8 Cal. 188.

6. The highest regard for the doctrine of stare decisis does not require its observance when a plain rule of law has been violated. *McFarland v. Pico*, 8 Cal. 631.

7. In reference to mere matters of practice, involving no principle, it is safe to adhere to a rule long established. *Piercy v. Sabin*, 10 Cal. 30.

8. The conservative doctrine of stare decisis was never designed to protect manifest innovations upon the well settled principles of law. *Aud v. Magruder*, 10 Cal. 292.

9. Though on questions of practice previous decisions are entitled to very great weight, still a single decision, made without notice of a statute, and in fact setting aside the statute, cannot be invoked as authority on the principle of stare decisis. *Duff v. Fisher*, 15 Cal. 382.

10. The rule of stare decisis and the various authorities thereupon fully discussed. *Hart v. Burnett*, 15 Cal. 579.

11. In the doctrine of stare decisis some of the authorities use the terms "a series of decisions," "an uninterrupted series,"

"a long established rule," and the like expressions; but we apprehend that the language was designed to imply not solely the age of the rule, but its permanent, settled, stable character. *Ib.* 607.

## STATE.

1. Where the people of the State are appellants it is not necessary to file the usual undertaking on appeal. *People v. Clingan*, 5 Cal. 391.

2. In the absence of any statute to that effect the State cannot be sued, and a judgment against her is erroneous. *People v. Talmage*, 6 Cal. 258.

3. Neither the governor nor the attorney general has any power to bind the State by a contract to procure the advice of counsel as to the rights of the State in certain property. *Ib.*

4. Services performed for the State under such a contract might be the subject of relief at the hands of the legislature, but are not a legal cause of action. *Ib.*

5. The State, in the contemplation of our theory of constitutional government, can have no interest in asking anything but that which is right; nor can she allow her agents to do so. She is as much interested in protecting the individual citizen as in protecting the mass; so that to address judicial process to the agents of the State does not implead the State herself. *Nouques v. Douglass*, 7 Cal. 74.

6. In a case where a citizen claims to be injured by an alleged failure of a State officer to do his duty, the State is not a formal party to the record nor responsible for costs in any event. Nor if the officer had failed to do his duty, can the State be injured by the decision of the court. Neither can she be injured if the officer does his duty, and is sustained by the court. *Ib.*

7. On the formation of this State, the title to water property passed to this State. *Chapin v. Bourne*, 8 Cal. 296.

8. The eighth article of the constitution, prohibiting the State from creating debts over three hundred thousand dollars, or loaning its credit, etc., only applies to the

## State.—State Prison.

State as a corporation, as a political sovereign represented by her law-making power, and does not prevent the State authorizing counties or municipal corporations to create debts when the debt of the State itself is up to the constitutional limit. *Pattison v. Supervisors of Yuba County*, 13 Cal. 182.

9. The State may have political subdivisions; that is, she may permit a portion of her powers of government to be exercised by local agents. But, politically considered, geographical or political departments are no more the State, or a part of the State, than a man's land, or his agent, is part of himself. *Id.*

10. Where the governor of a State, who is authorized, and it is made his duty by law, to take immediate possession of the State prison and grounds, then in the possession of a lessee of a State, goes, in company with other officers of the State, upon the grounds of the prison and demands of the person in charge the keys of the prison, which being refused, the door of the room in which the keys were was forced by order of the governor and the keys taken, and thus the possession of the prison and grounds taken by the governor in the name and on the behalf of the State: held, that such acts amounted to a forcible entry on the part of the governor, and he is personally liable therefor: held further, that the acts of the governor warranted the conclusion that any attempt on the part of the lessee to resume possession of the prison would be resisted by force. *McCauley v. Weller*, 12 Cal. 531.

11. Warrants drawn by the controller of State, delivered to the payees thereof and by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie, that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not

liable in this form of action. *State v. Wells*, 15 Cal. 344.

12. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State v. Poulterer*, 16 Cal. 521.

13. This duty may be collected by action of debt by the State against the auctioneer, and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Id.*

14. This suit not being a prosecution, but a civil action for the recovery of money due the State, is properly brought in the name of the State. *Id.*

See EMINENT DOMAIN, SOVEREIGNTY.

## STATE DEBT.

See INDEBTEDNESS.

## STATE OFFICERS.

See OFFICE.

## STATE RIGHTS.

See EMINENT DOMAIN, SOVEREIGNTY.

## STATE PRISON.

1. Where the governor of the State,

## State Prison.

who is authorized, and whose duty it is made by law, to take immediate possession of the State prison and grounds then in possession of a lessee of the State, goes in company with other officers of State upon the grounds, and demands possession, which was refused, and the room where the keys were kept was forced by the governor, and the keys taken, and possession of the prison and grounds taken by the governor in the name and on behalf of the State: held, that such acts amounted to forcible entry and detainer on the part of the governor, and he is liable therefor. *McCauley v. Weller*, 12 Cal. 531.

2. Although the State possesses the constitutional power to take private property for public purposes, by providing just compensation therefor, yet the means of compensating the owner must be provided before the property is taken. *Ib.*

3. The act of February 26th, 1858, under which the governor justified the taking, made no provision for compensation, and is therefore clearly in violation of the eighth section of article one of the constitution of the State. *Ib.*

4. The objection to the contract with Estill, under the act of the twenty-first of March, 1856, that it contained stipulations for the release of claims held by Estill against the State, thereby increasing the amount of the monthly payments, cannot be raised at this late day—three years having elapsed since the execution of the contract, and it having been in part performed on both sides, and thus acquiesced in and affirmed. *State of California v. McCauley*, 15 Cal. 455.

5. The fact that the contract with Estill was signed by the commissioners with their individual names, and not with the name of the State, does not make it defectively executed. The contract purports in its body to be between the State, acting by the commissioners under the act of March 21st, 1856, of the one part, and Estill of the other, and is signed by the commissioners with the affix of "Board of State prison commissioners." This makes it the contract of the State and not of the commissioners. *Ib.* 456.

6. Upon this point, the rule applicable to contracts of a private character differs from the rule governing contracts made by agents of the government. Such public agents are presumed to contract, not per-

sonally, but officially, within the sphere of their duties. *Ib.*

7. The act of March, 1856, having authorized the commissioners to execute a lease, without prescribing any specific form, or containing any restrictions as to assigning, and the lease being in its terms assignable, and no objections to this form of contract having been made at the time, it is too late to interpose them after the contract has been acted upon on both sides, and thus adopted and approved. The personal liability of the assignor continued after his assignment to McCauley. The security of his bond was not impaired thereby. *Ib.* 457.

8. If some of the covenants of the lease do not bind the assignee, the State cannot have relief on that ground. She can claim no greater exemption than an individual from the consequences of an unwise contract. *Ib.* 458.

9. The State cannot rescind the contract made with Estill for breaches of the covenants of the lease by him and his assignee, so long as she herself is in default. *Ib.*

10. One party cannot violate a contract himself, and then seek to rescind it on the ground that the other party has followed his example. *Ib.*

11. Nor, when the contract has been in part performed, and the parties cannot be restored to their original position, can the right of rescission exist. *Ib.*

12. In this case, the State, being in default in making the monthly payments under the contract as they became due, and for months previous to this suit refusing to pay at all; not offering to make restitution of the property received of the lessee, or pay the value of the claims relinquished by him at the execution of the contract, or to pay what the complaint shows to be now due; and it not being possible to restore Estill and McCauley to their original position, they having been in possession of the prison for nearly three years, and having performed valuable services; cannot claim in equity a rescission of the contract. *Ib.*

13. It is too late for the State to complain that the contract did not exact of the lessee security against breaches thereof, other than the bond of \$200,000 required by the act of March 21st, 1856, or did not reserve to the State the right to re-

## State Prison.—Statement in general.

enter and resume possession of the premises, and control of the prisoners, whenever she deemed proper. *Ib.* 459.

14. *State of California v. McCauley*, 15 Cal. 429, deciding the act of March 26th, 1856, appointing a board of State prison commissioners, to be constitutional, and the contract entered into by said board, in behalf of the State, with Estill, and the assignment thereof to McCauley, to be valid and binding upon the State, affirmed. *People v. Brooks*, 16 Cal. 25.

15. A contract entered into by the agents of the State, upon a subject within the constitutional control of the legislature, may be affirmed by the State by legislation, indirectly referring to the contract, or proceeding upon its assumed validity. Direct legislative action, in terms designating and affirming the contract, is not necessary. *Ib.* 26.

16. In the act of April 7th, 1856, appropriating moneys to defray the expenses of the prison up to March 28th, passed after a copy of the contract with Estill had been transmitted to the senate, the legislature recognized the existence, and in effect, the validity of the contract, in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison, until he surrendered such contract and released the State from all liability for such supplies "furnished after the leasing of said prison by the board of commissioners, under an act passed at this session of the legislature." *Ib.* 27.

17. The contract is not from month to month, but for the entire term of five years, the payments by the State to be made in monthly installments. The consideration advanced by the lessee for these payments is not merely the services rendered each month. It consists of buildings erected and other improvements made. These were not intended for any particular month, but for the entire term. The expenses of them cannot be apportioned out and considered as belonging to one or more months rather than others. These expenses probably absorbed the receipts of many months, and for reimbursement the lessee undoubtedly looked to the general profits from the entire contract. Again, large claims against the State were relinquished by the lessee as part of the consideration of the payments by the

State—not of one or of several months, but of the entire term. To the general profits of the whole term the lessee looked, as furnishing the equivalent for the relinquishment. Again, the lessee, or the other parties representing him, were entitled to the labor of convicts, and the profits of that labor, in the manufacture of brick or other articles of commerce, during the period the parties were excluded from the prison, may have exceeded the entire expenses of keeping the prison. *Ib.* 38.

18. If the State desire to resume the possession of the State prison, and the control of the convicts, she can do so only in one way—by compensation, as is required in all cases where private property is taken for public use. The leasehold interest is as much property for which compensation is to be made before it can be subjected to the uses of the State, as are lands held in fee. If the State has cause of complaint from the mismanagement of the prison, or any disregard of the stipulations of the contract, she must seek her redress, as individuals in like cases are required to do, by proceeding upon the bond executed as security for the performance of the contract. *Ib.* 47.

## STATEMENT.

- I. In general.
- II. On Motion for New Trial.
- III. On Appeal.
- IV. Amendment to a Statement.

## I. IN GENERAL.

1. We are to look at the substance of the contents of the statement, and disregard its imperfections in form. *Ringgold v. Haven*, 1 Cal. 113.

2. In a statement for a new trial the evidence may be simply referred to, and need not be contained in the statement itself. It is not so in a statement on appeal, in which the evidence, if relied upon, must be set out. *Dickenson v. Van Horn*, 9 Cal. 211.



## II. ON MOTION FOR NEW TRIAL.

3. An order for a new trial will be set aside where the defendant had failed to file a statement as required by statute. *Hill v. White*, 2 Cal. 307; *Hart v. Burnett*, 10 Cal. 66.

4. If the statement filed in support of a motion for a new trial is not settled by the judge, it cannot be therefore inferred that it was agreed to. Such statement must either be agreed to, or it must be settled by the judge, and one of these conditions must be shown affirmatively. In the absence of both, such statement will be rejected. *Linn v. Twist*, 3 Cal. 89.

5. A notice of a motion for a new trial unaccompanied by the affidavit required by the statute, will not entitle the statement of the grounds of the motion to be considered on appeal. *Adams v. City of Oakland*, 8 Cal. 510.

6. When it appears from the bills of exceptions signed by the judge, that the motion for a new trial was heard on statement, counter statement and affidavits, it cannot be objected that the statement was not settled. *Williams v. Gregory*, 9 Cal. 76.

7. Where a party appears and argues a motion for a new trial, he cannot afterwards object that the statement was not agreed to by him, and that it was not settled by the judge. *Dickenson v. Van Horn*, 9 Cal. 211.

8. A failure to file a statement setting forth the grounds upon which a party intends to rely, in a motion for a new trial, operates as a waiver of the right to the motion. *Wing v. Owens*, 9 Cal. 247.

9. Where the statement embodied in the record was filed on the motion for a new trial, the supreme court will only examine the action of the court below in denying the motion. *Meerholz v. Sessions*, 9 Cal. 277.

10. Where the affidavits used in support of a motion for a new trial are not set forth in the record on appeal, the party moving is deprived of all grounds of error based on the affidavits, but the omission does not affect his right to raise the questions as to errors apparent on the face of the record. *Branger v. Chevalier*, 9 Cal. 362.

11. An order denying a motion for a

new trial, where there is no statement settled on file, is erroneous. *Hart v. Burnett*, 10 Cal. 66.

12. Where the statement on motion for a new trial is not filed within the time prescribed by law, this court will only look to the judgment roll. *Lafferty v. Brownlee*, 11 Cal. 132.

13. A statement which was filed in the court below on motion for a new trial, and is neither agreed to by counsel or settled by the judge trying the case, has not sufficient authentication to constitute any portion of the record which this court can notice. *Doyle v. Seawall*, 12 Cal. 425; *Paige v. O'Neal*, 12 Cal. 492.

14. A rule of a district court requiring a party, on motion for a new trial or for judgment on a special verdict, to prepare and submit a statement of the evidence at the trial, does not apply to issues submitted to a jury in a chancery case. *Purcell v. McKune*, 14 Cal. 232.

15. But where the judge below requires such statement in a chancery case, and the attorney does not object, but fails to furnish it, and in consequence thereof the court, on motion of plaintiffs for judgment on the pleadings and verdict, refuses to proceed until such statement is furnished, mandamus will not lie. *Id.*

16. The court below must take the steps by it deemed necessary and proper in the premises. It may rehear the cause on the pleadings and proof, or possibly it may require the attorney to prepare the statement. *Id.*

17. A statement on motion for new trial, signed by the judge and appearing from the minutes of the court to have been used on the hearing on the motion, is sufficiently authenticated. The statute points out no mode of authentication, and any satisfactory evidence in the record, in some legitimate and proper form, that the statement has been examined and approved by the judge, is sufficient. *Kidd v. Laird*, 15 Cal. 177.

## III. ON APPEAL.

18. The presumption is that all the important testimony is embodied in the statement, and the supreme court must decide therefrom whether the evidence warrants

## On Appeal.

the verdict. *Ringgold v. Haven*, 1 Cal. 115; *Swanston v. Sublette*, 1 Cal. 124.

19. It is the duty of each party, upon the settlement of the bill, to see that all the evidence material for him in assisting in sustaining or recovering the decision appealed from is spread upon the minutes. *Ringgold v. Haven*, 1 Cal. 116.

20. In the absence of any testimony in the record, the appellate court will presume that the court below rendered a proper verdict upon the evidence. *Belt v. Davis*, 1 Cal. 139; *Folsom v. Root*, 1 Cal. 376.

21. The clerk should certify the statement, not only that it is a correct transcript, but that it contains the whole proceedings in the cause. *Belt v. Davis*, 1 Cal. 139.

22. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and no objection was raised or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

23. It is not necessary to file a contract if there be one with the clerk, and his certificate that he has returned all the papers in the cause on file in his office, does not show that no contract in writing was proved; it merely shows it was not filed. *Ib.*

24. The supreme court will not consider the statement unless it appears as settled by the parties or taken down by the clerk in writing at the request of one of the parties. *Ib.*

25. If the statement discloses no refusal on the part of the judge in the court below to charge the jury in any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts in the case. *George v. Law*, 1 Cal. 364.

26. An appellate court will not review the rulings of the court below unless presented in proper form in a statement or bill of exceptions. The testimony must be taken down by the clerk, but he is not authorized to say what decisions the court did or did not make. *Gunter v. Geary*, 1 Cal. 464; *Pierce v. Minturn*, 1 Cal. 471.

27. A mere transcript of the evidence taken down by the clerk is no part of the

statement, unless made so by bill of exceptions or by the signature of the judge. *Wilson v. Barry*, 2 Cal. 56.

28. Where the evidence is taken down by the clerk, on motion of a party, a transcript of which is certified by him, is a substitute of a bill of exceptions or statement of facts, in the absence of such bill or statement. *Ingraham v. Gildermeester*, 2 Cal. 61.

29. If the appellant allow the statute time to expire after taking the appeal without framing his statement, he waives his right to have a case stated, and a subsequent order of the court made without notice to the respondent, allowing further time to make up the statement, is a nullity. *Lesch v. West*, 2 Cal. 95.

30. If the statement does not explicitly state the particular ground of granting the nonsuit, yet if it be a necessary inference from what is disclosed, it is sufficient for the action of the appellate court, and will be reversed if erroneous. *Morgan v. Thrift*, 2 Cal. 563.

31. Errors which are relied upon on appeal must be set forth in the statement, clearly and affirmatively. *Rabe v. Wells*, 3 Cal. 151.

32. The naked directions of a court to a jury, unaccompanied by a statement of facts, will not satisfy the supreme court of substantial error, although some of the directions may not be in consonance with the rules of law. *White v. Wentworth*, 3 Cal. 426; *Nelson v. Lemmon*, 10 Cal. 50; *Nelson v. Mitchell*, 10 Cal. 93.

33. If the statement is not properly authenticated it forms no part of the record, and the appellate court will not consider it, but will only look to the judgment roll alone. *Vermeule v. Shaw*, 4 Cal. 215; *Garcia v. Sastrustegui*, 4 Cal. 244; *Harley v. Young*, 4 Cal. 284.

34. The statement on appeal must in all cases be signed by the judge, except when agreed to by the parties or their attorneys. *Harley v. Young*, 4 Cal. 284.

35. The affidavit of jurors will not be considered in a statement on appeal to contradict a verdict set out in the record. *Castro v. Gill*, 5 Cal. 42.

36. The object of the statement is to make record of that which before was not record, and which rests only in the recollection of the court, counsel or minutes of the clerk, and it is not necessary to embody mat-

## On Appeal.

ter of record in a bill of exceptions. *De Johnson v. Sepulveda*, 5 Cal. 151.

37. If the record does not purport to set out all the testimony, but contains only a meager statement, the court will not determine whether the verdict was contrary to the evidence or not. *Samuels v. Gorham*, 5 Cal. 227; *Ford v. Holton*, 5 Cal. 327.

38. An affidavit of one of the attorneys as to the selection of the jury, although copied into the transcript, is no part of the record, and therefore cannot be noticed. *Magee v. Mokelumne Hill Co.*, 5 Cal. 359.

39. The notices and affidavits filed on an application to retax costs cannot be considered on appeal, if not embodied in a bill of exceptions or statement. *Gates v. Buckingham*, 4 Cal. 286.

40. Where the evidence is not set out in a bill of exceptions or other authentic form, the appellate court will not inquire into the correctness of instructions given by the court below, considered as abstract questions of law. *People v. Lafuente*, 6 Cal. 202.

41. In every criminal case the instructions given and refused should be so marked and signed by the judge, or they will not be considered on questions of error. *People v. Lockwood*, 6 Cal. 205.

42. The fact of the appellants having objected in the court below to the introduction of evidence of location of a school land warrant, on the ground that it was not recorded in the proper office, is not sufficient to justify the appellate court in presuming that such was the case, when the statement on appeal contains no evidence of the fact. *Nims v. Johnson*, 7 Cal. 112.

43. Where a statement to be used on appeal is not filed within twenty days after judgment it cannot be regarded, and the case will be determined on the judgment roll alone. *Macomber v. Chamberlain*, 8 Cal. 323.

44. The finding of the court need not be embodied in the statement or bill of exceptions. *Reynolds v. Harris*, 8 Cal. 618.

45. A judge can revoke his certificate to a settled statement on appeal during the term at which the judgment was rendered, but after the term has expired it cannot be done. *Branger v. Chevalier*, 9 Cal. 172.

46. Where the judge of the superior court certified to an engrossed statement, and subsequently revoked his certificate,

and ordered the statement to be made conformable to this latter settlement, which order was not entered on record, and the judge of the fourth district court, to which the cause was transferred, ordered that the order of revocation and amendment be entered nunc pro tunc, there being no record evidence on which to base such an order: held to be error. *Ib.* 178.

47. Where the record in a criminal case states that it gives "in substance all that was proven on the part of the State," it is sufficient. The facts as proved being given, there is no necessity of setting forth the testimony. *People v. York*, 9 Cal. 422.

48. Instruments are sometimes admissible for one purpose and inadmissible for another; and when objected to, the grounds of the objection should be stated, and in preparing the record for appeal, so much of the evidence should be incorporated as may be necessary to indicate the pertinency and materiality of the objections taken, otherwise they cannot be regarded. *Provest v. Piper*, 9 Cal. 553.

49. A statement on appeal is sufficient when the judge certifies that it is substantially correct. It is not necessary that the testimony should be stated in the precise words of each witness. *Battersby v. Abbott*, 9 Cal. 568.

50. It is no objection that the statement does not affirmatively show that the settlement was upon proper notice, or in the presence of both parties. In the absence of evidence to the contrary, the presumption of law is in favor of the regularity of all official acts. *Ib.*

51. Where the court below excluded from the jury evidence of threats on the part of the deceased against the life of defendant, and the record does not show the character of such threats, the supreme court will presume that such proof was properly excluded. *People v. Glenn*, 10 Cal. 37.

52. Affidavits in support of a motion in the court below will not be considered on appeal, unless they are incorporated in the statement or bill of exceptions. *People v. Honshell*, 10 Cal. 86.

53. Where there is no statement on appeal, the supreme court is confined in its examination of the case to the judgment roll, and where that is regular, the judgment below will be affirmed. *Karth v. Orth*, 10 Cal. 193; *Lower v. Knox*, 10

## On Appeal.

Cal. 481; *American River W. and M. Co. v. Bear River W. and M. Co.*, 11 Cal. 340; *McGill v. Rainaldi*, 11 Cal. 391; *Newberg v. Hewson*, 12 Cal. 280; *Burdge v. Gold Hill and Bear River W. Co.*, 15 Cal. 198; *Barrett v. Tewksbury*, 15 Cal. 357; *Reynolds v. Lawrence*, 15 Cal. 361; *Dobbins v. Dollarhide*, 15 Cal. 375.

54. By an assignment of errors as the term is used in the supreme court, is meant a specification of the errors upon which the appellant will rely with such fullness as to give aid to the court in the examination of the transcript. *Squires v. Foorman*, 10 Cal. 298.

55. Where a notice of motion to dismiss a complaint as specified grounds is given, to obtain a review of the order made on the motion the record must disclose the papers read or the evidence offered in their support. *Freeborn v. Glazer*, 10 Cal. 388.

56. On an appeal from an order made on affidavits filed no statement is necessary. The affidavits must be annexed to the order, in place of a statement, and the certificate of the clerk should specify the affidavits used, and to enable him to do so he should at the time mark them as filed on the motion. *Paine v. Linhill*, 10 Cal. 370.

57. Where a motion for new trial is denied, and the record contains the statement used on such motion, but no statement on appeal from the judgment, this court can only examine the action of the court below in denying the motion—the judgment cannot be reviewed except through the order made upon the motion, and from this order, no appeal having been taken, the case stands on the judgment roll. *Lower v. Knox*, 10 Cal. 481; *Burdge v. Gold Hill and Bear River W. Co.*, 15 Cal. 198.

58. A stipulation inserted in the transcript and not embodied in a statement or bill of exceptions, form no part of the record which the supreme court can notice. *Ritter v. Mason*, 11 Cal. 214.

59. Nor do affidavits used on motion to open the judgments form any part of the record where there is no certificate of the judge or clerk, or an admission of counsel that they were used for that purpose. *Id.*

60. No errors can be assigned which the supreme court will notice on an instrument not embodied in a statement on

appeal or a bill of exceptions. *Moore v. Sample*, 11 Cal. 361.

61. Where there is no properly authenticated statement on appeal: held, that the special verdict of the jury is conclusive of the facts found. *Newberg v. Hewson*, 12 Cal. 280.

62. A statement on appeal must be filed within the time prescribed by law. A statement filed a year after judgment was rendered is not in time. *Heika v. Stansbury*, 12 Cal. 412.

63. Instructions to a jury which are not embodied in the statement on appeal or bill of exceptions, and are neither certified to by the judge trying the cause or signed by him, cannot be the subject of consideration by this court. *Paige v. O'Neal*, 12 Cal. 492.

64. Transcripts on appeal to this court should not contain irrelevant or unnecessary matter. Instead of copying into a statement for a new trial, or on an appeal, deeds and transcripts of records, when no point is made on the construction of the language, a brief statement of the instrument answers every purpose, and is all that the code requires. *Knowles v. Inches*, 12 Cal. 214.

65. A statement on appeal to be regarded must be entire, and statements and exceptions should be speedily settled. *Hutchinson v. Bours*, 13 Cal. 52.

66. The supreme court cannot receive evidence otherwise than through the statement or the record. *Vischer v. Webster*, 13 Cal. 60.

67. A clerk's certificate that a statement is the same which was used on motion for a new trial is entitled to no weight, as the clerk is not authorized by law to verify a statement in that form. *Fee v. Starr*, 13 Cal. 170.

68. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on the appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings v. Halleck*, 13 Cal. 207.

69. The supreme court will not inquire into objections as to the misjoinder of parties, unless it was taken in the court below, and this fact appear in the statement. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 238.

## On Appeal.—Amendment to a Statement.

70. Where there is no bill of exceptions and no statement, the rulings of the court upon questions of law during the trial cannot be sought from the testimony as taken down by the clerk, neither under the code of 1850 nor 1851. *Castro v. Armesti*, 14 Cal. 38.

71. A reference in the statement on appeal to the evidence as taken by the clerk with the consent of parties is sufficient, the evidence being in the transcript. The statement need not contain the evidence. *Dorst v. Rush*, 14 Cal. 84.

72. A statement on appeal, certified by the judge to be correct, according to his recollection, is not sufficient. *Van Pelt v. Littler*, 14 Cal. 196.

73. In criminal cases the statute requiring a statement or bill of exceptions to be made within ten days after the trial is directory, and the defendant is not precluded of his rights by failure of the judge to settle or sign the statement within the time. *People v. Woppner*, 14 Cal. 437; *People v. Lee*, 14 Cal. 510.

74. But defendant must prepare and tender his statement or bill within ten days, or such further time as may be granted by the district judge or a judge of the supreme court, or give sufficient excuse for his failure so to do. Such excuse being shown, the bill should be signed, otherwise not. *Ib.* 511.

75. The supreme court will not inquire into the reasons which induced the district judge to sign the bill after the statutory period, but will presume they were sufficient. *Ib.* 512.

76. The statement and bill of exceptions in the statute on this subject mean the same thing. *Ib.* 514.

77. When the judge cannot be found, the proposed statement or bill in a criminal case may be delivered to the clerk of the court for him—the clerk's office being the proper place for the deposit of papers for the judge in his absence from his chambers. The clerk should minute on the document the date of its receipt, and hand it to the judge at the earliest convenient opportunity. *Ib.*

78. Where judgment was rendered July 27th, 1859, and motion for new trial overruled October 22d, 1859, a statement on appeal served November 10th, 1859, was not in time. *Mahoney v. Caperton*, 15 Cal. 315.

79. A statement on appeal must specify the grounds on which the appellant relies. The questions of law and fact raised must be distinctly set forth, accompanied with only so much of the evidence as may be necessary to show their pertinency and materiality. *Barrett v. Tewksbury*, 15 Cal. 356.

80. There is no distinction as to the manner in which a statement is to be prepared between a case at law and a case in equity. The grounds of appeal must in both cases be stated; and in both cases much, if not the greater portion, of the evidence will be immaterial for the determination of these grounds in the supreme court. *Ib.* 357.

81. In criminal cases, if the instructions to the jury are erroneous under any and every state of facts, the supreme court will review them, even though there be no statement of facts—because it necessarily appears that the court erred to the prejudice of defendant. *People v. Levison*, 16 Cal. 100.

82. But where the instruction may be correct under any state of facts, then the supreme court presumes in favor of the judgment below, and will not reverse it when there is no statement of facts or bill of exceptions—because the appellant must show affirmative error. *Ib.*

83. Where the record shows simply a statement signed by the district judge, without any certificate preceding as to the correctness of the statement, and it does not purport to be a statement on motion for new trial, and no order appears disposing of the motion for new trial: held, that there is no statement on motion for new trial or on appeal. And the grounds of the motion for new trial not being filed within the time required by law, the appeal is from the judgment alone. *Mc Cartney v. Fitz Henry*, 16 Cal. 185.

## IV. AMENDMENT TO A STATEMENT.

84. The certificate of a judge is a sufficient authentication of a statement, and where a party does not think proper to file amendments, or the judge to correct the statement, the certificate of that fact by the judge is all that is necessary. *Redman v. Gulnac*, 5 Cal. 148.



Amendment to a Statement.—Statute of Frauds in general.—Sale of Lands.

85. While the term lasts, the court has power to amend the record; after the term has passed, the record cannot be amended unless there is something in the record to amend by. The settled statement until certified is not record. *Branger v. Chevalier*, 9 Cal. 172.

86. Where amendments are made to a statement on appeal, a fair copy of the statement as amended should be made; otherwise the supreme court will not look into it. *Marlow v. Marsh*, 9 Cal. 259; *People v. Edwards*, 9 Cal. 291; *Skillman v. Riley*, 10 Cal. 300.

87. A statement agreed on by parties should not probably be amended by the court on motion, unless under a very clear showing of mistake or fraud. *Hutchinson v. Bours*, 13 Cal. 52.

88. A statement on motion for a new trial regularly settled and signed by the judge, and containing all the grounds of the motion, but without any specification thereof, may be amended by the judge so as to insert a specification of the grounds of the motion, after the time for filing a statement has passed. *Valentine v. Stewart*, 15 Cal. 396.

## STATUTE OF FRAUDS.

- I. In general.
- II. Sale of Lands.
- III. Sale of Personal Property.
  - 1. Change of Possession.
  - 2. Delivery.
- IV. Consideration.

### IN GENERAL.

1. A plaintiff's recovery cannot be barred by the statute of frauds, unless the statute be pleaded. *Osborne v. Endicott*, 6 Cal. 153.

2. In order to create a trust in land, the facts need not appear affirmatively upon the face of the deed, but may be proved by any note or memorandum in writing of the nominal purchaser, even though he plead the statute of frauds. *Ib.*

### II. SALE OF LANDS.

3. A mere parol agreement for the conveyance of land made before the adoption of the common law and the reenactment of the statute of frauds in this State is void, there being neither delivery of possession nor of title deed, and no part payment of the purchase money. *Harris v. Brown*, 1 Cal. 100.

4. A specific performance of a contract for the conveyance of land can be enforced only when the contract is in writing, or where there has been a part performance of a verbal contract of the vendee. *Hoen v. Simmons*, 1 Cal. 121.

5. Where the terms of a verbal contract are reduced to writing, but the written paper is neither signed nor delivered, the contract will be deemed inchoate and incomplete, and neither party will be bound by it. *Ib.*

6. A party who seeks a specific performance of a verbal contract for the conveyance of real estate, should show that he has fully complied with the substance of the contract on his part. *Ib.*

7. An agreement for the conveyance of land resting solely in parol is void by the Mexican law, except perhaps in the case of an executed contract where corporeal possession was delivered at the very time of the sale by actual entry upon the premises, and the doing certain acts analogous to the livery of seisin at common law. *Ib.*

8. A certificate in writing in these words, "and I did at the time of the said agreement" (to convey land) "consent and agree that A should have possession of the lot forthwith," executed long after the agreement, forms no part of the original contract and wants consideration, and an action cannot be maintained for damages because a third person is in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

9. A parol promise to pay for the improvements made upon land is not within the statute of frauds. *Godeffroy v. Caldwell*, 2 Cal. 492.

10. A conveyance that would come within the statute of frauds if made by an individual, would be liable to the same construction if made by a corporation. *Smith v. Morse*, 2 Cal. 539.

11. A lease executed for two years by the agent of the lessors to the lessees, but

Sale of Lands.—Sale of Personal Property.—Change of Possession.

who had no written authority to do so, is within the statute of frauds. *Folsom v. Perrin*, 2 Cal. 604.

12. An unwritten contract for the sale of land is void by the statute of frauds, and courts of equity have no power to enforce a specific performance. *Abell v. Calderwood*, 4 Cal. 91.

13. An executed parol agreement is a good defense against an action upon a specialty. The statute of frauds contains no provision with regard to the dissolution of agreements or contracts under seal for the sale of lands. *Beach v. Covillaud*, 4 Cal. 316.

14. A sale of land at auction, where no note or memorandum is made by the auctioneer, and no writing exists between the parties, is void by the statute of frauds. *People v. White*, 6 Cal. 75.

15. No eviction is necessary to enable a vendor to recover back the purchase money of real estate where the sale was void under the statute of frauds. *Reynolds v. Harris*, 9 Cal. 340.

16. Where a verbal contract was alleged in the bill, and admitted in the answer, without the defendants insisting upon the statute, a specific performance was decreed and the obvious grounds that the admission of the contract took the case out of the mischiefs against which the statute was intended to guard, and the failure to insist upon the statute was a waiver of its protection. *Arguello v. Edinger*, 10 Cal. 158.

17. Where a verbal contract had been so far performed by one of the parties, relying upon the good faith of the other, that he could have no adequate remedy except by complete performance, courts of equity decreed its execution, upon the ground that the refusal to execute the same under such circumstances was a fraud, and that a statute having for its object the prevention of fraud, could not be used as an instrument for its perpetration. *Ib.*

18. Eminent judges have at different times questioned the wisdom of allowing exceptions to the statute, and have declared their intention not to extend them beyond the established precedents; but none have gone so far as to deny the power of a court of equity to grant relief in a clear case where the refusal to complete the contract would operate as a fraud upon the purchaser. *Ib.*

19. Nothing can be regarded as a part performance to take the case out of the operation of the statute, which does not place the party in a situation which is a fraud upon him, unless the contract be executed. *Ib.*

See LANDS, SALE, SPECIFIC PERFORMANCE.

### III. SALE OF PERSONAL PROPERTY.

20. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised, or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

21. Where there is no note or memorandum of the contract in writing, and no part of the purchase money paid, without an acceptance or receipt of the goods, the contract is void, and cannot be enforced. *Gardet v. Belknap*, 1 Cal. 400.

22. The memorandum required by the statute to be entered by an auctioneer in his sale book, must be made at the very time of the sale, or the vendee will not be bound by the contract, and a memorandum made in the afternoon of the same, or the morning of the next day, is insufficient. *Craig v. Godfrey*, 1 Cal. 415.

23. Where a sale of personal property is void as to the subsequent purchasers, must be determined under the fifteenth section of the statute of frauds. *Vance v. Boynton*, 8 Cal. 560.

See SALE.

#### 1. Change of Possession.

24. The continued change of possession required by the statute after a sale of goods and chattels in order to validate the sale, must be actual and not constructive. *Fitzgerald v. Gorham*, 4 Cal. 290.

25. In order to constitute a valid sale of personal property against creditors, there must be according to the statute of this State, an immediate delivery thereof,

## Change of Possession.

accompanied by an actual and continued change of possession. *Samuels v. Gorham*, 5 Cal. 227.

26. By an immediate change of possession is not meant a delivery instantane, but the character of the property sold, its situation and all the circumstances must be taken into consideration in determining whether there was a delivery within a reasonable time, so as to meet the requirements of the statute, and this will often be a question of fact for the jury. *Ib.*

27. If the mortgagee took immediate and actual possession of the property in the absence of any contract concurrent or subsequent to the mortgage, conferring any greater authority than that contained in the mortgage, he cannot claim by virtue of such possession, because the covenants of the mortgage show that he was not entitled to such possession. *Meyer v. Gorham*, 5 Cal. 324.

28. The plaintiff purchased from B. a certain number of cattle, and presented to C., the agent of B., an order for their delivery. C. pointed out the cattle to the plaintiff, as they were grazing in view, and told him that he delivered him possession, and then accepted an offer of employment from the plaintiffs, and remained in charge of the cattle until they were seized by the defendant: held, that this was a delivery as immediate and as complete as the nature of the case would admit, and followed by an actual and continued change of possession. *Montgomery v. Hunt*, 5 Cal. 369.

29. Where the goods of a third party are mixed with the property or in the apparent possession of the judgment debtor, the sheriff is not liable for levying on them as the property of the debtor, unless there has been notice and demand of the goods by the owner, and a delay or refusal to deliver. *Daumiel v. Gorham*, 6 Cal. 44; *Taylor v. Seymour*, 6 Cal. 543.

30. Where A had a large quantity of flour stored in the warehouse of B, and sold a portion of it to C, and gave an order for the flour sold on B, who accepted the same, and gave C in exchange a receipt for the same, and transferred it on his warehouse books to the account of C, but did not separate any specific portion from the flour of A as the property of B, and the whole was subsequently seized in an action against A: held, that the sheriff

was not liable to C in the absence of segregation of the flour, but that B was estopped by his receipt from denying his liability. *Adams v. Gorham*, 6 Cal. 71.

31. Where the plaintiffs bought a certain amount of flour, being part of a large quantity on storage belonging to the vendor, and the plaintiff did not remove the flour purchased, nor separate from the remainder, but the vendor subsequently sold the remainder, and more, to other parties, who removed what they purchased, leaving on storage a less amount than had been purchased by plaintiff, which was afterwards attached in a suit against plaintiff's vendor: held, that the sale and removal of all the flour except that bought by plaintiff was a segregation of plaintiff's flour, vesting in him a clear title at the time of the seizure. *Horv v. Barker*, 6 Cal. 496.

32. Growing crops are not goods or chattels within the meaning of the statute of frauds, and will pass by deed or conveyance from the very necessity of the case; as they are not susceptible of manual delivery until harvested and reduced to actual possession. *Bours v. Webster*, 6 Cal. 664.

33. The absence of any fraudulent intent will not take the case out of the statute. There must be an actual and continued change of possession or the sale is void as to creditors. *Stewart v. Scansell*, 8 Cal. 83; *Mitchell v. Steelman*, 8 Cal. 375; *Whitney v. Stark*, 8 Cal. 515.

34. Where A, the owner of a sea-going vessel, executes to B a mortgage thereon which is recorded in the custom house of her home port. B. commences suit to foreclose the mortgage and makes C a party defendant thereto, on the ground that he purchased the vessel subject to the plaintiff's mortgage. C, in his defense, avers that the mortgage was void under the statute of frauds, and that he now held the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of a mortgage was sufficient notice thereof to C. *Mitchell v. Steelman*, 8 Cal. 370.

35. Where notice of a mortgage is had by a subsequent purchaser or mortgagor, he is not protected by our statute of frauds. *Ib.* 375.

36. The question of delivery and change of possession is a mixed question of law

Change of Possession.

and fact; but as to what shall constitute a delivery is a question of law alone. *Vance v. Boynton*, 8 Cal. 561.

37. Where H., the owner of barley, which he had piled up in his corral, sells five hundred sacks thereof to V., who has it separated, marked V., and piled up in another part of the corral, and employs a third person to take care of the same for him, and H. afterward sells and delivers the same to B.: held, that B. was entitled to the property, the sale from H. to V. not being followed by an actual and continued change of possession. *Ib.*

38. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on the warehouseman, which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendor and creditor, the purchasers, with their respective lots: held, that there was a sufficient delivery of possession without a separation of the various lots. *Horr v. Barker*, 8 Cal. 608.

39. Where the vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from the larger mass in order to change the possession; but where all the goods of the vendor in the hands of a third party are sold, the change of possession is complete by delivery of the order, taking a new receipt, and entry of the transaction on the books of the warehouseman. *Ib.*

40. A delivery of a warehouse receipt stating that the goods named therein are deliverable on return of the receipt is sufficient prima facie to pass the title. There is no substantial difference in this respect between a warehouse receipt and a bill of lading. *Ib.* 614.

41. The change of possession of the property sold must be continued. The statute does not fix any limits when this change may cease, and if courts could put limits to it they could do away with the clear language of the law. *Bacon v. Scannell*, 9 Cal. 273. See *Stevens v. Irwin*, 15 Cal. 507.

42. F. sold and delivered to V. P. certain goods, the possession of which V. P. retained for two or three days, when he leased the premises in which the goods

were and delivered the goods to F., his vendor, and one M., who, after carrying on the business, in connection with F., for a few days, retired, leaving F. in the exclusive possession of the property, which possession continued until the goods were seized by L., as a constable, under an execution against F.: held, that the sale of the goods to V. P. was void as to creditors, and the goods were subject to the execution against F. *Van Pelt v. Littler*, 10 Cal. 394.

43. In the fall of 1856, L. rented of W. a portion of his brick yard, for the purpose of making bricks. L. subsequently made a brick kiln of bricks and left them in W.'s charge and possession for him to sell for L.'s benefit. In January, 1857, L. made and delivered a bill of sale of the bricks to R. and informed W. of the same, but there was no change of possession under the bill of sale. S., the defendant, as constable, seized the bricks under a process against L. and sold them as the property of L.: held, that L.'s sale to R. was a fraud as against the creditors of L., and that defendant was justifiable in taking the bricks and selling the same. *Richards v. Schroeder*, 10 Cal. 434.

44. K. & S. were the owners of a mule team, which they used in hauling quartz rock to their quartz mill—the team was driven by one L., an employé. K. & S. sold the team to H., executing a bill of sale, and delivering the team by the discharge of L., the driver, who was immediately employed by H., and saying to H., "There is the team." K. & S. then hired of H. the team for eight dollars per day, and put it in the same business of hauling quartz rock as before, and with L., the same driver. Team was kept and fed at K. & S.'s stable, as before the sale: held, that there was no such actual and continued change in the possession of the property, as to take the case out of the operation of the statute. *Hurlburt v. Bogardus*, 10 Cal. 519.

45. When A has six hundred barrels of flour on storage, and he sells to B one hundred, to C two hundred, to D three hundred, and gives each a delivery order upon his warehouseman, and the purchasers all surrender their several orders to the warehouseman without making any separation of each lot from the common mass, but voluntarily leave the flour standing

## Change of Possession.

on the books of the warehouseman to the credit of each purchaser for his proper number of barrels, it is a complete delivery to each purchaser, and will pass the title to each. *Horr v. Barker*, 11 Cal. 403.

46. The separation by the purchasers of their various lots is a mere matter of convenience among themselves, not affecting their rights as to their vendor or a mere trespasser. *Ib.*

47. The statute only requires an actual and continued change of possession as a protection against creditors and subsequent purchasers of the vendor. *Paige v. O'Neal*, 12 Cal. 495.

48. The Uncle Sam Mining Company execute a mortgage upon their mining claims to R., a director of the company. The mortgage was in fact in trust to secure F., et als., who had as sureties of R. signed with him a joint and several note to D., for money loaned by him to R. The money was for the company. R. assigns this mortgage to F. to secure him against liability on the note, delivering the mortgage at the same time to F., who retained it a few minutes and returned it to R. to receive the interest from the company, as agent for him, F. The note is unpaid; R. owes the company nothing: held, that after the assignment, R. had no interest in the mortgage which a judgment creditor could reach; that the delivery of the mortgage to R. for the purpose of collecting interest, there being no circumstance of fraud or suspicion, did not impair the rights of the assignee; that the liability of F., et als., as sureties, was a sufficient consideration for the assignment, and that such an assignment is not a mortgage of a mortgage. *Hall v. Redding*, 13 Cal. 220.

49. The doctrine of continuous possession of personal property after sale or mortgage, does not apply to the case of a paper the mere evidence of debt. *Ib.*

50. Action against the sheriff for seizing plaintiff's wheat, as the property of one Audeque. Evidence tending to show that the wheat was grown on the land of plaintiff and in his possession; that A. was on the land only to raise and harvest the crop; that the grain was cut and stacked on the premises; that plaintiff was entitled to one-third by the contract between him and A.: that A. sold to plaintiff and

delivered possession, and then abandoned the premises, plaintiff residing thereon. A. took no further control of premises or crops, and plaintiff assumed entire dominion of both: held, that plaintiff was not bound to abandon his premises and carry the grain beyond them to protect his title against creditors of A. That there was no error in refusing to instruct the jury that there was no evidence that the sale from A. to plaintiff was accompanied by an immediate delivery of the property, and followed by an actual and continued change of possession thereof. *Pacheco v. Humsacker*, 14 Cal. 124.

51. Plaintiff delivered to defendants gold dust, to be by them forwarded to San Francisco, to be there coined and returned. The dust belonged to five persons, partners in mining, of whom plaintiff and C. were two. While the dust was in the hands of defendants, C. sold to plaintiff, for a valuable consideration, his interest in it, and gave a receipt evidencing the sale. Defendants, after this, received the dust coined, and a creditor of C. attached the coin by garnisheeing defendants. Defendants had no notice of the sale to plaintiff until the day after the attachment, when plaintiff demanded C.'s share of the coin: held, that plaintiff was entitled to the coin; that the dust in defendant's hands was in the constructive possession of all the five owners, C. having no exclusive interest in any part until it was converted into coin and divided among the owners; that C.'s right in the dust was a chose in action, which he could assign by order in favor of the purchaser or assignee, and after such order, neither C. nor his creditors could claim any right to the money; that the statute of frauds has no application to a case like this. *Walling v. Miller*, 15 Cal. 40.

52. Where a vendee of personal property buys it bona fide, takes possession openly, and holds it in exclusive possession for a year or more, afterwards puts the property into the possession of the vendor, as attorney in fact of the vendee, this qualified possession of the vendor does not, as matter of law, show the sale to be fraudulent, and void as against the creditors of the vendor. *Stevens v. Irwin*, 15 Cal. 504.

53. Our statute of frauds (act of 1859, section fifteen) was not intended to go beyond the extreme rule adopted by the sa-



Change of Possession.—Delivery.

preme court of the United States and the English courts, to wit: that retention of the possession of personal property by the vendor, after an absolute sale, is per se fraud. The word "actual" in the statute was designated simply to exclude a mere formal change of possession, and the word "continued" to exclude a mere temporary change. But the statute does not require that the vendor, under penalty of forfeiture of the goods, shall never have any control over or care of them. *Ib.* 505.

54. All the statute requires is, that delivery must be made; the vendee must take actual possession; the possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. The possession must be continuous—not taken to be surrendered back again—not formal, but substantial. But it need not necessarily continue indefinitely, when it is bona fide and openly taken, and is kept for such a length of time as to give general advertisement of the status of the property, and the claim to it by the vendee. *Ib.* 506.

55. The facts in *Bacon v. Scannell*, 9 Cal. 272, differ from those here; but the principle announced in that case is not law. *Ib.* 507.

56. Plaintiff sues for damages in levying on fruit trees shipped by him to W., and landed to W.'s order on the wharf at Stockton, claiming that the trees were not paid for, and not subject to W.'s debts, for want of delivery, and asked, on the trial, this instruction: "That a man who is insolvent for the want of means to pay his debts in this State, is in law insolvent, without reference to any property in another State;" held, that the proposition is too broadly asserted, even if there were any proof on which it could rest—but in this case there is no proof of the insolvency of W. *Thompson v. Paige*, 16 Cal. 79.

57. Plaintiff also asked this instruction: "That a delivery at the wharf is not sufficient, unless notice be previously given to the vendee of their arrival, and that sufficient time be allowed to enable him to receive and remove them:" held, that this proposition is not strictly correct; that if the trees bargained for were put out on the wharf, marked for W., with the intention of his taking them, and if this were done by his order, they would vest in him, especially if he was willing to consider

this a good delivery; that there is in the testimony here no predicate laid for the doctrine of stoppage in transitu, or that plaintiff claimed the right to stop the trees. *Ib.*

2. Delivery.

58. Words alone, unaccompanied by acts, cannot make out a delivery to take the case out of the statute. *Gardet v. Belknap*, 1 Cal. 402.

59. Where an arbitrator refuses to deliver an award made by him until his fees are paid, and a promise to pay is made and he delivers his award, it takes the case out of the statute, and the undertaking to pay a reasonable compensation is supported by a sufficient consideration. *Young v. Starkey*, 1 Cal. 427.

60. A sale of personal property, unaccompanied by immediate delivery, is void as to creditors, and this though delivery be made before levy is made by the creditors. *Chenery v. Palmer*, 6 Cal. 122.

61. And where such sale is absolute in terms, but with an understanding between vendor and vendee that it was only to operate as a mortgage, there it is a secret trust as to the surplus and void as to creditors. *Ib.*

62. Where a sale or mortgage of personal property was void for want of immediate delivery, subsequent advances after delivery cannot be recovered, where it appears that they were paid under the general contract. The contract being void, all subsequent acts relate to its inception, and are alike tainted with fraud. *Ib.*

63. Where the plaintiff sold a number of bales of drillings to A for the purpose of making sacks, delivered to A as fast as he needed them for manufacturing, and A agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A, the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett v. Flint*, 7 Cal. 265.

64. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors, as warehousemen, at a reg-

## Consideration.

ular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart v. Scannell*, 8 Cal. 83.

## IV. CONSIDERATION.

65. Where the consideration of a contract is expressed in writing, although fictitious, it satisfies the statute of frauds, and if the consideration is not paid, that fact may be urged specially as a good ground of defense. *Hoppe v. Stout*, 2 Cal. 462.

66. A guarantor on a promissory note is not within the statute of frauds, for the want of a consideration expressed in writing, as the contract imports a consideration, and each one who writes his name upon it is a party to it and an original undertaker. *Riggs v. Waldo*, 2 Cal. 487.

67. The statute requires a written agreement to answer for the debt of another to express the consideration upon which it is made; but where the agreement is executed at the same time as the lease, and forms the consideration for the execution, it is not a promise to answer for the debt of another, but must be considered as an original undertaking, and as a promise made, upon the strength of which another was enabled at the time to obtain possession of property and enjoy its use. *Evoy v. Tewksbury*, 5 Cal. 285.

68. A guaranty not under seal, nor expressing consideration, made contemporaneously with the contract guaranteed, is a part of that contract, and the expression of the consideration in the contract takes the guaranty out of the statute of frauds. *Jones v. Post*, 6 Cal. 104.

69. Where the complaint charged that A was indebted to the plaintiff, and had conveyed his property to B to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B, who had accepted it, and further charged that B had subsequently reconveyed a portion of the property to A without consideration, praying that B be compelled to execute the trust in favor of plaintiff: held, that A was a proper and necessary party to the action, and that the order of A on B is not void by the statute of frauds. The con-

veyance by the former to the latter was a sufficient consideration to support their promise. *Lucas v. Payne*, 7 Cal. 96.

70. There is no conclusion of fraud springing from the want of consideration in a deed, which will enable a stranger to attack it, though it is a circumstance, among others, from which fraud may be inferred. *Gillan v. Metcalf*, 7 Cal. 139.

71. A guaranty endorsed on a charter party at the same time with its execution, and the consideration of one being in fact the consideration of the other, and being in these words: "I hereby guarantee the fulfillment of the within charter, on the part of the charterer," is good. *Hazeltine v. Larco*, 7 Cal. 33.

72. The instrument referred to in the guaranty becomes part thereof. If the guaranty were executed subsequently it would fail, for there is either no consideration for the promise in fact, or the new consideration is not expressed in the instrument referred to. *Ib.* 34.

73. Where the court below, sitting as a jury, found that a sale was not made in good faith, and was without consideration, but failed to find as a fact a fraudulent intent, and entered judgment accordingly in favor of a subsequent purchaser: held to be error. *Gillan v. Metcalf*, 7 Cal. 139.

74. Where defendant entered into a contract with a builder for the construction of a brick house, and the builder applied to the plaintiffs, who were proprietors of a brick yard, for the sale of the necessary brick, and the defendant said to the proprietors to induce the sale, that he would become responsible for all the brick furnished his building, and whatever contract or agreement was made with the builder he would see carried out, or would pay for the brick if the builder would not: held, that the promise of defendant was within the statute of frauds. *Clay v. Walton*, 9 Cal. 333.

75. Whenever the leading object of the promisor is not to become surety or guarantor of another, but to subserve some interest of his own, his promise is not within the statute, although the effect of the promise may be to pay the debt or discharge the obligation of another. *Ib.* 334.

76. The provision of the statute of frauds which requires the promise to pay the debt of another to be in writing, expressing the consideration, does not apply

Consideration—Stay of Proceedings.—Stipulation.

to the promise of A to pay money he owes by contract with B to C. This is paying A's own debt, and creating his own obligation, not assuming another's. *Barringer v. Warden*, 12 Cal. 314.

77. Where A, who is indebted to B, promises in consideration of his release, to B, to pay the amount to C who is a party to the arrangement, it is a sufficient consideration to support such promise. *Ib.*

78. It is essential to the validity of a contract to answer for the debt or default of another, that it or some note or memorandum thereof be in writing, that it expresses the consideration, and that it be subscribed by the party to be charged thereby. *Ellison v. Jackson Water Co.*, 12 Cal. 552.

79. A promise by B. to perform J. W.'s contract could furnish no consideration for a promise from E., nor could the consideration of the original contract attach to the subsequent promise of B. *Ib.*

STATUTE OF LIMITATION.

See LIMITATION.

STATUTORY CONSTRUCTION.

See CONSTRUCTION OF STATUTES.

STAY OF PROCEEDINGS.

1. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond to entitle them to a stay of proceedings under the statute, and in the mean time order a stay of all proceedings in the inferior court until the extended

period shall have expired; in such case the court may impose such terms as shall appear to be proper. *Bradley v. Hall*, 1 Cal. 199.

2. It seems that an appeal from an order of reference does stay the proceedings. *Smith v. Pollock*, 2 Cal. 92.

3. A stay of proceedings from its nature under an appeal, only operates upon orders, or judgments commanding some act to be done, and does not reach a case of injunction. *Merced Mining Co. v. Fremont*, 7 Cal. 132.

4. An injunction is not dissolved or superseded by appeal taken. *Ib.*

5. A justice of the peace has jurisdiction to grant appeals and stay proceedings thereupon, and his action cannot be reviewed on certiorari. *Coulter v. Stark*, 7 Cal. 245.

6. Where there is no question as to the proper judgment to be entered on a verdict, the judgment should be entered at once, without waiting for a motion for a new trial. A stay of proceedings under the judgment will fully protect the losing party. *Hutchinson v. Bours*, 13 Cal. 52.

7. The stay of proceedings granted according to the statute on the execution of the undertaking an appeal is a sufficient consideration thereof. *Dore v. Covey*, 13 Cal. 508.

8. It is only of orders or judgments which command or permit acts to be done, that a stay of proceedings on appeal can be had. *Hicks v. Michael*, 15 Cal. 109.

STEAMERS.

See VESSELS.

STIPULATION.

1. A stipulation that a verdict should be entered in favor of the defendants, reserv-

## Stipulation.—Stolen Goods.

ing to the plaintiffs the same rights which he would have had in case a jury had been called and a verdict actually rendered for the defendants, should be regarded in precisely the same light as a verdict, and be followed by the same legal results. *Suñol v. Hepburn*, 1 Cal. 258.

2. Where the court orders a new trial, unless the judgment creditor stipulates to remit a part of the verdict and the judgment creditor acquiesces and files the remittitur, he raises a right to question the verdict. *George v. Law*, 1 Cal. 365.

3. Where a written stipulation is filed by the parties in the court below to govern the proceedings there, but has not been brought to the notice of the court for its adjudication, the appellate court will not regard it. *Clarke v. Forshay*, 3 Cal. 291.

4. If the appellant has been injured by a disregard of the stipulation, his remedy must first be sought in the court in which it is filed, or in some court of original jurisdiction. *Ib.*

5. Where one of the issues was the condition of the goods when they left New York, and defendant stipulated on the trial that "if merchantable when they left New York, he made no claim," it was held that he was concluded by the admission. *Burritt v. Gibson*, 3 Cal. 399.

6. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court, on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation, and insist on such points other than those mentioned in the stipulation. *Cahoon v. Lery*, 10 Cal. 217.

7. Counsel in the trial of a cause cannot object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge, as would, in his judgment, be sufficient to present all the questions raised by the pleadings. *Marius v. Bicknell*, 10 Cal. 224.

8. A stipulation inserted in the transcript on appeal, and not embodied in a statement or bill of exceptions, forms no part of the record which this court can notice. *Ritter v. Mason*, 11 Cal. 214.

9. When parties in the court below stipulate that a motion for a new trial should be denied, they cannot question on appeal

the correctness of an order denying such motion. *Brotherton v. Hart*, 11 Cal. 405.

10. The supreme court will not examine errors assigned on appeal, where, after the service of notice of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment, were waived. *Glotsback v. Foster*, 11 Cal. 37.

11. A stipulation to the effect that a statement may "be used on the motion for new trial in this cause, and also on appeal to the supreme court," includes an appeal from the judgment as well as an appeal upon the decision of the motion for a new trial. *Hastings v. Halleck*, 13 Cal. 207.

12. A stipulation in the supreme court, that a cause be continued for the term, and that any motion may be made therein at the next term by either party, which might have been made at the first term after the filing of the transcript, covers only the rights of a party had at the time of the stipulation, and not those already lapsed by the laches of the party. *Reynolds v. Lawrence*, 15 Cal. 361.

13. Parties here have no unqualified right to stipulate for the abrogation of rules prescribed by the supreme court. *Ib.*

## STOLEN GOODS.

1. An auctioneer who in the course of regular business receives and sells stolen goods, and pays over the proceeds of sale to the felon without notice that the goods were stolen, is not liable to the true owner for a conversion. *Rogers v. Huie*, 2 Cal. 571; overruling *Rogers v. Huie*, 1 Cal. 433.

2. Where the defendants were sureties for the appearance of one H., charged with the crime of receiving two mules alleged to be stolen, and the indictment was found against H. for "receiving stolen goods:" held, that it does not follow from this general description of the indictment that it was for the same crime mentioned in the recognizance. *People v. Hunter*, 10 Cal. 503.

3. Warrants drawn by the controller of State, delivered to the payees thereof, and

by them endorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide and without fraud, for warrants apparently good against the State, are not liable in this form of action. *State of California v. Wells*, 15 Cal. 340.

4. On trial under an indictment for receiving stolen goods, the court instructed the jury "That a guilty knowledge, on the part of the defendant, is essential to the constitution of the offense. This may be shown either directly, by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them very much under their value, or denied their being in his possession, or the like:" held, that the charge is erroneous in this, that it asserts as a conclusion of law, that if the defendant purchased the goods at a price much below their value, or if he denied that he had them, or if the thief swore defendant received them, then, in either case, the guilty knowledge was proved; that this is not law; that either one of these facts is a circumstance of guilt, but does not alone constitute conclusive proof of guilt. *People v. Levison*, 16 Cal. 99.

See LARCENY.

## STREETS AND HIGHWAYS.

- I. In general.
- II. Commissioner of Streets.

### I. IN GENERAL.

1. Taking a part of a lot from an individual for the purpose of a public street,

though it may perhaps give him a claim on the public for compensation, does not confer upon him the right to encroach to the same extent on the land of his neighbor. *Reynolds v. West*, 1 Cal. 329.

2. Whether driving piles in a street extended into the bay in the city of San Francisco is an obstruction to the free use of the street by the public, is a question of fact for the jury to pass upon, and if not so submitted a new trial will not be granted. *City of San Francisco v. Clark*, 1 Cal. 386.

3. Every individual should not be permitted to determine for himself whether the grade of a street or a wharf is too high or too low, and set about altering it at his pleasure. *Clark v. McCarthy*, 1 Cal. 454.

4. An assessment was laid for the purpose of improving a street, and thereby benefiting the property of the plaintiff in common with the property of other persons owning lots on the same street, and after the work was completed and all the benefit possible derived therefrom, the plaintiff cannot claim to be exempt from the assessment on the ground of irregularities in the mode of making the assessment. *Weber v. City of San Francisco*, 1 Cal. 457.

5. All that part of a bay or river below low water mark at low tide, is a public highway common to all citizens, and no one has a right to appropriate the use to himself solely. *Gunter v. Geary*, 1 Cal. 468.

6. It is a public nuisance to erect a house in a highway. *Ib.*

7. The city of San Francisco could not take property in the possession of another for the purpose of a public slip, without paying an adequate compensation, where the title is not in the city. *Ib.*

8. Where lots were sold as fronting on or bounded by a certain space designated in the conveyance as a street, the use of such space as a street passes as appurtenant to the grant and constitutes a dedication of such street, and it cannot afterwards be sold or disposed of to alter or defeat such dedication. *Breed v. Cunningham*, 2 Cal. 368.

9. Where the streets of a city are diverted from their ordinary and legitimate uses by special license to a private person, for his own benefit, as to run a railroad there, in the pursuit of a business which involves constant risk and danger, he is



## In general.

bound in the exercise of such right to use extraordinary care. In this a private railroad differs from a public one. *Wilson v. Cunningham*, 3 Cal. 243.

10. Where private property is taken as a street, compensation must be made before a citizen can be divested of his rights. *City of San Francisco v. Scott*, 4 Cal. 115.

11. A dedication of land to the public as a street may be by deed or other overt act, or may be presumed from the lapse of time or acquiescence of the party; but where there is no abandonment or dedication of the land, the user for a limited time by the public cannot presume a dedication. *Ib.* 116.

12. Where a city is laid out with streets running to the water's edge, such streets should be held to continue on to the high water, if the city front is filled in or the space enlarged by accretion. *Wood v. City of San Francisco*, 4 Cal. 193.

13. On an attempt by a municipality to convert a public easement to private use or benefit, and to defeat the right of way over a public street, it is beyond the power of a corporation, and the legislature has no authority to interfere with the disposition of the land and the premises upon which the easement is situated after title has passed from the State. *Ib.*

14. All the public streets of San Francisco running into the water, as laid down on the official map of the city, were by operation of the act of March 26th, 1851, extended and carried to the front line of the city, and as such are subject to the free enjoyment of the public and exempt from executions against the city. *Ib.*

15. The obligation of a municipal corporation to keep the streets in repair is necessarily suspended while they are actually undergoing such alterations as for the time made them dangerous. *James v. City of San Francisco*, 6 Cal. 530.

16. Where the law compels the corporation to give out a contract for grading a street to the lowest bidder, it takes away from the corporation the responsibility arising from the acts of the person taking the contract. *Ib.*

17. It follows that where a party was injured by falling at night into an excavation made in grading the street of a city under such contract, owing to the failure to put lights or guards about the place, the contractor and not the city is liable. *Ib.*

18. Under the charter of the city of San José, an ordinance abolishing the salary of the office of street commissioner, and substituting fees instead thereof, is legal and binding on the officers. *Wilson v. City of San José*, 7 Cal. 276.

19. The charter of the city of San Francisco provides that when the common council think proper to open or improve a street, etc., notice shall be given, and if no protest be made as provided, then the council shall proceed with the improvement: held, that when an ordinance had passed to give the required notice, which was given and no protest made, the full discretionary power of the council had been exercised, and it became binding as a contract between the city and the property holders to make the improvements, the remaining acts on the part of the city being mere ministerial duties of its proper officers. *Lucas v. City of San Francisco*, 7 Cal. 473.

20. The liability of the city for street improvements is limited to the expense of improving the crossings. The remainder is to be paid by the property holders fronting upon the streets. The city in contracting as to the latter must be regarded as the mere agent or trustee, and is therefore not primarily liable. *Ib.*

21. Where the charter of the city of Sacramento authorized the common council to levy a special assessment for grading and improving the streets of the city, and provided that when the council thought it expedient to open, alter or improve any street, they should give notice, etc., and if one-third of all the owners in value of the adjacent property protest against the proposed improvement within ten days after the last publication, it shall not be made, and a protest was presented more than ten days after the last publication of such notice: held, that such protest was not presented in time, and was, therefore, ineffectual: further held, that it must appear that one-third of the owners, in value, of the adjacent property united with it. *Burnett v. City of Sacramento*, 12 Cal. 82.

22. An ordinance for the improvement of the streets, passed by the council before the expiration of the time for the presentation of the protest, is not thereby invalid. *Ib.*

23. The legislature had the right to provide in the act known as the consolida-

## In general.

tion act for the government of the city and county of San Francisco, that the owners of lots in said city should keep the streets in front of their lots in repair. *Hart v. Gaven*, 12 Cal. 477.

24. Where the owner of a lot neglects for three days after notice from the superintendent of public streets in said city to repair the street in front of his lot, the superintendent has the right to make a contract for that purpose, and an action will lie in the name of a party performing the work against the owner of the lot adjacent for the amount. *Ib.*

25. To constitute a dedication of land for the purposes of a rural highway, no particular formality is necessary. The intention on the part of the owner to dedicate is the vital question. *Harding v. Jasper*, 14 Cal. 646.

26. This intention may be manifested with or without writing by an act of the owner, as throwing open his land to public travel, platting it, and selling lots bounded by streets designated on the plat, or acquiescence in the use of land as a highway, and hence time is not an essential ingredient in the act of dedication. *Ib.* 647.

27. Stronger proof of dedication is required in cases of roads in the country than in cases of streets or lands in a town or city. *Ib.* 648.

28. The charter of the city of San Francisco of 1851 gave the city power to open streets and alleys and to alter and improve the same, and this power includes authority to enter into contracts for that purpose, binding upon the city. And this, notwithstanding section two, article five of that charter, providing that the adjacent property shall bear two-thirds of the expense of every improvement. This section simply made the property holders liable to the city for the two-thirds, and the remedy of the city was by assessments on the property, and such assessments, when collected, go into the city treasury to be used as the city sees fit. *Argenti v. City of San Francisco*, 16 Cal. 263.

29. The provision in section five, article three of the charter of 1851, as to not creating liabilities beyond \$50,000, over and above the annual revenue of the city, etc., is directory, and not a limitation upon the power of the city to contract debts. *Ib.* 264.

30. The legal effect of this provision is entirely different from the clause in the eighth article of our constitution, prohibiting the legislature from creating debts against the State. *Ib.*

31. Plaintiff, by virtue of contracts entered into with an officer of the city of San Francisco, which contracts were executed by such officer in his official capacity, made valuable and permanent improvements to the city, for the exclusive benefit of it and its inhabitants; such improvements were made under the immediate supervision of an officer of the city, and when completed, were approved of and received by him on behalf of the city; plaintiff, in making the improvements, relied on the validity of the contracts and the obligation of the city to pay, as therein provided; the city authorities were fully informed of these facts, took no steps to repudiate the contracts, or to inform plaintiff as to her disposition to pay: held, that plaintiff can recover on the contracts, although there is no evidence that the officer signing them was expressly authorized; that the silence of the city authorities, under the circumstances, was equivalent to a direct sanction of the acts of such officer, and estops the city from denying his authority; that the city having acquiesced in the contracts from the commencement to the completion of the improvements, never questioning the validity of the contracts until she had received all the benefit to be had from their performance, it would be a fraud on plaintiff to permit her now to repudiate them. *Ib.* 274.

32. The mayor and controller of said city having drawn warrants on the treasurer thereof, payable out of the street assessment fund, in favor of plaintiff, for the improvements so made under said contracts: held, that plaintiff cannot recover on the warrants; that being payable out of a particular fund, they are neither bills of exchange nor promissory notes; and that the treasurer must pay from that fund and no other. *Ib.*

33. Nor can plaintiff recover on some of the warrants so drawn, for the further reason, that they do not specify the appropriations under which they were issued, nor the date of the ordinances making the same, as is required by the eighth section of the third article of the city charter; and

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they would not constitute any authority to the treasurer to pay them, even if there were funds in the treasury specially appropriated for their payment. *Ib.* 275.

34. The common council of the city of San Francisco passed an ordinance authorizing the street commissioner to advertise for proposals to grade, plank and sewer a portion of Mission street, in said city, "the same to be paid for by the property holders adjacent \* \* the proposals to be opened and awarded by the street commissioner, with the committees on streets from both boards of aldermen." This ordinance was published for ten days successively in a daily newspaper of the city, and the advertisement required was made in like manner for the same period. Proposals, based upon certain specifications, were received under the ordinance, and opened by the committee of the two boards and the commissioner, and the work awarded to B. Subsequently, an instrument was executed by B., as contractor, and by the street commissioner, purporting to act in the name of the city, setting forth the acceptance by the city of B.'s proposal, and an agreement by her to pay him for the work at certain designated rates, and an agreement on his part to do the work to the satisfaction of the city and the street commissioner. B. began the work, and afterwards transferred his contract and his interest therein to plaintiff, who completed the work in the best manner, and to the satisfaction of the street commissioner and the city. The work was measured as it progressed by the city's engineer, who duly certified to the accounts for the same, which accounts were duly audited, and upon them warrants were drawn by the controller, by authority of the city, and delivered to plaintiff. The warrants were presented to the treasurer, and payment demanded and refused, on the ground that there were no funds in the treasury applicable to them. Previous to the demand, assessments had been duly levied by the city upon the property adjacent to the improvements, to meet their expenses, and these assessments had been collected by the collector of street assessments, and by him paid into the city treasury. Plaintiff sues the city, as liable either on the express contract, or upon the warrants, or upon implied contracts, for the services

rendered and materials furnished, or for money received by defendant to his use: held, that, as under the charter, the city had authority to order the improvements in question, the acceptance of the proposals of B. by the street commissioner and the committee of the two boards converted what were previously mere propositions on the part of the city into contracts, perfect in all their parts, binding alike upon the city and the contractor. *Ib.* 277.

35. Held, further, that the city is primarily liable; that she, and not the contractor, must look to the property holders adjacent to the improvements, for the necessary expenses; that the property holders are not parties to the contracts; that the city must levy and collect the assessments; that the contractor has no claim upon the property or the property holders, but must look alone to the city; that the clause in the ordinance as to how the improvements shall be paid for is only a designation of the sources upon which the city relies for payment. *Ib.* 282.

36. In this case, the city having discharged the assessments by receiving in payment thereof outstanding warrants, she is primarily liable to plaintiff as for moneys received to his use, even on the theory that she acted simply as the agent of the plaintiff in collecting the assessments. *Ib.* 283.

37. The city would not be liable independent of the contract made by her acceptance of the proposals of the contractor. A municipal corporation can only act in the cases and in the mode prescribed by its charter, and for street improvements of a local nature, express contracts, authorized by ordinance, are necessary to create a liability. The doctrine of liability as upon implied contracts has no application to cases of this character. *Ib.*

38. The doctrine applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes upon the city the obligation to do justice with respect to the same. *Ib.*

39. If the city obtain the money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her upon the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial. If the city obtain

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other property which does not belong to her, it is her duty to restore it, or if used by her, to render an equivalent to the true owner, from the like general obligation. *Ib.*

40. In these cases, the city does not make any promise, but the law implies one, and it is no answer to a claim resting upon such implied contract, to say no ordinance has been passed, or that the liability of the city is void when it exceeds the limitation of \$50,000 prescribed by the charter. *Ib.*

41. To fix the liability of the city in respect to money or other property, the money must have gone into her treasury or been appropriated by her, and the property must have been used by her, or be under her control. *Ib.*

42. In case of services rendered, the acceptance of the services must be evidenced by ordinance to that effect. Their acceptance by the city, and the consequent obligation to pay them, cannot be asserted in any other way. If not originally authorized, no liability can attach upon any ground of an implied contract. *Ib.*

43. The improvements in this case—being to particular streets—were local in their character, and though to some extent of general benefit, yet were chiefly for the benefit and advantage of the immediate neighborhood. The advantages resulting from them do not constitute that kind of general advantage to the city, from the existence of which any liability to pay for the same can be inferred. The general doctrine that when one takes a benefit which is the result of another's labor he is bound to pay for the same, does not apply to cases of this kind. The benefit is immediate to the adjacent property holders, and only indirectly to the city at large. *Ib.*

44. As a general rule, a city is only liable upon express contracts authorized by ordinance. The exceptions relate to liabilities from the use of money, or other property, which does not belong to her, and to liabilities springing from neglect of duties imposed by her charter, from which parties are enjoined. *Ib.* 284.

45. Even these exceptions are limited in many instances, as where the property or money is received in disregard of positive prohibitions in her charter—as for

instance, upon the issuance of bills of credit. *Ib.*

46. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco, upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin v. City of San Francisco*, 16 Cal. 286.

47. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they were given. *Ib.*

48. These warrants, with few exceptions, do not comply in their form with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriations under which they were issued, and the date of the ordinances making the same. *Ib.* 287.

See DEDICATION.

## II. COMMISSIONER OF STREETS.

49. A street commissioner is empowered to use the necessary force, but no more than is necessary to prevent an injury to the streets of a city, and no action can be maintained against him or those who act under his orders for using such force. *Clark v. McCarthy*, 1 Cal. 453.

50. To entitle a party to recover his salary as a street commissioner it is incumbent on him to show, not only that he performed the duties of the office for the time alleged, but first that he had been lawfully elected, and second, that he had qualified himself to hold the office by taking oath and filing his bond in the manner and at the time prescribed by law. *Payne v. City of San Francisco*, 3 Cal. 125.

51. A resolution of a municipal body recognizing a party as street commissioner who has not lawfully qualified, will not enable him to recover for services rendered in that capacity on quantum meruit. *Ib.* 128.



## SUBSCRIBING WITNESS.

See WITNESS.

## SUMMONS.

1. In actions in personam in courts other than admiralty courts, no man can be deprived of his property without having first been personally cited to appear and make his defense, unless by virtue of some positive statutory enactment. *Loring v. Illsley*, 1 Cal. 29.

2. The summons cited the defendant to appear and answer the complaint, at 10 A. M., and the judgment was rendered at 9 A. M. against him: held, that the judgment was irregular and a new trial should be ordered, although the court subsequently offered to allow the defendant to come in and defend. *Parker v. Shephard*, 1 Cal. 132.

3. Where a defendant is served with summons in a county other than that in which the action is brought, he has thirty\* days within which to answer, and a judgment by default rendered before the time for answering expires, will be set aside. *Burt v. Scrantom*, 1 Cal. 416.

4. The court can allow a summons to be amended by inserting the notice of the cause of action required therein. *Polock v. Hunt*, 2 Cal. 194.

5. If the summons be radically defective it will not support a judgment by default. *People v. Woodlief*, 2 Cal. 242.

6. Where defendant's attorneys accepted service of the summons, but attached no date thereto, the date of the return by the sheriff was held sufficient. *Crane v. Brannan*, 3 Cal. 194.

7. Where the summons was headed with the words "district court," but was issued out of the county court, under the county court seal, and tested by the judge of said court, it was held good as the writ of the county court. *Ib.* 195.

8. Where a summons is directed to the

sheriff of a county and he returns it served, but does not state where he served it, the presumption is he served it in his jurisdiction. *Ib.*

9. Where the summons was issued against Adams & Co. and served on C. B. Macy, and nothing appeared to connect Macy with Adams & Co., it was held that the judgment by default was bad. *Adams v. Town*, 3 Cal. 247.

10. A final judgment by default can properly be rendered upon an unliquidated demand, where the defendant has been notified in the summons of the amount for which the plaintiff will take judgment. *Hartman v. Williams*, 4 Cal. 255.

11. An appearance by attorney at common law and by our code, amounts to a waiver of service of summons. *Suydam v. Pitcher*, 4 Cal. 281.

12. After the adjournment of the term the court loses all control over cases decided, unless its jurisdiction is saved by some motion or proceeding at the time, except in the simple case provided by statute, where the summons has not been served in which the party is allowed six months to move to set aside the judgment. *Carpentier v. Hart*, 5 Cal. 406; *Shaw v. McGregor*, 8 Cal. 521.

13. Courts cannot know an under officer, and the act and return on a summons of a deputy sheriff is a nullity, unless done in the name and by the authority of his principal. *Joyce v. Joyce*, 5 Cal. 449.

14. A judgment by default will be reversed on appeal, where the record shows that the defendant has not been legally served with process. *Ib.*

15. The code allows a party ten days after the service of summons to file his answer, if served in the county, twenty days if out of the county, but within the judicial district, and forty days in all other cases. A nonresident of the State would come under the last clause, and would be entitled to forty days, after the service of of the summons, by three months publication. *Grewell v. Henderson*, 5 Cal. 466.

16. The code provides that in relation to service on nonresidents by publication, that "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication:" held, that the publication only effects the service of the summons, and the defendant is entitled to forty days after the

\*The code of April 29th, 1851, now allows forty days, if out of the county, and not in the same judicial district.



## SUMMONS.

period of publication to file his answer. *Ib.*

17. Production of the original note and mortgage, and proof of the service of summons, are sufficient to justify a decree of foreclosure on default. *Harlan v. Smith*, 6 Cal. 174.

18. At common law, when the summons has been served, default confessed every issuable fact stated in the declaration, and could only be set aside for objections to the declaration which would have been good on general demurrer. *Harlan v. Smith*, 6 Cal. 174; *Rowe v. Table Mountain Water Co.*, 10 Cal. 444; *Hentsch v. Porter*, 10 Cal. 558; *McGregor v. Shaw*, 11 Cal. 48; *Hunt v. City of San Francisco*, 11 Cal. 259; *Curtis v. Herrick*, 14 Cal. 119; *Smith v. Billett*, 15 Cal. 26.

19. In a suit against a corporation, the summons must be served on one of the officers or agents named in the code, and service on a party in possession of the property who does not appear to be one of the officers named, will not entitle the plaintiff to a judgment by default. *Aiken v. Quartz Rock Mariposa Gold M. Co.*, 6 Cal. 186.

20. A defendant who has not been served with a summons is not a competent witness for his codefendant, in an action of trespass. *Gates v. Nash*, 6 Cal. 194.

21. Where the attorney of record makes an affidavit that defendant conceals himself to avoid service of process, it is sufficient for an order for the service of summons to be made by publication. *Anderson v. Parker*, 6 Cal. 201.

22. An injunction will not lie to enjoin a judgment by default, on the ground that the sheriff's return on the summons does not show the place in which service was made on the defendant, where it is proved on the hearing of the application for injunction that defendant was served in a certain county of this State more than thirty days before entry of his default. *Pico v. Suñol*, 6 Cal. 295.

23. An order of court setting aside a default and judgment entered during vacation, is regular and correct where there has been no service of summons upon the defendants. *Pico v. Carillo*, 7 Cal. 32.

24. Where a defendant was served with process, but was not given the time al-

lowed by statute to appear and answer, it would be a sufficient reason for the court to quash the writ, on motion, by an *amicus curiæ*, or for extension of the time on defendant's motion, or a good objection on writ of error, arrest of judgment or motion for new trial; but it cannot be said that the court had no jurisdiction of the person, so as to render its judgment a nullity. *Whitwell v. Barbier*, 7 Cal. 62.

25. A judgment by default, where summons had been served on defendant, cannot be attacked, collaterally, for a mere irregularity of service, or for a defective return. *Dorente v. Sullivan*, 7 Cal. 280.

26. The only object of a summons is to bring a party into court, and if that object be obtained by the appearance and pleading of a party, there can be no injury to him. *Smith v. Curtis*, 7 Cal. 587.

27. A justice of the peace cannot make a summons returnable in eleven days after service. *Deidesheimer v. Brown*, 8 Cal. 340.

28. Where a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss it, it does not amount to a waiver of his rights so as to cure the defect. Nor does he waive his rights by answering after moving to dismiss and motion to overrule. *Ib.*

29. A judgment obtained by publication of summons against a defendant then out of the State in which the judgment is rendered, though it may be enforced against his property in that State, has no binding force in personam, and is mere nullity when attempted to be enforced in another State. *Kane v. Cook*, 8 Cal. 455.

30. Where judgment by default is entered in an action against a party, for fraudulently converting money of the plaintiff, the summons must have apprised the defendant that on failure to answer judgment would be taken against him for the fraud; a mere notice in the summons that a money judgment would be taken will not support a judgment for fraud. *Porter v. Hermann*, 8 Cal. 625.

31. Under the theory of the code, the defendant, when summoned by publication in the manner prescribed, is as duly brought into court as if personally served with the summons; and as a legitimate result of being legally in court, unless he denies the allegations of the complaint within six months, he is held to admit

## Summons.

them to be true, and cannot afterwards show their falsity. *Ware v. Robinson*, 9 Cal. 111.

32. Where the proof of service of summons consists in the written admissions of defendants, such admissions to be available in the action should be accompanied with some evidence of the genuineness of the signatures of the parties. In the absence of such evidence the court cannot notice them. *Alderson v. Bell*, 9 Cal. 321.

33. The statute does not require an admission of service to designate the place where the service was made. The object of such designation when required is to determine the period within which the answer must be filed or when default may be taken. *Ib.*

34. An attachment issued before the issuance of the summons in the suit is void, and the subsequent issuance of the summons cannot cure it. *Low v. Henry*, 9 Cal. 552.

35. Where there is but one clerk in the office of a public newspaper, his affidavit of the publication of summons or notice in said paper is sufficient, and it is unnecessary for the affidavit to describe him as principal clerk. *Gray v. Palmer*, 9 Cal. 637.

36. The requirement of the statute being positive, that in actions against a minor under the age of fourteen years, personal service of summons must be made, in cases where he resides out of this State, and his residence is known to plaintiff, such residence should be stated in the affidavit of publication. *Ib.* 638.

37. The failure to deposit in the post office a copy of the complaint and summons directed to such minor is not cured by the appearance of the mother, in her own behalf, and the court had no right to appoint a guardian ad litem until the infant is properly brought into court. *Ib.*

38. The failure of a justice of the peace to state on his docket that the summons was returned "served," will not vitiate the judgment on appeal. The fact of service may be shown by the return of the officer on the summons. *Denmark v. Liening*, 10 Cal. 94.

39. Where in an action against an incorporated company, the return of the sheriff showed that he had served the summons in the action "upon James Street, one of the proprietors of the company:"

held, that it was not sufficient evidence of service to give the court jurisdiction, it not appearing that Street was president, or head of the corporation, or secretary, cashier or managing agent thereof. *O'Brien v. Shaw's Flat and Tuolumne Canal Co.*, 10 Cal. 343.

40. A sheriff's return on the summons against a corporation, that he served the same on the president and secretary of the company, is prima facie evidence that the persons named in the return were such officers. *Rowe v. Table Mountain Water Co.*, 10 Cal. 444.

41. A personal judgment cannot be given against a party not served with process, in an action on a joint obligation of several defendants. *Treat v. McCall*, 10 Cal. 512.

42. To support a plea in abatement founded on the pendency of a prior action, it is necessary to show that process was issued in such action. *Weaver v. Conger*, 10 Cal. 238; *Primm v. Gray*, 10 Cal. 522.

43. The return of a sheriff on a summons, that he had served it on one Pendleton, one of the partners and associates of the company, is prima facie evidence that Pendleton was such partner and associate. *Wilson v. Spring Hill Quartz Mining Co.*, 10 Cal. 445.

44. An acknowledgment of service of summons is only sufficient when reduced to writing and subscribed by the party. A verbal acknowledgment is not sufficient. *Montgomery v. Tutt*, 11 Cal. 314.

45. An affidavit which avers that affiant on the day named "served the summons in this action upon the defendant, Mary B. McMillan, at her residence in the city of San Francisco, by delivering and leaving with her a copy thereof, attached to a copy of the amended complaint filed in this action is insufficient, in not stating that the person serving it was a white male citizen, etc., or that a certified copy of the complaint accompanied the summons. *McMillan v. Reynolds*, 11 Cal. 378.

46. The affidavit of service of summons must show affirmatively compliance with all the requirements of the law. *Ib.*

47. Where judgment of foreclosure was obtained on such service, and the premises sold under the judgment to a party who was at the time of such purchase cogniz-

## Summons.

ant of the fact of such defective service, and also that the defendant was a married woman, and where the defendant has a valid defense to such action, the judgment will be set aside. *Ib.*

48. A judgment rendered against a party who is absent from the State, upon publication of the summons thirty days only, is void for the want of jurisdiction of the person of the defendant. *Jordan v. Giblin*, 12 Cal. 102.

49. An affidavit which avers a cause of action against the defendant—that defendant cannot after due diligence be found in this State—that summons has been issued but the sheriff cannot find him; that defendant's residence is in the county where the summons issued, and that defendant still has a family residing in said county—is insufficient to authorize the court to appoint an attorney to represent such absent defendant. *Ib.*

50. Where service is attempted in a mode different from the course of the common law, the statute must be strictly pursued to give jurisdiction. *Ib.*

51. An affidavit for an order of the publication of the summons upon the ground of the absence of the defendant, which states that the defendant could not after due diligence be found in the county where the action was pending; that affiant had inquired of Fogg, who was an intimate friend of defendant, as to his whereabouts; that Fogg was unable to inform him, and that plaintiff did not know where defendant could be found within the State, is insufficient to authorize the publication. A publication made upon such an affidavit will not give the court jurisdiction of the person of the defendant. *Swain v. Chase*, 12 Cal. 285.

52. Equity has jurisdiction to vacate a judgment fraudulently altered so as to include a defendant not served with process, and not originally included in the judgment. *Chester v. Miller*, 13 Cal. 560.

53. Where a man is sued by a fictitious name, and the return of the sheriff on the summons shows service on defendant by his proper name, as "John Doe alias Westfall," a default being entered, judgment may be rendered against the defendant in his true name, Westfall, without proof that Doe and Westfall are the same. *Curtis v. Herrick*, 14 Cal. 120.

54. A defendant having no defense to

an action cannot go into equity and enjoin a judgment by default on the ground that the Sheriff's return of service of summons on him is false, and that in fact he had no notice of the proceeding. *Gregory v. Ford*, 14 Cal. 141; *Gibbons v. Scott*, 15 Cal. 286.

55. Where the judgment of the court recites that summons was served on defendant, the fact that years afterwards there appears some erasure or interlineation on the sheriff's return is not sufficient to nullify the return, in the absence of a direct attack upon it for fraud or forgery, or alteration. *Gregory v. Ford*, 14 Cal. 144.

56. The superior court of San Francisco city had power to send a summons for service out of the city of San Francisco. *Chipman v. Bowman*, 14 Cal. 158.

57. The recital in the docket of a justice who had rendered judgment, that the summons was "returned duly served," is of no weight to prove proper service of the summons. The return of the officer is as much a part of the record as the docket itself, and if the return fail to show sufficient service, the recital being based on the return alone amounts to nothing more than the opinion of the justice, and cannot be relied on to give validity to the judgment. *Lowe v. Alexander*, 15 Cal. 300.

58. The record of the proceedings in a justice's court, in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non judice, and void, and the failure of defendant after summons was served to appear and object that suit was brought in the wrong township is no waiver of the objection. *Ib.* 301.

59. Where the record shows that suit was brought in township number four, Sierra county, that the summons was served by the constable of that township in township number three, and it nowhere appears either that the defendant was a resident of township number four, or a nonresident of the county, or that the suit was within any of the other exceptions of the statute, the judgment rendered is void, and not admissible as evidence of title upon a sale made thereunder. *Ib.* 302.

60. On appeal, a judgment by default will be reversed, unless the record show service of summons on the defendant, or appearance, though possibly a judgment

so obtained could not be impeached collaterally. *Schloss v. White*, 16 Cal. 82.

61. If, as contended in this case, a judgment by default be void, because of the absence of the seal of the district court to the summons issued in the action in which the judgment was entered, or because of a defect in the certificate of the sheriff of the service of summons and copy of complaint, or because of irregularities of the clerk in entering the judgment, the district court can quash the execution issued on such judgment, and injunction to restrain the enforcement thereof does not lie. *Logan v. Hillegass*, 16 Cal. 202.

62. If such judgment be not void, but merely irregular, because of the defects named, and the defects can be reached by motion before judgment, or on appeal, then the complaint here to enjoin the enforcement of the judgment should aver that plaintiff has paid the claim for the recovery of which the action was brought, or that he has a valid defense to the same. *Ib.*

63. Under the Act of 1857, (Ch. 236) regulating fees of office in certain counties, the sheriff may charge fees for copies of the summons and injunction served by him in a suit, though the copies were prepared and printed by the plaintiff, and certified by the clerk at the plaintiff's request; but the sheriff must look for his fees to plaintiff, at whose request the copies were served, and cannot sue the clerk for money had and received—although plaintiff had paid the clerk for such copies—unless the money was delivered to him to be paid the sheriff. *Edmonson v. Mason*, 16 Cal. 387.

64. The clerk is entitled to charge, under the act, fees for certified copies of summons and injunction, if the copies, though prepared by plaintiff, were certified by the clerk at plaintiff's request. There is no necessity for plaintiff to obtain copies of summons and injunction from the clerk. *Ib.* 388.

65. A judgment by default rendered in a justice's court cannot be attacked collaterally as void for want of jurisdiction of the person of the defendant—who was a resident of the county, but not of the township in which the suit was instituted—when there appears in the record a certificate, endorsed on the summons by the officer serving it, and filed with the justice

who acted on it, that the summons was served on the defendant in the township in which suit was commenced. *Fagg v. Clements*, 16 Cal. 392.

66. Such certificate is sufficient, prima facie, to establish the jurisdiction of the justice. The objection to the jurisdiction, that defendant did not reside in the township where suit was brought, should have been taken at the trial; and as defendant failed to appear, the judgment is conclusive. *Ib.*

## SUNDAY.

1. In the absence of any custom to the contrary, Sundays are computed in the calculation of lay days at the port of discharge; but when the contract specifies working lay days, Sundays and holidays are excluded in the computation. *Brooks v. Minturn*, 1 Cal. 483.

2. The constitution provides that if any bill presented to the governor, having passed both houses of the legislature, shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return: held, that both Sundays intervening must be computed. *Price v. Whitman*, 8 Cal. 415; overruling *People v. Whitman*, 6 Cal. 660.

3. The act of April, 1858, "for the better observance of the Sabbath, is in conflict with the first and fourth sections of article first of the constitution of this State, and is therefore void. *Ex parte Newman*, 9 Cal. 510.

4. The act violates this section of the constitution because it establishes a compulsory religious observance; and not because it makes a discrimination between different systems of religion. *Ib.* 513.

5. A writ placed in the sheriff's hands on Sunday cannot be officially received by him on that day. It can only be considered officially in his hands when Sunday has expired. *Whitney v. Butterfield*, 13 Cal. 341.

6. Where one attachment was placed in



the sheriff's hands on Sunday and another against the same defendant was placed in the hands of a deputy at a quarter past twelve on Monday morning, the sheriff not knowing the fact, and the first levy was made under the last writ at one o'clock Monday morning, the sheriff was not guilty of negligence in executing the first writ, no special circumstances being shown. *Ib.*

### SUPERIOR COURT.

1. The superior Court of the city of San Francisco has no jurisdiction of proceedings by quo warranto, and a judgment of that court by which the right to an office was determined in these proceedings was reversed on appeal. *People v. Gillespie*, 1 Cal. 343; *People v. King*, 1 Cal. 345.

2. The superior court had constitutionally all the powers which are specified in the act, and such has been the uniform understanding of the profession. *Seale v. Mitchell*, 5 Cal. 403; *Curtis v. Richards*, 9 Cal. 39; *Hickman v. O'Neal*, 10 Cal. 295; overruling *Meyer v. Kalkman*, 6 Cal. 590.

3. The superior court was not intended to be an inferior tribunal in respect to the mode of enforcing its process, but in respect to the character of the subjects of its jurisdiction, and a subordinate relation to other tribunals. *Hickman v. O'Neal*, 10 Cal. 295; *Chipman v. Bowman*, 14 Cal. 158.

4. The late superior court had no jurisdiction of a suit affecting real estate outside the city limits. If the point arose on the complaint, it would be fatal, and probably if the fact that the property was beyond the city appeared anywhere in the record, it would be fatal. *Watts v. White*, 13 Cal. 324.

5. The superior court had jurisdiction of a suit to settle the accounts of a partnership formed for the purpose of mining claims, where the parties resided in the city, but could not by its decree affect the title thereto, or any interest in the claims themselves. *Ib.* 425.

6. The late superior court of San

Francisco had power to send a summons for service out of the city of San Francisco. *Chipman v. Bowman*, 14 Cal. 158.

### SUPERVISORS.

1. A certiorari to the board of supervisors, on the ground of want of jurisdiction, is premature, if taken before the action of the board. *Wilson v. Supervisors of Sacramento County*, 3 Cal. 388.

2. A mandamus to a board of supervisors to issue a warrant for a specified sum is irregular; it should direct them to audit the account and issue warrants accordingly. *Tuolumne County v. Stanislaus County*, 6 Cal. 442.

3. A contract made by the court of sessions being void, could not be made valid by subsequent ratification of the board of supervisors. *Phelan v. Supervisors of San Francisco County*, 6 Cal. 540.

4. The supervisors of a county are a quasi political corporation, and as such, the district courts of this State, by virtue of their general jurisdiction as superior courts, have a supervisory power and control over their proceedings, to the exercise of which appellate power is not necessary. *People v. Hester*, 6 Cal. 680.

5. *This may be done by mandamus, prohibition or injunction, but their proceedings cannot be reviewed by certiorari.* *People v. Hester*, 6 Cal. 681; overruled in *People v. Supervisors of El Dorado County*, 8 Cal. 61.

6. A mandamus can only compel a board of supervisors to act, but could not direct their action, and the rejection of an account is an action upon it, which is all a mandamus could require where the compensation claimed in the account is not fixed by law. *Price v. Sacramento County*, 6 Cal. 256.

7. There is nothing in the act of 1855 creating boards of supervisors in the counties of this State, which entitles a warrant drawn on the fund for current expenses during that year to a priority in payment over a warrant of the same class drawn the year before. As it does not seem to have been the intention of the act



## Supervisors.

to cut off all previous indebtedness, an honest creditor will not be postponed or denied the benefit of the act under which he contracted, and which provided that warrants should be paid in the order of registry. *McCall v. Harris*, 6 Cal. 282.

8. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses; the order of payment of warrants is established by law, and cannot be changed by the supervisors. *Lafarge v. Magee*, 6 Cal. 650.

9. The power to grant a ferry license is not judicial, and its exercise properly belongs to the supervisors. *Chard v. Harrison*, 7 Cal. 116.

10. A ferry owner whose license has expired does not lose his right to a renewal of his license, either by the incompetency or refusal of the supervisors to act in the premises. *Chard v. Stone*, 7 Cal. 117.

11. Where the supervisors in the exercise of their discretion, determined, after hearing testimony, that a ferry had not been properly kept, and therefore granted it to another, there is no authority to interfere with their determination; but when they act under mistake of law and award the license to another, supposing that he has succeeded to the rights of the owners of the franchise, the error may be corrected by mandamus or any other proper proceeding. *Thomas v. Armstrong*, 7 Cal. 287.

12. The consolidation act gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 438.

13. The statute providing that no person shall sue a county for any demand unless the claim had first been presented to the board of supervisors and been by them rejected, applies as well to actions arising out of tort as upon contracts. *McCann v. Sierra County*, 7 Cal. 124.

14. Where private property is appropriated to public use by the supervisors of a county, without making provision for paying for the same, such act is illegal and may be enjoined. *Ib.*

15. A writ of certiorari will lie in the

district court to review the action of the board of supervisors; otherwise their action would be beyond control. *People v. Supervisors of El Dorado County*, 8 Cal. 61; overruling *People v. Hester*, 6 Cal. 681.

16. From the necessity of the case, supervisors exercise judicial, legislative and executive powers in matters relating to the police and fiscal regulations of counties. *People v. Supervisors of El Dorado County*, 8 Cal. 681.

17. The board of supervisors are not empowered to create a debt or liability on the part of the county for any purpose except as provided by law. *Foster v. Coleman*, 10 Cal. 281.

18. The provision of the statute organizing boards of supervisors which empowers them to "require new bonds of any county or township officer, with additional securities, whenever they deem the same necessary," does not leave the exercise of the power to their arbitrary discretion. By the terms "whenever they deem the same necessary," is meant whenever their judgment pronounces, after an examination of the facts of the case, that there is a necessity for further security. *People v. Supervisors of Marin County*, 10 Cal. 345.

19. Where the board of supervisors of a county have canvassed the returns of an election, and in the exercise of their discretion declared the result of an election adversely to a party claiming to have been elected, a mandamus will not lie upon the application of such party to compel the board to issue to him a certificate of election. *Magee v. Supervisors of Calaveras County*, 10 Cal. 376.

20. It was not intended by the provisions of the ninth section of the act of 1855, "to create a board of supervisors in the counties of this State, and to define their duties and powers," which requires the property belonging to the county to be sold at public auction, that this provision should apply to choses in action. *Beals v. Evans*, 10 Cal. 460.

21. A mandamus directing the board of supervisors to proceed and audit certain accounts of the relator, does not necessarily require the board to allow the accounts: such board have a discretion in respect to their action in this regard, though compelled to act on the subject matter of the claim: such writ does not control or pre-

scribe the mode or determine the result of their action. *People v. Supervisors of San Francisco County*, 11 Cal. 47.

22. The board of supervisors of a county cannot settle with the county treasurer at a special meeting of said board, unless they have first given public notice of such meeting, and specified in such notice that such business will be transacted. *El Dorado County v. Reed*, 11 Cal. 132.

23. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. *People v. El Dorado County*, 11 Cal. 174.

24. An act of the legislature authorizing and directing the board of supervisors of the city and county of San Francisco to audit and allow the claim of a judgment creditor is not unconstitutional, as being judicial in its character. *People v. Supervisors of San Francisco County*, 11 Cal. 211.

25. The board of supervisors has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald v. Mad-dux*, 11 Cal. 190.

26. It was the intention of the legislature, by the twenty-fifth section of the act creating a board of supervisors throughout this State, to transfer from the courts of sessions to the boards of supervisors, the general and special powers and duties of a civil character, which had before the passage of that act been vested in such court. *People v. Bircham*, 12 Cal. 54.

27. The record of the proceedings of a board of supervisors under their seal is prima facie evidence of such proceedings. *Ib.* 56.

28. The board of supervisors of the city and county of San Francisco have no control over the treasurer in the payment of the interest and principal of the sinking fund of that city. The allowance or disallowance, auditing or refusing to audit of the board, are alike immaterial. *People v. Supervisors of San Francisco County*, 12 Cal. 301.

29. The board of supervisors cannot order a special election to fill a vacancy in the office of county judge. *People v. Martin*, 12 Cal. 411.

30. The board of supervisors of a county is a special tribunal with mixed powers,

administrative, legislative and judicial, and jurisdiction over roads, ferries and bridges is given to it by statute. Its judgments or orders cannot be attacked collaterally any more than the judgments of courts of record. *Waugh v. Chauncey*, 13 Cal. 13.

31. The supervisors sitting as a board of equalization have no power to raise the valuation of land as fixed by the assessor, without notice to the owner. The general notice of the sitting of the board by publication does not amount to the notice required. If the board raised the tax without proper notice to the owner, their action is void, and the assessment remains in full force. *Patten v. Green*, 13 Cal. 329.

32. Mandamus will not lie to compel the supervisors of a county to order a special election to fill vacancies in the offices of assessor and sheriff. *People v. Supervisors of Santa Barbara County*, 14 Cal. 102.

33. An act of the legislature authorizing boards of supervisors to appoint a collector of foreign miners' licenses is not unconstitutional. *People v. Squires*, 14 Cal. 17.

34. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento have no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and their action, in creating such office and raising such salaries, may be reviewed on certiorari. *Robinson v. Supervisors of Sacramento County*, 16 Cal. 211.

35. That act is an enabling statute, creating a board with special powers and jurisdiction, and the board has only the powers conferred by the act. *Ib.*

## SUPREME COURT.

- I. In general.
- II. Jurisdiction.
- III. Costs in the Supreme Court.

### I. IN GENERAL.

1. The supreme court is authorized to

## In general.—Jurisdiction.

render such judgment as substantial justice shall require, but by this is intended substantial legal justice, ascertained and determined by fixed rules and positive statutes, and not the abstract and varying notions of equity entertained by each individual. *Harris v. Brown*, 1 Cal. 98.

2. A party should present his whole case on the first hearing, and ought not to be permitted to argue it by peacemeal. On rehearing he will not be allowed to raise new points. *Grogan v. Ruckle*, 1 Cal. 197.

3. The supreme court may after a judgment direct a rehearing in a cause before a remittitur is sent down and filed in the court below; but if the remittitur is sent down after the order of rehearing is made, the court still has jurisdiction. *Grogan v. Ruckle*, 1 Cal. 194; *Mateer v. Brown*, 1 Cal. 231.

4. The unconstitutionality of the statute empowering the governor to commission a person as judge of the supreme court during the temporary absence of one of its judges, fully discussed. *People v. Wells*, 2 Cal. 198; 610.

5. At common law, the appellate court either affirms or reverses the judgment, upon the record before it. The opinion which is rendered is advisory to the inferior court, and after the reversal of an erroneous judgment, the parties in the court below have the same rights which they originally had. *Stearns v. Aguirre*, 7 Cal. 448.

6. In holding the judiciary act of 1789 to be constitutional, we by no means recognize an unlimited right of appeal from the decisions of the supreme court of the State to that of the United States. *Ferris v. Coover*, 11 Cal. 179.

7. A motion to amend the judgment of the supreme court must be made within the ten days allowed for filing a petition for rehearing. *Gray v. Gray*, 11 Cal. 341.

8. The legislature cannot require the supreme court to give the reasons for its decisions in writing. The constitutional duty of the court is discharged by the rendition of its decisions. *Houston v. Williams*, 13 Cal. 25.

## II. JURISDICTION.

9. The constitution of the State confers the authority of peace officers upon the justices of the supreme court and the district judges. *People v. Smith*, 1 Cal. 13.

10. The supreme court has no jurisdiction in cases where the matter in dispute is less than two hundred dollars, nor has the constitution which defined this jurisdiction excepted those cases pending before its adoption. *Luther v. Ship Apollo*, 1 Cal. 16; *Simmons v. Brainard*, 14 Cal. 278.

11. The judiciary act of February 28th, 1850,\* provides that an appeal may be taken from any final judgment of a court of first instance, rendered since the first day of January, 1847, and if the decision of the court below be a final judgment, an appeal lies; otherwise not. *Loring v. Illsley*, 1 Cal. 27.

12. The legislature has not provided the supreme court with a jury in any case, nor authorized it to cause an issue of facts to be made up in that court and referred to another court for trial. All issues of fact are to be tried in the inferior courts of this State. *Ex parte the Attorney General*, 1 Cal. 87.

13. The constitution has not clothed the supreme court with the powers and jurisdiction of the court of king's bench in England. *Ib.*

14. The supreme court is strictly an appellate tribunal, and has no original jurisdiction except in cases of habeas corpus, and consequently is not empowered to issue a writ of quo warranto for the purpose of inquiring by what authority a person exercises the duties of an office. *Ib.* 88.

15. The supreme court having no original jurisdiction to issue a writ quo warranto, application for the same should be made to the district court, and should the relief be refused which it alone has the power to grant, the supreme court may issue the writ of mandate commanding the necessary process to be issued, or by its writs of injunction or prohibition prevent the abuse of power and correct errors on appeal in the exercise of their powers. *Ib.* 89.

\*The act of February 28th, 1850, repealed by the act of May 19th, 1853.

## Jurisdiction.

16. The constitution has not enumerated the courts from whose judgments an appeal will lie to the supreme court, and the statutes have not conferred upon the supreme court appellate jurisdiction over judgments of county courts.\* *Warner v. Hall*, 1 Cal. 91.

17. The supreme court cannot exercise the jurisdiction conferred by the constitution until the mode in which it shall be exercised is prescribed by statute. *Ib.*

18. The supreme court is strictly a court of appellate jurisdiction, but it may exercise its appellate jurisdiction by means of the process of mandamus; so also it seems by means of the writs of habeas corpus, certiorari, supersedeas, prohibition, &c. *People v. Turner*, 1 Cal. 144; *White v. Lighthall*, 1 Cal. 348; *Adams v. Town*, 3 Cal. 248.

19. To enable a court of strictly appellate jurisdiction to issue the writ of mandamus, it must be shown to be an exercise, or be necessary to the exercise, of appellate jurisdiction. *People v. Turner*, 1 Cal. 146.

20. The several district courts of the State have all the same jurisdiction and powers, and stand on the same level, and one cannot attempt by the writ of mandamus to supervise, direct, or restrain the action of another, and this power must exist in the supreme court, for without it the judiciary system would be irremediably imperfect. *Ib.* 149.

21. The supreme court is strictly an appellate court, having no original jurisdiction, and its appellate jurisdiction extends only to those cases in which the legislature authorizes it to entertain appeals. No power was conferred upon the supreme court to review the judgments of the county courts† on appeal. *White v. Lighthall*, 1 Cal. 347; *Adams v. Town*, 3 Cal. 248.

22. Though the plaintiff recover less than two hundred dollars, the defendant is entitled to an appeal, if the costs added to the judgment, exceed two hundred dollars. *Gordon v. Ross*, 2 Cal. 157; overruled in *Dumphy v. Guindon*, 13 Cal. 30.

23. If inferior courts exceed their powers, the supreme court in every case within

its reach would not fail to interfere by a certiorari. *Ex parte Hanson*, 2 Cal. 263.

24. Where the constitution gave the supreme court appellate jurisdiction, but the statute failed to provide the manner of appeal, a writ of error would lie to take the case up. *Adams v. Town*, 3 Cal. 248; *Middleton v. Gould*, 5 Cal. 190.

25. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

26. In equity, the supreme court, on an appeal, has full power and jurisdiction for the purposes of equity to correct the errors of the court below, in whatever shape or by whatever party the appeal is taken up. *Grayson v. Guild*, 4 Cal. 125.

27. Under the act of March, 1854, requiring the sessions of the supreme court to be holden at the capital of the State, it became the duty of this court to ascertain for its own action the locality of the seat of government. *People v. Bigler*, 5 Cal. 24.

28. No appeal was allowed by law from the county court to the supreme court prior to the first day July, 1854. *Middleton v. Gould*, 5 Cal. 191.

29. The constitution of the State confers upon the supreme court appellate jurisdiction in all cases where the amount in controversy exceeds two hundred dollars. *Zander v. Coe*, 5 Cal. 231; *Adams v. Woods*, 8 Cal. 314; *Conant v. Conant*, 10 Cal. 253.

30. The supreme court has no appellate jurisdiction in cases of misdemeanor or crimes of a less degree than felony, and no jurisdiction can be conferred by the statute in these cases. *People v. Applegate*, 5 Cal. 296; *People v. Shear*, 7 Cal. 140; *People v. Vick*, 7 Cal. 166; *People v. Cornell*, 16 Cal. 188.

31. The supreme court is an appellate tribunal, and can take no original jurisdiction however conferred. *Ex parte Knowles*, 5 Cal. 301.

32. Where a case has once been decided on appeal, the judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered

\*The act of May 15th, 1854, confers this appellate jurisdiction on the supreme court.

†The amendment to the code of May 15th, 1854, conferred jurisdiction on the supreme court in appeals from the county courts.



## Jurisdiction.

or changed, and this applies not only to questions of law but to questions of jurisdiction. *Clary v. Hoagland*, 6 Cal. 688.

33. Where the right to determine the extent and effect of restriction is either expressly, or by necessary implication, confided to the legislature, then the judiciary has no right to interfere with the legislative construction. But in all other cases of restriction it is the right and duty of the supreme court to decide the effect and extent of the restriction in the last resort, and the question whether that right is vested in the legislature or in the judiciary must be equally decided by the supreme court. *Nouques v. Douglass*, 7 Cal. 69.

34. It is the right and duty of the supreme court on habeas corpus to review the decisions of inferior courts in cases of contempts. *Ex parte Rowe*, 7 Cal. 182; *Ware v. Robinson*, 9 Cal. 111; overruling *Ex parte Cohen*, 5 Cal. 495.

35. The legislature has not the power to impair or take away the appellate jurisdiction of the supreme court, but it has the power to prescribe the mode in which appeals may be taken. *Haight v. Gay*, 8 Cal. 300; *Adams v. Woods*, 8 Cal. 314.

36. The supreme court has the power under its rules to reinstate causes which had been dismissed at a previous term. *Haight v. Gay*, 8 Cal. 300.

37. The constitution of this State confers upon the supreme court appellate power in all cases where the amount in controversy exceeds two hundred dollars, and this appellate power, having been conferred by the constitution, cannot be taken away or impaired by act of the legislature. *Adams v. Woods*, 8 Cal. 314.

38. There are but two appellate tribunals under the constitution—the county and supreme courts—and neither of these courts has the right to take original jurisdiction of any case they can hear upon appeal. *People v. Fowler*, 9 Cal. 89.

39. The supreme court possesses appellate power in all cases; provided, that when the subject of litigation is capable of pecuniary computation, the matter in dispute must exceed in value or amount two hundred dollars, unless a question of the legality of a tax, toll, impost or municipal fine is drawn in question. *Conant v. Conant*, 10 Cal. 253.

40. The supreme court possesses appel-

late jurisdiction from a decree rendered in a suit for divorce from the bonds of matrimony. *Ib.*

41. Unless it affirmatively appear in the record that a copy of the notice of appeal has been served on the adverse party or his attorney, the supreme court cannot take jurisdiction of the case. *Hildreth v. Guindon*, 10 Cal. 490.

42. The supreme court will not entertain jurisdiction in cases where the record fails to show that judgment and costs amount to over two hundred dollars. *Doyle v. Seawall*, 12 Cal. 280.

43. The supreme court has jurisdiction to hear and determine appeals from the judgment of a county court, on questions of fraud, made on the petition of an insolvent for a discharge from his debts. *Fisk v. His Creditors*, 12 Cal. 281.

44. The supreme court has no jurisdiction of an action where the amount involved is less than two hundred dollars, though the costs added thereto would increase it beyond two hundred dollars. *Dumphy v. Guindon*, 13 Cal. 30; overruling *Gordon v. Ross*, 2 Cal. 256.

45. The words "matter of dispute" in the constitution, conferring jurisdiction on the supreme court, mean the subject of litigation—the matter for which suit is brought. *Dumphy v. Guindon*, 13 Cal. 30.

46. The supreme court has the right to compel inferior tribunals to proceed to hear and determine causes of which they refuse to take cognizance, and this by virtue of its appellate powers and its authority to issue process necessary to give them effect. *Purcell v. McKune*, 14 Cal. 231.

47. The supreme court has no jurisdiction where the amount in dispute is less than two hundred dollars, though an offset be pleaded. *Simmons v. Brainard*, 14 Cal. 278.

48. Plaintiff obtained a preliminary injunction, restraining defendants from obstructing a road leading to plaintiff's mine. Upon the answer being filed, the injunction was dissolved. Plaintiffs being about to appeal from the order dissolving the injunction, the judge thereupon made an order that upon such appeal being perfected by filing a bond, etc., as required by him, the order granting the injunction should be revived, and continue in force. Plaintiffs perfect the appeal, and apply to the supreme court for an injunction, pend-



## Jurisdiction.—Costs in the Supreme Court.

ing the appeal, on the ground that defendants are disregarding said reviving order, and obstructing to the ruin of plaintiffs: held, that the application must be denied, if this court had the power to grant it; that the remedy of plaintiffs under the reviving order is ample to protect them until the appeal can be heard, or the injunction be dissolved by some competent authority. *Eldridge v. Wright*, 15 Cal. 89.

49. The supreme court has no power to grant an injunction pending an appeal. *Hicks v. Michael*, 15 Cal. 114.

50. The supreme court has no jurisdiction on appeal of a motion to offset in part a judgment for less than two hundred dollars, against another judgment of six hundred dollars. *Orandall v. Blen*, 15 Cal. 408.

51. Where, in an action of forcible entry and detainer, the judgment is for the possession of the premises, and ninety-four dollars, treble damages, besides costs—the title not being involved—query, whether the supreme court has jurisdiction of an appeal from the county court. *Paul v. Silver*, 16 Cal. 76.

52. On an indictment for an assault with intent to commit murder, defendant plead guilty to an assault with a deadly weapon with intent to commit bodily injury, and upon this plea, was adjudged to pay a fine of \$1,200, or be imprisoned in the county jail. Defendant appeals: held, that the supreme court has no jurisdiction of the appeal, the offense for which defendant was punished being a misdemeanor only, and not a felony. *People v. Cornell*, 16 Cal. 188.

See APPEAL.

### III. COSTS IN THE SUPREME COURT.

53. Where a judgment was affirmed in part and reversed in part, the respondent was allowed his costs in the court below, but was required to pay the costs of the appeal. *Cole v. Swanston*, 1 Cal. 54.

54. The clerk of the supreme court, in entering up the judgments adds the words "with costs," and annexes to the remittitur a copy of the bill of costs filed; these words are a sufficient awarding of costs for the clerk below to issue an exe-

cution. *City of Marysville v. Buchanan*, 3 Cal. 213.

55. The judgment of the supreme court on appeal and costs consequent thereon is final, and the district court has no authority to prevent immediate execution of the judgment of this court, so remitted. *Ib.*

56. In an action for a dissolution of a copartnership, on appeal the appellate court modified the decree, and under the circumstances of the case the costs of the appeal were equally divided between the plaintiff and the defendant. *Crosby v. McDermitt*, 7 Cal. 148.

57. Where a judgment of the court was incorrect in part, the appellate court ordered the court below to modify its judgment accordingly, and the appellants recovered the costs of their appeal. *Welsh v. Sullivan*, 8 Cal. 512.

58. If any one or more of the parties desire a modification of the judgment as to costs, the proper application should have been made within the ten days allowed for filing a petition for a rehearing. *Gray v. Gray*, 11 Cal. 341.

59. Where a case is remanded for further proceedings and costs awarded in this court, in general terms, the costs on appeal only are included, leaving the costs of the former trial to abide the event of the suit. *Ib.*

60. The costs upon the appeal are properly the costs of the supreme court, and the costs of making up the appeal in the court below, including the costs of making out the transcript. *Ib.*

61. If no motion be made in the court below to correct a clerical error disclosed by the pleadings, the error will be corrected in the supreme court at appellant's cost. *Tryon v. Sutton*, 13 Cal. 491.

62. Where a judgment is against two, one only of whom appeals, and the appeal is dismissed with twenty per cent. damages, the damages with the costs do not become part of the original judgment, and the redemptioner is not bound to pay them when he redeems from a sale under the judgment. The clerk below can issue execution for these damages and costs. *McMillan v. Vischer*, 14 Cal. 241.

63. Where costs, on appeal to the supreme court, are not entered on the judgment docket in the court below, they do not become a lien until the levy of an execution. *Chapin v. Broder*, 16 Cal. 420.

## On an Obligation.

64. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment, being for possession and damages, was affirmed in the supreme court, upon respondent's remitting the damages and paying the costs of appeal. *Doll v. Feller*, 16 Cal. 434.

## SURETY.

- I. On an Obligation.
- II. On an Undertaking.

## I. ON AN OBLIGATION.

1. A grantor of a promissory note is entitled to demand and notice of protest. *Riggs v. Waldo*, 2 Cal. 487; *Pierce v. Kennedy*, 5 Cal. 139; *Brady v. Reynolds*, 13 Cal. 32; *Geiger v. Clark*, 13 Cal. 580.

2. Where a party signs a joint and several promissory note, he is not entitled to notice of demand and nonpayment, though in fact he signed as surety, and such fact was known to the payee. *Humphreys v. Crane*, 5 Cal. 175; *Hartman v. Burlingame*, 9 Cal. 561.

3. A mere neglect to sue the principal will not exonerate the surety. *Ib.*

4. Where A authorizes B to sign his name as surety to a note, and B signs A's name with his own as joint and several makers of the note, A is not liable. *Bryan v. Berry*, 6 Cal. 396.

5. Neglect to sue a contractor for his first breach of contract does not operate so as to release his sureties for subsequent breaches. *City of Sacramento v. Kirk*, 7 Cal. 420.

6. Where the authority given by the defendants was to sign his name to a promissory note, as surety, and not as principal, and the authority was not exercised in the manner delegated, the plaintiff cannot recover. *Bryan v. Berry*, 6 Cal. 397; *Sayre v. Nichols*, 7 Cal. 538.

7. An outstanding liability, as surety or endorser for another, together with an express promise by such surety or endorser

to the principal, that he will make the debt his own and pay it, is a sufficient consideration for an express promise to pay an equal amount in a promissory note. *Gladwin v. Gladwin*, 13 Cal. 332.

8. If a party sign a promissory note, and append to his name the word "security," or "surety," he only means to bind himself as such, and not as principal. *Sayre v. Nichols*, 7 Cal. 538.

9. The failure of a holder of a note to sue when requested by a surety does not operate to discharge the liability of the latter. If the surety desires to protect himself he must pay the debt and proceed against the principal, or apply to a court of equity to compel the holder to proceed against the principal. *Hartman v. Burlingame*, 9 Cal. 561.

10. Where a promissory note is signed by two persons in the same manner, with nothing on the face of the note to show that one was merely a surety, he cannot set up in defense that he was such, and that the plaintiff had not sued in due time, and had given no notice of demand and protest. *Kritzer v. Mills*, 9 Cal. 23.

11. One who signs a note to pay absolutely at a certain time, although he writes the word surety to his name, is not guarantying another contract, but he is making his own, and whether the consideration of the contract inure to him or his friend is wholly immaterial, so far as the construction and obligation of it are concerned. *Aud v. Magruder*, 10 Cal. 288.

12. The word surety written opposite the name of one of the makers indicates no more than that as between the payors such maker is his surety. It is convenient for the purpose of evidence in case the surety has to pay the money, but it does not in any way control the words of the note as between such payor and the payee. *Ib.* 289.

13. The sureties are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey v. Shillenberger*, 10 Cal. 390.

14. Mere extension of time to the maker of a promissory note is not sufficient to discharge a surety or endorser. To operate as such discharge the agreement with the maker must be founded upon a valuable consideration, and be such

## On an Obligation.—On an Undertaking.

as will suspend the right of action against the maker. *Williams v. Covillaud*, 10 Cal. 426.

15. Plaintiff was surety on a contract for the payment of money, upon which judgment was obtained against all the parties, and execution was subsequently issued and levied upon property of the principal sufficient to satisfy the same. After the levy, the sheriff, under the directions of the plaintiff in execution, took the principal's note for the amount of the judgment and released the levy. Subsequently a second execution was issued upon the judgment, and an attempt made to levy it on the property of plaintiff: held, that the release of the levy of the first execution and the taking of the principal's note, discharged the surety. *Morley v. Dickenson*, 12 Cal. 563.

16. February 26th, 1855, Page, Bacon & Co. were indebted to plaintiff, and the debt was due. That firm being then unable to pay, an agreement was made between them and plaintiff, dated on that day, by which an extension was to be given the firm of two, four, six and eight months from date—the debt to be paid in equal installments. In consideration of this extension, defendant and others signed and delivered to plaintiff an instrument dated February 26th, 1855, guaranteeing the payment by P., B. & Co. of such indebtedness in the installments, and at the different times, in said agreement and certificate set forth, conditioned to be void when said certificates were fully paid. In fact, said agreement did not mention certificates. March 13th, 1856, P., B. & Co. issued to plaintiff certificates for his indebtedness in installments, at two, four, six and eight months from that date: held, that defendant is not liable on his guaranty, which was to pay at the times mentioned in the agreement; that plaintiff, having taken certificates, dated March 13th, 1856, thereby extended the time of payment, and released defendant, who was a mere surety. *Gross v. Parrott*, 16 Cal. 145.

See BOND, ENDORSER, GUARANTOR, PROTEST.

## II. ON AN UNDERTAKING.

17. Where a bond was given in pursu-

ance of the code of 1850 providing for the collection of demands against boats and vessels, for the discharge of the vessel in a case where the vessel was not liable to be attached under the act: held, that judgment rendered against the principal and sureties in the bond was erroneous, and that a bond given for the release of a vessel, when the vessel was not liable to seizure under the act, was invalid. *McQueen v. Ship Russell*, 1 Cal. 166.

18. The district attorney can bring suit against the sureties on a bail bond at any time after the adjournment of the term at which the recognizance was declared forfeited. *People v. Carpenter*, 7 Cal. 403.

19. Sureties in a bail bond cannot avail themselves in defense to an action thereon of an insufficiency of the justification of the undertaking. *Ib.*

20. Where a defendant in a replevin suit failed to claim the return of the property in the answer, and on the trial the jury found a verdict for the defendant on which the court rendered judgment against plaintiffs for costs, which were paid: held, that the payment of the judgment as taken was a complete discharge of plaintiff's sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390.

21. In an action of replevin where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff in order to hold the sureties on the undertaking must be in the alternative as required by the code. *Nickerson v. Chatterton*, 7 Cal. 571.

22. In an action against the sureties on a replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it and for whom the bond was given. *Ib.*

23. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Ib.* 572.

24. Where a judgment is rendered against A and his sureties, and A and a portion of his sureties, in order to secure the payment of said judgment, mortgaged their property, subsequent to which the execution under the judgment is levied upon sufficient property of B, a surety not joining in the mortgage, to satisfy the judgment, and afterward is voluntarily released: held, that no action can be main-

## On an Undertaking.

tained on the mortgage, for the levy satisfied the judgment. *People v. Chisholm*, 8 Cal. 30.

25. Where the plaintiff in replevin gives the statutory undertaking, and takes possession of the property in suit, and is afterward nonsuited and judgment entered against him for the return of the property and costs: held, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking and detention, the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 8 Cal. 448.

26. The sureties on the bail bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen v. Breslauer*, 8 Cal. 554.

27. The sureties upon the official bond of an officer are only responsible for the official acts and not for private debts. *Hill v. Kemble*, 9 Cal. 72.

28. Where the obligors in a sheriff's bond bind themselves jointly and severally in specific sums designated, they may all be joined in the same action, but separate judgments are required. *People v. Edwards*, 9 Cal. 293.

29. The defect in the approval of a sheriff's bond cannot be set up as a defense in an action on said bond against the sureties. The object of the law in requiring the approval is to insure greater security to the public, and it does not lie in the obligors to object that their bond was accepted without proper examination into its sufficiency by the officers of the law. *Ib.*

30. In an action against the sureties on an injunction bond, the condition of which is, that the plaintiff in the suit for whom the sureties undertook should pay all damages and costs that should be awarded against the plaintiff by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damage had been awarded: held, that such complaint is fatally defective. *Tarpey v. Shillenberger*, 10 Cal. 390.

31. A failure of sureties upon an undertaking on appeal to justify, when they are expected to, leaves the appeal as though no undertaking had been filed, and ineffectual

for any purpose. *Lower v. Knox*, 10 Cal. 480.

32. A motion against a sheriff and his sureties, under the provision of the ninth section of the "act concerning sheriffs," passed April 29th, 1851, is a summary proceeding in derogation of the common law, and is penal in its character, and for these reasons the act must be strictly construed. *Wilson v. Broder*, 10 Cal. 488.

33. Where an assignment of a note and mortgage has been made to plaintiffs to indemnify them as sureties on a bail bond for the assignor, and where suit is then pending on such bond, it is proper for them as such assignees to institute suit on the note and mortgage, and a decree of foreclosure in such case, with direction to pay the money into court, to await the further decree of the court is proper, or at least there is no error in such a decree to the prejudice of the defendant. *Hunter v. Leran*, 11 Cal. 12.

34. A surety has a right to stand on the precise terms of his contract. He can be held to no other or different contract. *People v. Buster*, 11 Cal. 220.

35. In the case of sureties on the official bond of a county treasurer, they all contract together and with reference to the common responsibility. In case of a breach or loss each surety has his recourse for contribution on his fellows. The discharge of one of the obligors affects the contract as to all, and amounts to a release of all as to all future acts of such official. *Ib.*

36. The sureties on a bond given by the party in the original suit to perform any decree that might be rendered therein, cannot, any more than the party, obtain the aid of chancery to vacate a judgment against the principal, unless he shows that he has exhausted all proper diligence to defend in the suit in which judgment was rendered. *Riddle v. Baker*, 13 Cal. 204.

37. In an undertaking on appeal, the names of the sureties need not appear in the body of the paper. *Dore v. Corey*, 13 Cal. 507.

38. Residence of the sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions. *Ib.*

39. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the



## On an Undertaking.

principal is conclusive against the surety. *Pico v. Webster*, 14 Cal. 204.

40. In the case of official bonds, the sureties undertake in general terms that the principal will perform his official duties; and a judgment against the officer in a suit to which they were not parties is not evidence against them. *Ib.*

41. That the sureties had notice of the suit against the principal amounts to nothing, unless it was notice according to the statute, or unless they appear voluntarily as parties to the record. *Ib.*

42. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only. The presumption is that such signed upon the understanding that the others, named as obligors, would also sign; otherwise as to an undertaking under our system. *City of Sacramento v. Dunlap*, 14 Cal. 423.

43. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 374.

44. Where the examination of the sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

45. The statute requires the places of residence and occupation of the sureties to be stated in an undertaking on appeal, only when a stay of execution upon a judgment directing the payment of money is sought. *Ib.* 375.

46. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case the justification being made without notice, the appeal was ordered to be dismissed unless appellants within ten days file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark v. Barrett*, 15 Cal. 364.

47. Plaintiff sued out an attachment

against K., and the sheriff levied it on certain goods. Other creditors issued attachments, which were levied by the sheriff on the same goods. Plaintiff then dismissed his attachment, and sued the sheriff in replevin, claiming that K. obtained a portion of the goods of plaintiff by fraud. Instead of taking the goods out of the sheriff's possession, plaintiff made an arrangement with the sheriff, whereby he agreed to sell the goods, and keep the proceeds to answer any judgment plaintiff might obtain in his replevin suit. Sheriff sold the goods, paid the money into court, saying nothing about this arrangement, and the money was paid, by order of court, on the claims of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to the arrangement. Plaintiff had judgment in replevin: held, that the sureties on the sheriff's official bond are not liable to plaintiff for the goods or the money received from the sale—this agreement between him and plaintiff being no part of the sheriff's official duty; that the sheriff, as such, had no legal authority to sell these goods and to hold the money on bailment for plaintiff; and that, in so far as plaintiff trusted the sheriff with the goods, and authorized him to sell them, he became the agent of plaintiff, and must be looked to as such. *Schloss v. White*, 16 Cal. 68.

48. Sureties on the sheriff's official bond in this State stipulate for his official, not his personal dealings, and are entitled to stand on the precise terms of their contract. *Ib.*

49. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of the appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 73.

50. In suit in the district court, on a bond given in the court of sessions for the appearance there of a party indicted for misdemeanor—the court of sessions having declared the bond forfeited for nonappearance—the sureties cannot defend on the ground that the judgment of forfeiture was



## On an Undertaking.—Surprise.

erroneous. That judgment cannot be thus revised. *People v. Wolf*, 16 Cal. 385.

51. The question, whether a party indicted for misdemeanor has an absolute right to appear by attorney and defend, so as to prevent the forfeiture of his bond, not passed on. *Ib.* 386.

See BOND, UNDERTAKING.

## SURPRISE.

1. On a motion for a new trial on the ground of surprise at a trial, by the non-attendance of witnesses, the affidavit should show that reasonable diligence had been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers v. Huie*, 1 Cal. 432.

2. Where a slight degree of prudence would guard against surprise, it is not sufficient ground to allege for a new trial. *Brooks v. Lyon*, 3 Cal. 113.

3. Where one party to an action is misled by the act of the other, justice demands that a new trial should be granted. *Pinkham v. McFarland*, 5 Cal. 138.

4. Surprise at the testimony of a witness called by the adverse party is no ground for a new trial, it not appearing that the party against whom the testimony was given had been misled by previous statements of the witness as to what he would testify. *Taylor v. California Stage Co.*, 6 Cal. 230.

5. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

6. Surprise at the ruling of the court on the trial, as to the admission of testimony, is not a ground for a new trial. *Fuller v. Hutchings*, 10 Cal. 526.

7. A party who is unprepared for trial at the time of the calling of the case, should move for a continuance; and if he fails to do this he waives his want of preparation and cannot afterwards, when judgment has gone against him, move for a new trial on this ground. *Turner v. Morrison*, 11 Cal. 21.

8. It is not sufficient for a new trial to aver that the party thus represented was ignorant at the time of the trial of the facts. He must show that he could not with the use of due diligence, unmixed with any negligence on his part, have made himself acquainted with or ascertained the existence of the facts. *Williams v. Price*, 11 Cal. 213.

9. A new trial will not be granted on the affidavit of the attorney of record, that he as well as his client and witnesses were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice of a day of trial, when such affidavit is met by counter affidavits by the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

10. Complaint avers in substance that defendant made his note, etc., setting out a copy, that plaintiff is holder by transfer from the payee, etc., and that defendant is indebted to the plaintiff thereon in the sum, etc. The complaint then avers: Plaintiff further shows that after said note was executed, etc., \*\*\* defendant by virtue of \*\*\* proceedings in insolvency, etc., \*\*\* claims to have been discharged from the payment of the note and debt hereinbefore mentioned; and plaintiff further shows, that after said discharge as aforesaid, on or about \*\*\* defendant promised the payee and other persons that he would pay said note to said payee on demand, etc.; and that defendant thereby revived said obligation, etc. Plaintiff herein having rested his case upon proving his note, and defendant not introducing any proof of his discharge in insolvency, the court below instructed the jury to find for plaintiff, and afterwards set aside the verdict and granted a new trial: held, that this court will not revise the discretion of the court below in granting the new trial; that defendant might well have been taken by surprise, and supposed it unnecessary to introduce proof of his discharge. *Smith v. Richmond*, 15 Cal. 502.

11. Where in suit for a mining claim, plaintiff in his complaint states the particular facts constituting his title, and on that title seeks a recovery, and the answer denies such title, plaintiff must prove his title as averred, at least in substance, and he cannot, against defendant's objection,

## Surprise.—Survey.

recover on another and different title. And where, in such case, plaintiffs were permitted to prove and recover on a title other than the one set up, it was error in the court below to refuse a new trial, the motion for which was based on an affidavit of defendant that he was taken by surprise arising out of the frame of the pleadings, and that he could have rebutted plaintiff's case but for this surprise. *Eagan v. Delaney*, 16 Cal. 87.

## SURVEY.

1. A survey may be detailed from memory by a witness as well as by a diagram, but must by statute be excluded, unless the witness be a county surveyor, or be introduced to rebut or explain his survey. *Vines v. Whitton*, 4 Cal. 230.

2. A map made by a county surveyor, with protractions of certain lines made by his deputy, is admissible in evidence when both officers swear to the correctness of the protractions. *Gates v. Kieff*, 7 Cal. 126.

3. A mere survey and marking lines of a boundary, without an enclosure of the premises, is not a possession in law, unless made so by complying with the statute in reference to the mode of maintaining possessory actions on public lands. *Bird v. Dennison*, 7 Cal. 302.

4. Where a claim to a tract of land under a Mexican grant, somewhere within a certain larger tract, was ascertained and the land segregated by a survey under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a day four days after the survey. *Palmer v. Boling*, 8 Cal. 389.

5. A line upon which a ditch is actually intended to be dug should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditchowners date back to the survey; what is a reasonable time

must depend upon the circumstances of the case. *Parke v. Kilham*, 8 Cal. 79.

6. A private survey is no legal evidence of the facts it purports to contain, since if it were, any man might recover the land of another by including it in his own boundaries. *Rose v. Davis*, 11 Cal. 141.

7. Where a private survey is admitted as a diagram but not as evidence, the court should clearly explain to the jury the precise purpose and effect of its admission. *Ib.* 142.

8. A survey or map of the United States surveyor of a grant is inadmissible as evidence to establish boundaries, without proof of the orders or authority under which he acted. *Ib.*

9. The matter of surveys of floating grants belongs to the executive department of government, under the legislation of Congress on the subject of the public lands; with such surveys the courts of justice have nothing to do. Whether in justice to the claimants the location should have been different from the official survey is none of their concern. That belongs to a department of government whose action is not subject to review by the judiciary. *Waterman v. Smith*, 13 Cal. 413; *Moore v. Wilkinson*, 13 Cal. 486; *Boggs v. Merced Mining Co.*, 14 Cal. 361; *Yount v. Howell*, 14 Cal. 469.

10. The location of the specific quantity may be made by a survey of such quantity, or by grants with specific boundaries of such parts of the general tract as will reduce it to such specific quantity. *Waterman v. Smith*, 13 Cal. 416.

11. The approval of the survey by the proper officers is the determination, the judgment of the appropriate department of the government that the survey does conform to such decree. *Moore v. Wilkinson*, 13 Cal. 487; *Boggs v. Merced Mining Co.*, 14 Cal. 361.

12. There is no obligation resting upon the claimant of land under a Mexican grant, or upon the United States surveyor general, to give notice of the official survey directed by the final decree of confirmation to any one, and it is of no consequence how secretly or how openly the survey is made. *Boggs v. Merced Mining Co.*, 14 Cal. 358.

13. In ejectment on a patent issued upon a final decree of confirmation of land claimed under a Mexican grant, defend-

## Survey.

ant cannot set up fraud in the survey, or the procurement of the patent, to defeat the action. If the defendant have vested rights so as to avail him against the assertion of any claim of the government respecting the premises in controversy, it would only follow that the patent was inoperative to that extent—not that it is void. The rights of the defendant would in that case be effectually protected by the provisions of the fifteenth section of the act of March 3d, 1851, and the patent would be like a second deed to premises previously granted, and pass, as to the property, no interest. *Boggs v. Merced Mining Co.*, 14 Cal. 361; *Yount v. Howell*, 14 Cal. 469.

14. Nor would the fraud alleged here and supposed to consist in a variance between the private survey made by the grantee and the official survey made by the surveyor general, and concealment of this latter survey, avail defendant in avoiding or resisting the patent even if presented in an original or cross bill. *Boggs v. Merced Mining Co.*, 14 Cal. 363.

15. A certificate of the surveyor general that the paper "is a true and accurate copy of a document" on file in his office, is sufficient against the objection that the copy is not duly authenticated, it being conceded that such document was the original grant. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 550.

16. The deposition of a surveyor who ran the boundary lines of a grant, taken in one action is admissible in another action between different parties as hearsay evidence, upon the location of such lines, after his death. *Morton v. Folger*, 15 Cal. 278.

17. In ejectment for land within Sutter's Fort, in the city of Sacramento, if the petition of Sutter, soliciting eleven leagues in the establishment "named New Helvetia," and the grant in which is conceded the land referred to in the petition "named New Helvetia," be in evidence, together with the declarations of Vioget in connection with the accompanying map, fixing the southern boundary of the grant some miles below the American river, and also, together with the proof that the territory lying between the American river and Sutterville, the western line of Leidesdorff's grant and the Sacramento river, embracing "Sutter's Fort," and the enclosures and settlements around it, was

known and recognized by every one throughout the country as New Helvetia; that Sutter had entire and undisputed possession of the same; that no one questioned his right till 1850; and that the premises in dispute were within his enclosures at the fort; the evidence would be prima facie, if not conclusive proof, that the premises were covered by the grant. *Morton v. Folger*, 15 Cal. 278; *Cornwall v. Culver*, 16 Cal. 427.

18. California, upon her admission into the Union, acquired, under the eighth section of the act of Congress of September 4th, 1841, entitled "an act to appropriate the proceeds of the sales of the public lands, and to grant preëmption rights," a vested and present interest in 500,000 acres of land, with a right to select and locate the same, in such manner as her legislature might direct, out of any of the public lands of the United States, except such as were or might be reserved from sale by any law of Congress, or the proclamation of the President. *Doll v. Meador*, 16 Cal. 315.

19. This right of selection or location was not suspended until the United States had made their surveys, but locations made previous to the survey of the United States were subject to change, if, subsequently, upon the survey being made, they were found to want conformity with the lines of such survey. With this qualification, and the further qualification of a possible reservation by a law of Congress, or a proclamation of the President, previous to the survey, which might have required further change, or the entire removal of the location, there was no limitation upon the right of the State to proceed at once to take possession and dispose of the quantity to which she was entitled by the grant. *Ib.*

20. Conformity in the locations with the sectional divisions and subdivisions of the United States survey is required, to preserve intact the general system of surveys adopted by the federal government, and to prevent the inconvenience which would ensue from any departure therefrom. *Ib.*

21. The laws of this State, authorizing the selection or location of lands under the act of Congress, provide for securing conformity in the locations with the lines of the government survey. *Ib.* 316.

22. The effect of a location pursuant to the laws of California, upon lands subject

## Survey.

to location, is to make particular the general grant of the federal government, and to vest an absolute and perfect title to the same, which the State may, by her patent, convey. *Ib.*

23. Neither the tenth section of the act of 1841, nor the act of May 23d, 1844, entitled "an act for the relief of citizens of towns upon the land of the United States, under certain circumstances;" nor the act of March 3d, 1853, providing "for the survey of the public lands in California, the granting of preëmption rights therein, and for other purposes," in effect reserve town sites from same. *Ib.* 321.

24. New States, under the act of September 4th, 1841, acquire their interest upon their admission into the Union, and may make selections of land before the survey of the United States—which selections are only subject to three qualifications: first, they must not be of lands reserved from sale by any law of Congress or the proclamation of the president; second, they must be in parcels of not less than three hundred and twenty acres each; and third, the parcels selected must be in such form as to correspond with the survey of the United States, when made. *Ib.* 331.

25. State selections will not become absolute and definite until the survey—until then, the parcels selected may be subject to a possible reservation from sale; and when there is no such reservation, they may require some change in their exterior lines, so as to conform to the official sectional divisions and subdivisions. In the legislation of the State, provision is made so as to secure such conformity. *Ib.*

26. For land, shown to be within the boundaries of the general tract granted to Sutter, in the county of Sacramento, ejectment will lie directly upon the grant; and it is no objection to a recovery, that an official survey and measurement have not as yet been made by the officers of the government; and that it may possibly appear, when such survey and measurement are made, that there exists, within the exterior limits of the general tract, a quantity exceeding the eleven leagues. If there be such excess, it is for the government to survey and lay it off. *Cornwall v. Culver*, 16 Cal. 429.

27. In ejectment on a patent from the United States for land under a Mexican grant, in which patent there was incor-

porated a plat of survey, on the margin of which was a memorandum that the land was surveyed under the orders of the United States surveyor general, by Von S., deputy surveyor, and that the field notes from which it was made had been examined and approved by the United States surveyor general for California, and were on file in his office, plaintiff offered the patent of evidence, and defendant objected to the survey it set forth, on the ground that the deputy surveyor who made it was interested in the grant: held, that the objection is untenable; that it is immaterial whether the deputy was, at the time, interested in the grant or not, as the approval of the survey by the surveyor general and by the proper department at Washington imparted validity to the survey, and put it beyond the reach of attack in actions of ejectment; that such approval was the judgment of the appropriate tribunal; that the survey was in conformity with the final decree of confirmation—this case having arisen previous to the act of Congress of 1860, giving the district court supervision over the action of the surveyor general, etc. *Mott v. Smith*, 16 Cal. 548.

28. Under the decision in *Fossat's case*, 21 How. 445, it may be true that the jurisdiction of the United States district court previous to this act of Congress embraced all questions as to the location and boundaries of the land confirmed, and could have been exercised to control the surveys of such lands until the issuance of the patent; but where no question was made as to the form or correctness of the survey, by proper parties, before the district court, pending the proceedings for confirmation, the approval of the survey by the surveyor general and the department at Washington was final. *Ib.*

29. Of that approval, and also of the regularity and validity of all the different proceedings required by the acts of Congress, from the filing of the petition of the claimant before the board of land commissioners to the issuance of the patent, the patent itself is, in an action of ejectment, not only evidence, but conclusive evidence against the government and all parties claiming under the government, by title subsequent, and against parties claiming no higher title than mere possession. *Ib.*



## SURVEYOR.

See SURVEY.

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SWAMP AND OVERFLOWED LANDS.

1. The act of May 3d, 1852, "providing for the disposal of 500,000 acres of land granted by Congress to this State," is not in conflict with the act of Congress of 1841, which provides for their location after they have been surveyed. *Nims v. Palmer*, 6 Cal. 13.

2. This State has a right to dispose of the swamp and overflowed lands granted to her by Congress prior to the issuing of a patent from the United States, so as to convey to the patentee a present title as against a trespasser. *Owens v. Jackson*, 9 Cal. 324; *Summers v. Dickinson*, 9 Cal. 556.

3. The language of the act of Congress conveyed to the State a present interest in the lands. The description of swamp and overflowed lands is sufficient to give the State a present prima facie right. *Owens v. Jackson*, 9 Cal. 323.

4. The patent is a matter of evidence and description by metes and bounds, and its office is to make the description of the land definite and conclusive, as between the United States and the State. *Ib.*

5. The Governor, in issuing a patent to an individual of such lands, acts as the agent of the State, under powers conferred by statute, and his authority extends only to such lands as were granted to the State by the act of Congress. *Summers v. Dickinson*, 9 Cal. 555.

6. The third section of the act "to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare Valley," passed April 11th, 1857, is a grant upon condition precedent, and not upon condition subsequent, and passes no estate to the grantee, until performance of the conditions annexed—that is, until the reclamation of the lands. *Montgomery v. Kasson*, 16 Cal. 193.

7. This grant is a contract between the State and the grantees, by which the State grants certain lands, upon condition of work to be performed; the grant to take effect when the work is done. It is a contract by which rights may be acquired absolutely, upon performance of the acts specified as the consideration moving to the State. *Ib.* 194.

8. The grantees under the act, having surveyed the lines of the canals mentioned therein, and commenced the work of excavating one of them, and continued the same within and during the year after the passage of the act, have brought themselves within the first sections thereof, and secured the right to proceed with the reclamation; and, when this is accomplished, to take one-half of the lands. And if, within the five years limited in the act, the reclamation be effected, the title to the alternate sections designated will vest in the grantees absolutely. *Ib.*

9. With the contract, and the rights of the grantees thereunder acquired by this part performance of its consideration, the legislature cannot interfere. They are protected by both the Federal and the State constitutions. *Ib.* 194.

10. The act of April 20th, 1858, repealing the act of April 11th, 1857, making this grant, and declaring the rights and privileges thereunder forfeited, is unconstitutional and void. *Ib.*

11. Where one of the grantees under this act of 1857 enters into an agreement to sell to defendant five of the sections of land embraced within the act, and covenants that he and his associates will execute a good and sufficient deed to the defendant, upon payment of the several notes given as the consideration; will complete the canals within the five years allowed; and that by means thereof, and the operation of the statute, they will have a good and valid title to the premises: held, that defendant cannot resist the payment of the first note merely because the legislature has attempted, by an unconstitutional act, to repeal the contract of the State with the vendor and his associates—the agreement itself providing for a surrender of the unpaid notes, and a return of the moneys paid, in case of future failure of title, and the rights of the grantees of the State being fully known to defendant. *Ib.* 195.

Swamp and Overflowed Lands.—Tax Collector.

12. As it is desirable that there should be some end to the present controversy, and other controvesies of a similar character, with respect to the land claimed under the grant to Sutter in Sacramento county, it will be well to look with some care into the nature of the reservation of overflowed lands. The petition of Sutter is for eleven leagues, "not including in said eleven leagues the land which is periodically inundated with water in winter." The grant is for eleven leagues "without including the lands inundated by the impulse and currents of the rivers." The language of the grant was probably intended as a compliance with the terms of the petition, and has, as we conceive, but one meaning, and that is, to exclude lands which are inundated during the winter, and does not apply to lands which are occasionally flooded upon a rise of the rivers, either from protracted rains in the winter, or the melting of the snows of the Sierra Nevadas in the spring. The whole country within the exterior limits of the grant, with the exception of small portions entirely insufficient to meet the quantity specifically granted, is sometimes flooded in this way. The most valuable tracts, both for cultivation and pasturage, are the low lands bordering on the streams, over which every two or three years the water rests for a few days at a time. They were the lands which any one in the position of Sutter, at the time he presented his petition to the government, would naturally have selected, and these lands the survey actually made by Vioget, both on the Sacramento and the Feather rivers, included. As we read the petition of Sutter, he solicits the eleven leagues excluding the land which is periodically in the winter inundated, that is, the lands which are regularly inundated during the winter, and refers only to what are known as tule lands. No other lands will meet the terms of the petition. These lands are regularly, periodically, every winter, inundated. The low lands, which are not tule lands, are not thus inundated every winter, but only occasionally—often at intervals of three or four years. The tule lands remain, too, inundated to a greater or less extent during the entire winter and spring—until the waters of the Sacramento and Feather rivers subside to their lowest point. The least rise from the first rains of much

length in the winter covers them with water. They are unfit for cultivation without draining. Within the exterior limits of the grant to Sutter there is an immense tract of these tule lands, and it is to them that the reservation applies. *Cornwall v. Culver*, 16 Cal. 430.

TAX COLLECTOR.

1. The tax collector in Oakland has no right summarily to sell the property upon which the taxes were unpaid, at public sale, as the taxes could only be recovered by suit. *Hays v. Hogan*, 5 Cal. 242.

2. Though the office of sheriff and tax collector are distinct by the constitution, yet they may be united in the same hands. *Merrill v. Gorham*, 6 Cal. 42; *People v. Squires*, 14 Cal. 16.

3. Where the sheriff as ex-officio tax collector received taxes, and afterwards, on being sued therefor, denied the right of the county to recover the same from him because the same had been illegally levied by the court of sessions; held, that although the court of sessions had no power to levy taxes, yet the defendant being the agent or trustee of the county, was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

4. The offices of sheriff and tax collector, though filled by the same person, are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. *People v. Edwards*, 9 Cal. 292.

5. The revenue act of 1854 made the sheriff ex-officio tax collector, and provided that he should be liable on his bond for the discharge of his duties in the collection of taxes. No other bond is required by law of the sheriff, except when he acts as collector of foreign miners' licenses; held, that the bond entered into in 1856 must be deemed to have been executed in view of the provisions of the revenue act, and that all delinquencies in the collection of taxes, except foreign min-

Tax Collector.—Taxation.

ers' licenses, are covered by the bond. *Ib.*

6. Where the legislature passed an act to remedy the failure on the part of the tax collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special, and is passed not to meet a given state of facts; and consequently, that provision of our constitution which provides that "all laws of a general nature shall be uniform in their operation," does not apply. *Moore v. Patch*, 12 Cal. 271.

7. The sheriff being ex-officio tax collector of foreign miners' licenses by an act of the legislature, may be deprived of the office of tax collector before the expiration of his term. *People v. Squires*, 14 Cal. 16.

8. The constitution affixes no period of tenure to the office of tax collector, nor does it provide any mode of appointment. So far as this office exists in the incumbent, it is an office created by legislative act. The legislature may direct how it shall be filled, and how its duties shall be discharged. *Ib.*

9. Assessors and tax collectors are constitutional officers, but it is not necessary under the thirteenth section of article eleventh of the constitution that every portion of the revenue pass through their hands. The legislature may authorize the tax payer to pay his taxes directly into the treasury. *Ib.* 17.

10. The foreign miners' license, though in some sense a tax, yet probably it is not so in the sense involved in the necessary duties of a tax collector, as a tax collector on land or personal property. *Ib.* 18.

11. A tax collector has power to contract for publishing the delinquent list of tax payers, so as to bind the county for payment of the price. He is the agent of the county in this respect, and for any reasonable exercise of that agency the county is responsible. *Randall v. Yuba County*, 14 Cal. 222.

12. And where he did so contract with plaintiffs, who publish the list and sue the county for the price, the fact that the tax collector had assented to a contract previously made or attempted to be made by the supervisors with another party for publishing the list is not enough to affect

plaintiffs if they had no notice of it; and evidence of such assent was properly ruled out. *Ib.*

13. Taxes not justly due and paid under protest, may be recovered back by suit against the tax collector. *Falkner v. Hunt*, 16 Cal. 170.

TAX DEED.

See DEED, XVII.

TAXATION.

1. With the exception of exports, imports, tonnage and such things as are held by the United States government, where its rights might be impaired if the property was taxed by the States, it seems to be conceded by most American jurists that the power of taxation exists in the States to a full extent. *People v. Naglee*, 1 Cal. 236.

2. The sovereign States may, subject to the above restrictions, tax everything within their territorial limits, and every person, whether citizen or foreigner, who resides under protection of their respective governments. *Ib.*

3. Foreigners emigrating to a country, after they land and become intermingled with citizens, are subject to be taxed by the State. *Ib.*

4. Individuals living upon the public lands of the United States, whether as naked trespassers or claiming under a preëmption right, are not exempt from taxation by the State. *Ib.* 238.

5. The State can levy a poll tax to such extent as it might deem expedient upon all persons engaged in mining upon public lands, and there is nothing in the constitution of the United States which deprives the State of the power of imposing it. *Ib.*

6. Where the State passed a law taxing foreign miners, until such time as Con-

Taxation.

gress shall by law assume the regulation of the mines, is not contradictory or repugnant to the power of Congress. *Ib.* 240.

7. Under the treaties existing between the United States and foreign powers, even that most liberal to aliens does not exempt them from taxation by a State in the enjoyment of certain privileges. *Ib.* 246.

8. Foreigners cannot be said to have any property to enjoy in the mineral lands by which the constitution of the State would guarantee them against taxation for working them and extracting the metals therefrom. *Ib.* 252.

9. The constitutional provision requiring taxation to be uniform, refers only to property, and not that the entire aggregate amount of taxation upon persons, or the value of property in every city or town of the State should be equal to and uniform with the amount in every other city and town. *Ib.*

10. Where a tax is laid upon property, it is not necessary or proper for a court to interfere by a decree rendered in an injunction suit to restrain the collection, to order a sale of the premises: the municipality should be left to make the amount of the tax in the ordinary way. *Weber v. City of San Francisco*, 1 Cal. 456.

11. The mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of a reality, and this property is not taxed by the revenue law of 1851. *Dewitt v. Hays*, 2 Cal. 468.

12. Property, whose owners reside in New York, and by whom it was sent to California to be employed in labor, is liable to taxation; nor can the legislature exempt any species of property, however owned, from taxation. *Minturn v. Hays*, 2 Cal. 591.

13. Where the same property is taxed abroad it is no ground why it should not be taxed in California, when it is within the limits of the latter State. *Ib.* 592.

14. In all cases involving simply the question of taxation, the issue is strictly one at common law, and courts of equity can take no cognizance thereof, and in such case to grant an injunction is error. *Ib.* 293.

15. The United States as owners of

land within the limits of a State, only occupies the position of any private proprietor, with the exception of exemption from taxation. *Hicks v. Bell*, 3 Cal. 227.

16. When a foreign miner, subject to a license tax, was employed by one of a partnership to work in the mines which were the partnership property: held, that the employer, and not the partnership, was liable for the tax. *Meyer v. Larkin*, 3 Cal. 405.

17. The certificate of the tax collector, offered to prove payment of taxes, so as to show that there was no abandonment of the possession of the premises, is not evidence where the tax collector himself can be called as a witness. *Powell v. Hendricks*, 3 Cal. 430.

18. The power of the legislature to tax trades, professions and occupations, is a matter completely within the control, and unless inhibited by the constitution, eminently belonging to and vesting in the sound discretion of the legislature. *People v. Coleman*, 4 Cal. 49.

19. The provision that taxation shall be equal and uniform throughout the State does not operate as a limitation to the taxing power of the legislature, and apply to any species of taxation, but is to be taken as applying only to direct taxation on property as such. *Ib.*

20. If the legislature should pass a revenue act designedly operating unequally, or if a want of uniformity in its operation was apparent on its face, it would be the duty of the supreme court to interpose and prevent the commission of so grave an injustice. *Ib.* 56.

21. The revenue act of 1853 provides that the board of supervisors shall levy, in addition to a State tax, a tax not to exceed fifty cents on each hundred dollars, for county purposes, and such other special taxes as may be by law authorized to be collected. The board levied a tax of fifty cents for county purposes and twenty-five cents for funded debt tax: held, that both of these should have been included in the fifty cents for county purposes. *McDonald v. Griswold*, 4 Cal. 252.

22. The act of May 4th, 1852, to incorporate the town of Oakland, confers no power of taxation directly, but leaves it to be derived from the general act of March 27th, 1850, under which the trustees of towns have power to levy and col-

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lect a tax annually, not exceeding fifty cents on every hundred dollars of the assessed value of the property, and providing further, that unpaid taxes should be recovered by a suit in the name of the corporation: held, that an assessment of two and three-fourths per cent. was wholly unauthorized by law and void. *Hays v. Hogan*, 5 Cal. 242.

23. To sustain a title by virtue of a tax deed, every prerequisite to the exercise of the power of sale by the officer must be shown to have been accomplished. *Norris v. Russell*, 5 Cal. 257; *Ford v. Holton*, 5 Cal. 321.

24. The power to tax is one of the highest attributes of sovereignty, and may or may not be exercised at the will of the sovereign. *Hunsacker v. Borden*, 5 Cal. 290.

25. The fact that the assessment of State and county taxes for 1855-6, in San Francisco county, was not based on the valuation of the city assessor, as required by the act creating the board of supervisors, passed 1851, is not a sufficient ground for an injunction upon the collection of the taxes, as the party could have appealed to the board of equalization if aggrieved. *Merrill v. Gorham*, 6 Cal. 42.

26. If a tax is illegally imposed, the parties taxed have a perfect remedy at law, and a court of equity has no power to interpose. *Robinson v. Gaar*, 6 Cal. 275.

27. A. & Co. having on general deposit with B. & Co., of Marysville, seventy-five thousand dollars, a tax for county purposes levied thereon and payment demanded, both from B. & Co. and A. & Co.: held, that the tax was legal. *Yuba County v. Adams*, 7 Cal. 37.

28. The levy of a tax created a judgment and lien on the property, having the force and effect of an execution, and could be enforced in the same manner. *Ib.*

29. The power of taxation was given to the legislature, without limit, for all purposes allowed by the constitution, and the framers of that instrument knew that it was not the practice of governments well conducted to borrow money for the ordinary expenses of government. *Nougues v. Douglass*, 7 Cal. 68.

30. If the legislature had no right to create a State debt beyond the limited fund by the constitution, that body has no

constitutional right to tax the people to pay a void debt. *Ib.*

31. The power of taxation for purposes contemplated by the constitution is unlimited in the legislature, but such power does not exist for purposes not sanctioned by that instrument, but expressly prohibited. *Ib.*

32. The act of 1855, imposing a tax of fifty dollars on every person arriving in that State by sea who is incompetent to become a citizen, is void. *People v. Downer*, 7 Cal. 171.

33. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854 allowing payment in warrants was thereby repealed. *Scofield v. White*, 7 Cal. 400.

34. The acceptance by a collector of taxes of a warrant is not a liquidation of the debt, but the receipt of it by the State treasurer from the collector would be a liquidation for which the treasurer would be responsible. *Ib.* 401.

35. Where the sheriff, as ex officio tax collector, received taxes, and afterwards, on being sued thereon, denied the right of the county to recover the same from him, because the same had been illegally levied by the court of sessions: held, that although the court of sessions has no power to levy taxes, yet the defendant being the agent or trustee of a county was estopped from denying the right of the county to recover. *Placer County v. Astin*, 8 Cal. 305.

36. Where a claim to a tract of land, under a Mexican grant somewhere within a certain larger tract, was ascertained and the land segregated by a survey, under a decree of confirmation by the United States supreme court: held, that the land became immediately taxable, and that an assessment thereof will be presumed to have been made after the survey, where the time allowed by law for the assessment extended to a few days after the survey. *Palmer v. Boling*, 8 Cal. 388.

37. The assessment of taxes is not a judicial act; it partakes of no element of judicial character. It is a legislative act: it requires the exercise of a legislative

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power, which for certain governmental purposes in the county may be devolved upon a board of supervisors, but cannot be delegated to any branch of the judicial department. *Hardenburgh v. Kidd*, 10 Cal. 403.

38. The provisions of the revenue act of 1853 and 1854, authorizing the court of sessions to assess a tax for county purposes, are unconstitutional, and the assessment made thereunder, and a subsequent levy upon and sale of property in the enforcement of such assessment, are void. *Ib.*

39. Property must at the time be liable for all the taxes for which it is sold; and where property was sold at one sale for both State and county taxes, added together in a single sum, and the county taxes were illegally levied, the entire sale was void. *Ib.* 404.

40. The listing and valuation of real estate for the purpose of taxation is an essential prerequisite to the validity of all subsequent proceedings. The assessment must be made by the assessor. *Ferris v. Coover*, 10 Cal. 632.

41. If no valuation was placed by the assessor upon the property, none can be placed upon it by the board of equalization. The board may alter the valuation in order to equalize it, but cannot place the valuation in the first instance. *Ib.*

42. By the doctrine of the common law, a party claiming under a tax deed must show that all the requirements of the law from the first to the last have been complied with. Though the statute has altered the rule and made the deed prima facie evidence of the conveyance of all the title of the delinquent, it does not dispense with the necessity of the officer reciting in the deed the authority under which he acted. The deed has no validity as an independent conveyance. It depends upon the statute, and if by any of its recitals it appears that any material requisition of the law has been omitted, the deed is void. *Ferris v. Coover*, 10 Cal. 632; *Lachman v. Clark*, 14 Cal. 133.

43. A tax payer cannot enjoin the collection of the tax due the county on the ground that he has in former years paid into the county treasury taxes assessed on his property, which were illegally assessed and collected. *Fremont v. Mariposa County*, 11 Cal. 362.

44. A sheriff, whose term of office has

expired, has no right to collect the State and county tax as unfinished business from the assessment list which came into his hands while in office. *Fremont v. Boling*, 11 Cal. 389.

45. The taxes of 1855, after March, 1856, are not of the unfinished business of the outgoing sheriff, for the reason that after the settlement of the sheriff with the county auditor in March, the delinquent taxes of that year are transferred to the tax list of the succeeding year, and it is made the duty of the then sheriff to proceed to collect such delinquent tax as other taxes. *Ib.*

46. There is no irreconcilable conflict between the amendatory act of 1853 and the revenue acts of 1853 and 1854. The provision that the sheriff going out of office shall continue to collect the taxes coming to his hands before his term expired, was intended to provide for the period intervening between October and March, the time of his settlement. *Ib.* 390.

47. In such a case, the party who is about to be injured by the sale of his property has a right to an injunction against the person offering to sell to prevent the sale. *Ib.* 390.

48. The interest of the occupant of a mining claim is property, and under the constitution it is in the power of the legislature to tax such property. *State of California v. Moore*, 12 Cal. 69.

49. Several persons may have, in the same land, a property which is subject to taxation, and it is not perceived that the fact that the property of the government is exempt from taxation affects the right to tax the interest which the private individuals have acquired in the same property. Exemption from taxation is a privilege of the government, not an incident to the property. *Ib.* 71.

50. If the acquisition of the fee by a private person subjects the property to taxation, it follows that the acquisition of a lesser estate would equally subject such estate. *Ib.*

51. For the purposes of taxation there is no distinction between a thing and its value; it is the value which is assessed and upon which the tax is imposed, and an exemption of certain property from taxation exempts its value also. *Ib.* 72.

52. The legislature having expressly

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exempted mining claims from the operation of the revenue act, it cannot be presumed that it intended indirectly to subject them to taxation by levying a tax on the price paid for them. *Ib.*

53. The constitution provides for equality and uniformity of taxation upon property, but applies only to that charge or imposition upon property which it is necessary to levy to raise funds to defray the expenses of the government of the State, or of some county or town. It has no reference to special assessments for local improvements, by which individual parties are chiefly benefitted in the increased value of their property, and in which the public is only to a limited extent interested. *Burnett v. City of Sacramento*, 12 Cal. 83.

54. For the expenses of such improvements, it is competent for the legislature to provide either by general taxation upon the property of all the inhabitants of the county or town in which they are made, or upon property adjacent thereto, and especially benefitted thereby. *Ib.* 84.

55. The power of apportionment, with the power of taxation, is exclusively in the legislature. The constitution contains no inhibition to the tax, and prescribes no rule of apportionment. *Ib.*

56. A stage company engaged in carrying passengers to and from Sacramento city, are liable to pay to the city a license tax under the provisions of section twenty-two of "an ordinance authorizing and regulating the issue of licenses and the collection of a license tax." *City of Sacramento v. California Stage Co.*, 12 Cal. 138.

57. The provisions of the revenue act of 1857, which requires the tax collector to publish the delinquent tax list, giving the name of the owner (when known) of all real estate and improvements, together with a condensed description of the property, etc., are not conditions precedent to the vesting of the tax. The obligation to pay the tax does not exist by the force of these provisions. The tax is a debt due from the property holder to the State, and these proceedings by publication, etc., are merely modes adopted by the legislature to collect them. If the property be omitted from the delinquent list, this does not discharge the property holder, but the defect may be remedied by the legislature. *Moore v. Patch*, 12 Cal. 270.

58. Where the legislature passed an act to remedy the failure on the part of the tax collector to publish the names of the owners, together with a list of the property, such act cannot be defeated upon the constitutional ground that it is not uniform in its operation. Such act is not general, but special, and is passed to meet a given state of facts, and consequently, that provision of our constitution which provides that "all laws of a general nature shall be uniform in their operation," does not apply. *Ib.* 271.

59. The act of 1858, dispensing with the publication of the delinquent tax required by the act of 1857, also dispensed with the proof of that fact. *Ib.* 272.

60. Taking the third section of the act of 1858, together with the first section, it is evident that the intention of the legislature in the passage of the act of 1858 was to substitute the assessment roll for the delinquent list required by the act of 1857, or rather to give full and complete effect to that list as a valid warrant for the collection of the taxes therein mentioned, and then to provide as is done in section three of that act for their collection. *Ib.*

61. A party seeking to enjoin the collection of a tax assessed upon his property upon the ground that the law provides for the meeting of the board of equalization for the correction of the tax list, and that the board did not meet as required, must show in his bill that there was error to be corrected in his list. *Cowell v. Doub*, 12 Cal. 274.

62. Nor can such party enjoin the collection of the tax upon the ground that notice was not given of the meeting of the board, as required by law, unless he shows that there was error in the assessed value of his property to his prejudice. *Ib.*

63. An injunction will not lie to restrain the collection of taxes due on property, unless it be shown that the injury resulting from the collection to the owner would be irreparable. An assessment of this character must appear in the bill, and if denied, it must be sustained at the hearing. *Ritter v. Patch*, 12 Cal. 299.

64. A tax is not a cloud upon the title to real estate; and its unlawful collection by distress or seizure of chattels is no more than an ordinary trespass. *Ib.*

65. Query: Whether a tax payer can interfere by injunction to restrain the per-

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formance of a ministerial duty cast upon public officers by law, merely upon the ground that the effect at some future time, if certain other things be done, might be to subject his property to taxation. *Pattison v. Supervisors of Yuba County*, 13 Cal. 181.

66. The legislature has a right to authorize a location for the purpose of internal improvements; it may authorize the local authorities to impose the tax; this authority may be given upon petition, or without it, or by or without a submission of the proposition to the people, and it is not essential that the improvement should be within or conferred to the locality taxed, and a subscription of stock to be paid for by taxation is a valid contract to pay it. *Ib.* 189.

67. The only limitation upon the taxing power of the legislature, is the provision for equality and uniformity, found in the thirteenth section of article fourth of the constitution. *People v. Burr*, 13 Cal. 350.

68. The legislature can impose a general tax upon all the property of the State, or a local tax upon the property of particular subdivisions, as counties, cities and towns. The cases in which its powers shall be exercised, and the extent to which the taxation in a particular instance shall be carried, are matters exclusively within its own judgment, subject to the qualifications of equality and uniformity in the assessment. And, except as especially restricted, its power of appropriation of the moneys raised, is coëxtensive with its power of taxation. *Ib.* 357.

69. The fact that the legislature has once exercised its power in limiting the extent of taxation in municipal corporations, under the thirty-seventh section of article fourth of the constitution, does not prevent the legislature from again exercising its power by enlarging the authority to tax. *Ib.* 355.

70. An assessment for taxes must be made against the owner when known. The individual, and not the property, pays the tax. The property shows the amount of the tax with which to charge the owner, and is security for payment. *Kelsey v. Abbott*, 13 Cal. 617.

71. Where a party made defendant in a foreclosure suit, as claiming some interest in the land, sets up as a full defense a

tax title, he cannot object afterward that equity has no jurisdiction over tax titles. *Ib.*

72. Proceedings in tax sales are strictissimi juris. The fact that a tax deed is prima facie evidence of certain facts, makes it none the less obligatory to comply strictly with the law. The deed simply shifts the burden of proof. *Ib.* 618.

73. A party in possession of premises under sheriff's sale, and receiving rents and profits during the time for redemption, should in equity, as between him and defendant in execution, pay the taxes so assessed while he is so in possession. If the owner does not pay them, then the statute requires the party in possession to pay. *Ib.* 619.

74. If in such case the party fail to pay the tax, permit the premises to be sold, and buy them in, he can derive no benefit from the sale, except that in equity the amount paid would properly be considered as advanced to the judgment debtor. And this, though the premises were bid in by one of two partners; while the possession under the sheriff's sale was by both partners. The duty to pay the tax was several as well as joint. *Ib.*

75. A foreign miner's license, though in some sense a tax, yet probably is not so in the sense involved in the necessary duties of a tax collector, as a tax on land or personal property. *People v. Squires*, 14 Cal. 18.

76. An assessment of property as "a ranch commonly known as Clark's ranch, situated on the Auburn road, two miles south of Grass Valley, in Nevada county, State of California," is insufficient, and a tax deed on a sale upon it is void. *Lachman v. Clark*, 14 Cal. 133.

77. Lands outside of a city or incorporated town must be described by metes and bounds, the number of acres as nearly as possible, and the locality and township must be given. *Ib.*

78. Under the second section of the revenue act of 1857, taxing all property within the State, except certain descriptions of property, among which are mining claims, a flume constructed by a mining company along the bank of a river leading to the claims of the company in the bed of the river, is not exempt. *Hart v. Plum*, 14 Cal. 153.

79. Under the consolidation act of 1858,

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the board of supervisors of the city and county of Sacramento have the power to levy a license tax upon the business of a merchant, and to collect such tax by ordinary suit. *City of Sacramento v. Crocker*, 16 Cal. 122.

80. An ordinance graduating the amount of such tax according to the amount of the monthly sales of the merchant, is not unconstitutional because the tax is unequal. The tax is not on the goods, but on the business, and the provision for determining the amount of the tax is uniform and equal, applying to all persons in the same category. *Ib.*

81. Taxes not justly due, and paid under protest, may be recovered back by suit against the tax collector. *Falkner v. Hunt*, 16 Cal. 170.

82. A mortgage is not personal property within the revenue act of 1856, nor liable, *as such*, to taxation. *Ib.* 171

83. An assessment thus: "Mortgages (Marysville) \$100,000," is insufficient under the act. The assessment does not show for what the mortgages were given, nor on what property, nor whether the debts were solvent, nor the value of the property mortgaged; and the sole fact that a mortgage is held for a given amount does not make the mortgage subject to taxation for so much money. *Ib.* 172.

84. Land mortgaged may be taxed without reference to the mortgage, and if the mortgage be to secure a debt, the debt may be taxed; if to secure a loan of money, the money may be taxed; but the act does not intend to tax the mortgage, *as such*, and also to tax the money loaned and secured by the mortgage, or the solvent debt it represents. *Ib.*

85. An assessment thus: "personal property—mortgages (Marysville) \$100,000," is not good as an assessment of personal property, independent of the term "mortgages," on the ground that the act requires no description of personal property to be given, but its value only. The whole statement must be taken together, and that shows "mortgages" to be taxed, and they are not subject to taxation as such. *Ib.*

86. Prima facie, a mortgage is no more taxable than a deed or any other muniment of title or mere security, and the money which it secures cannot be taxed without a more particular description than

the general designation, "personal property." *Ib.*

87. Under this act, a lumping assessment of "personal property" is bad. Every item of taxable property need not be listed, but the different classes named in the act should be stated—as goods, money loaned, gold dust, solvent debts. *Ib.*

88. A tax is a personal debt, or in the nature of a personal debt due from the property holder, and not a mere charge upon the property created by and depending upon the regularity of the proceedings given by statute; and the legislature may prescribe a mode of correcting an informal assessment. *People v. Seymour*, 16 Cal. 341.

89. The legislature has the power of taxation without restrictions as to mode or limitation as to time; and if, from accident or oversight, or remissness on the part of the tax payer, the time for payment has passed, or the mere mode of charging him has not been followed by the officers, the legislature may still compel him to pay. *Ib.* 342.

90. Though a man can only be made to pay a tax according to law, that law may be made as well at one time as another, or by one series of acts as another, and as well after an informal assessment, or no assessment, as before. *Ib.* 343.

91. The act of 1860, authorizing suit to be brought for the unpaid taxes of the years 1858 and 1859, in the city and county of Sacramento, and prohibiting the defendants from setting up in defense any informality in the levy or assessment of the tax, and making duly certified copies of the delinquent tax list, or the original or duplicate assessment rolls, evidence of the delinquency of the property assessed, of the amount of taxes due and unpaid, and that all the forms of law in relation to the levy and assessment have been complied with, is constitutional. *Ib.*

92. Such a law, making the assessment prima facie proof, merely affects the remedy, and is not therefore liable to any constitutional objection. *Ib.* 344.

93. Nor is the act unconstitutional because it compels the delinquent, if sued, to pay costs and percentage by way of attorney's fees, in addition to the tax assessed. *Ib.*

94. Nor is it any constitutional objection to the act that the delinquent tax list

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for 1859 was not properly published. The liability to pay the tax assessed preceded the publication of the delinquent tax list, and suit, under the act of 1860, is based upon that liability. *Ib.* 345.

95. The tax levied in Sacramento county for the wagon road from the eastern boundary line of said county through El Dorado county to Carson Valley, under the act of 1858, and the tax for agricultural hall under the act of 1859, are constitutional. *Ib.* 3.

96. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to account for rents and profits received by him from tenants of the premises. From rents so received the tenant in possession may deduct the amounts paid for the taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time, with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Goodenow v. Ewer*, 16 Cal. 472.

97. The duty imposed by the forty-ninth section of the revenue act of 1857, for selling goods at public auction, is not a tax on the auctioneer, but a tax on the sale of goods, or the proceeds of the sale—the auctioneer being made the collector of the State for the amount of the tax. *State of California v. Poulterer*, 16 Cal. 523.

98. This duty may be collected by action of debt by the State against the auctioneer; and the penal remedy afforded by the fifty-second section of the act is not an exclusive remedy. *Ib.*

99. The forty-ninth section of the act makes the auctioneer liable to pay this

duty, and the meaning is that he shall be legally held to pay it. The fact that a bond is required of the auctioneer, conditioned for the performance of his duty, shows that the legislature did not mean to restrict his responsibility to the penal provision of the act—as the bond covers this duty of paying over the money to the State. *Ib.*

100. The criminal process of the fifty-second section is not a remedy provided by the statute for the payment of the duty imposed, but a mere provision for the punishment of those who violate the law. The remedy spoken of by the authorities as excluding any other remedy, means the process provided by the legislature, whereby the duty may be enforced. But under our act, the remedy is not such; for, after the party has been fined and imprisoned, the duty of paying over to the State the money in the hands of the auctioneer remains. *Ib.*

101. Under the act here, the auctioneer's liability does not depend upon his statement or exhibit of the sales made by him. The act creates a liability for the percentage, and the provision therein for the statement therein under oath is only a means for arriving at, or enforcing a settlement. If the auctioneer fail of his duty in making the statement, he is in no better situation than if he discharged it. *Ib.* 526.

102. Nor does the fact that the defendant was not licensed as an auctioneer, or did not give bond, defeat the action for the duty under the act. Having done the business, and acted openly as an auctioneer, he is estopped to deny the responsibilities of an auctioneer. He cannot plead his own wrongs in failing to comply with the law in bar of his responsibilities for violating its provisions. *Ib.* 532.

103. Under the act, it is the duty of the auctioneer each month to make the statement of the amount of his sales for the month preceding, and at that time to pay over to the State what is then due as per his statement. No demand of payment is necessary. The auctioneer, if he fail to make the statement or pay the money, is in default by his own act, and is a debtor to the State for the amount so due. *Ib.*

104. If the auctioneer, under this act, be merely the agent of the State to collect and pay over its dues on sales of goods, it

is doubtful whether his liability to the State for the duty imposed on such sales flows from the statute. By the common law, independent of any statute, such an agent would be responsible to his principal for the money so received. If the auctioneer chooses to put himself in this relation—that is, accepts and assumes this trust, his liability would seem not to flow from the statute, but, like that of any other custodian of funds, would arise from the general law defining the responsibilities of such agents. And the principle that, as the law had already fixed the liability from these facts, the particular remedy given by the statute would be merely cumulative, would seem to apply; but this point is not here decided. *Ib.*

105. An action of debt for taxes will not lie when the predicate of the action is a mere assessment upon property. Much depends upon the language of the act creating the tax. If the act merely impose a tax upon property, and provide a particular process for enforcement, as a sale of the property, no suit can be brought against the person to collect the tax. If a personal liability be imposed for the tax, and the act is silent as to the mode of enforcement, then an action would lie for the enforcement of the obligation; for the rule is general, that debt lies at common law to enforce a statutory duty, or penalty, or forfeiture. *Ib.*

TELEGRAPH.

1. Telegraph companies in contemplation of law are common carriers, and are subject to the rules of law governing the same. *Parks v. Alta California Telegraph Co.*, 13 Cal. 426.

2. Where A contracts with a telegraph company to have his dispatch transmitted, authorizing his agent to secure a debt due from a third party by attachment, and this service was so negligently performed that other creditors of the common debtor obtain the first attachment and exhaust the assets of the debtor, which would not have been the case had the telegraph company performed its contract within a reasonable

time, the company is liable not only for the cost of the dispatch but for the amount of A's claim, which constitute the natural and proximate damages resulting from the breach of contract. *Ib.*

3. Where a telegraph company fails to transmit a message, upon compliance by the person contracting with it with the conditions required by section one hundred and fifty-four of the act of 1850, page three hundred and seventy, an action for the penalty given by the act lies in favor of such person. *Thurn v. Alta California Telegraph Co.*, 15 Cal. 474.

4. The sum to be recovered is a penalty for a breach of the duty to transmit the message, and the act is a penal law to be strictly construed. *Ib.* 475.

5. Under the above section, the person entitled to recover the penalty is the party who contracts or offers to contract for the transmission of the dispatch. He may, probably, do this by his agent or servant; but when the contract is made by a party as agent of another, in order to give the right of action to the principal, the fact of agency must be shown. *Ib.* 475.

6. Proof as follows: "I am superintendent of the California State telegraph company, and operator in their office at San Francisco. July 2d, plaintiff came to our office and delivered a message to be transmitted to Jackson, and paid for transmitting it there. The message was: 'Alta Express Co., Jackson: If you have package for me, forward immediately.' Signed 'C. Thurn.' In the margin of the message sent, were the words: 'F. July 2d.' Few words passed when the message was delivered; no express agreement that the California State Telegraph Co. should forward the message to Sacramento, and employ the Alta California Telegraph Co. to transmit it from there to Jackson. He must have known that we could not send it to Jackson, as we had no line there. I think there was something said about sending it by the defendants' line from Sacramento." C. Thurn, the plaintiff, sues the Alta Telegraph Co. for the penalty, under the one hundred and fifty-fourth section of the act of 1850, page three hundred and seventy: held, that under these facts, he is not the person making or offering to make the contract, within the act, and cannot recover; that the only contract proven is a contract by the State

Telegraph Co. to send the message or to have it sent; and a contract, on its part, to contract on its own account with the Alta Telegraph Co. to send the message. *Ib.* 475.

7. If the message, in this case, had not been transmitted, plaintiff might have held the State Telegraph Co. responsible. *Ib.* 476.

TENANT.

See LANDLORD AND TENANT, LEASE, RENT, TENANCY.

TENANCY.

1. Two corporations cannot hold as joint tenants, but may as tenants in common. *Dewitt v. City of San Francisco*, 2 Cal. 297.

2. A deed for "one-half of my lot," accompanied by proof that the grantor owned at the time but that lot, is not void for uncertainty, but is only a deed for an undivided one-half, and the grantee claims as tenant in common. *Lick v. O'Donnell*, 3 Cal. 63.

3. One tenant in common cannot sustain an action for forcible entry and detainer against his cotenant holding over. He must first resort to a partition of the land. *Ib.*

4. The homestead becomes a sort of joint tenancy, with the right of ownership as between husband and wife. *Taylor v. Hargous*, 4 Cal. 273.

5. Two or more several cotenants cannot join *in an action of ejectment. *De Johnson v. Sepulveda*, 5 Cal. 151; *Throckmorton v. Burr*, 5 Cal. 400.

6. The statute does not contemplate that a homestead should be carved out of land

held in joint tenancy, or by tenancy in common. *Wolf v. Fleischacker*, 5 Cal. 245; *Reynolds v. Pixley*, 6 Cal. 167; *Giblin v. Jordan*, 6 Cal. 417; *Kellersberger v. Kopp*, 6 Cal. 565.

7. Lands held by a husband, with his wife and child as tenants in common, are not subject to homestead rights under the laws of this State. *Giblin v. Jordan*, 6 Cal. 418.

8. If parties were tenants in common, and the defendant sold the chattels held in common and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received, and an action for goods, wares and merchandise sold and delivered will not entitle him to a judgment. *Williams v. Chadbourne*, 6 Cal. 561.

9. Tenants in common of land are not bound by the acts of a cotenant in accepting a balance of the purchase money and promising a deed, after the right thereto had become forfeited. *Pearis v. Covillaud*, 6 Cal. 621.

10. One of several tenants in common has a right to sue alone for his moiety. *Covillaud v. Tanner*, 7 Cal. 40.

11. Joint tenants must join in an action for possession of land jointly held. The failure to do so is fatal to a recovery. *Dewey v. Lambier*, 7 Cal. 348.

12. Tenants in common, or partners, have a right to acquire their cotenants' or copartners' interest by purchase under an execution sale, there being nothing in their relations to forbid it. *Gunter v. Lafan*, 7 Cal. 593.

13. One joint tenant or tenant in common of a chattel cannot dispose of anything more than his own interest therein. *People v. Marshall*, 8 Cal. 51.

14. Actions for the diversion of the waters of ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Parke v. Kilham*, 8 Cal. 79.

15. The possession of one tenant in common is possession for all, but this possession in one for all ceases the moment it becomes adverse to the others. *Partridge v. McKinney*, 10 Cal. 184.

16. Tenants in common must sue separately for the recovery of real estate, and we know of no rule which would compel a party to divest himself of or alter his

*The statute of March 6th, 1857, (Statutes, p. 62) enables one or more tenants in common or joint tenants to sue jointly or separately.

Tenancy.

estate, for the purpose of asserting his title thereto. *Welch v. Sullivan*, 8 Cal. 187.

17. Possession of one partner or tenant in common of a mining claim is the possession of all. *Waring v. Crow*, 11 Cal. 371.

18. Where the tenant in common or partner goes away and remains absent from the premises, leaving his associates in possession, it creates no presumption of abandonment, nor does his refusal to pay or delay in paying the expenses of the business or the assessments, create of itself a forfeiture. *Ib.*

19. The mere passive acquiescence of the other partners or tenants in common of a sale of the interest of the plaintiff by a party having no title, cannot confer any upon the vendee. *Ib.*

20. The fact that two or more persons join in the execution of a mortgage of lands does not raise a presumption that the estate mortgaged is joint property. *Bowen v. May*, 12 Cal. 357.

21. In order to constitute a joint estate of lands in two or more persons, such estate must be expressly declared as such in the conveyance, otherwise the estate conveyed will be held by the grantees as tenants in common. *Ib.*

22. In an action by a tenant in common against his cotenant, who is in the sole possession of the premises, to recover a share of the profits of the estate, a complaint which avers a tenancy in common between the parties, the sole and exclusive possession of the premises by the defendant, the receipt by him of the rents, issues and profits thereof; a demand by the plaintiff of an account of the same, and the payment of his share; the defendant's refusal, and that the rents, issues and profits amount to \$84,000, is insufficient to support the action. *Pico v. Columbet*, 12 Cal. 419.

23. In such complaint there are no special circumstances alleged which withdraw the case from the ordinary remedies at law, and require the interposition of equity. The action is a common law action of account; and viewed in this light the complaint is fatally defective in not averring that the defendant occupied the premises upon any agreement with the plaintiff as receiver or bailiff of his share of the rents and profits. It is essential to a recovery that this circumstance exist, and

equally essential to the complaint that it be alleged. *Ib.*

24. At common law, one tenant in common has no remedy against the other who exclusively occupies the premises and receives the entire profits, unless he is ousted of possession, when ejectment may be brought, or unless the other is acting as bailiff of his interest by agreement, when the action of account will lie. *Ib.*

25. The occupation by him, so long as he does not exclude his cotenant, is but the exercise of a legal right. His cultivation and improvements are made at his own risk; if they result in loss he cannot call upon his cotenant for contribution, and if they produce a profit his cotenant is not entitled to a share in them. The cotenant can at any moment enter into equal enjoyment of his possessions; his neglect to do so may be regarded as an assent to the sole occupation of the other. *Ib.* 420.

26. There is no equity in the claim asserted by the tenant, to share in profits resulting from the labor and money of his cotenant, when he has expended neither, and has never claimed possession, and never been liable for contribution in case of loss. There would be no equity in giving to a tenant who would neither work himself or subject himself to any expenditures or risks, a share in the fruits of another's labor, investments and risks. *Ib.* 422.

27. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier v. Corbett*, 15 Cal. 186.

28. One joint tenant or tenant in common of land may convey his interest in a particular portion of the land described by specific metes and bounds, but the grantee takes subject to the cotenant's right of partition of the whole tract. The grantee's title is good against his grantor and all persons except the cotenant. *Stark v. Barrett*, 15 Cal. 368.

29. The right of partition existing in the cotenant may be exercised at any time, and may result in the loss to the grantee of the particular parcel conveyed to him. *Ib.*

30. One tenant in common out of possession may, in equity, as a collateral incident to a claim for partition, compel his cotenant in possession to give account for

Tenancy.—Tender.

rents and profits received by him from tenants of the premises. *Goodenow v. Ewer*, 16 Cal. 471.

31. From rents so received, the tenant in possession may deduct the amounts paid for taxes and for necessary and proper repairs and additions for the preservation and security of the building held in common during the period for which the rents were collected. And where the building contained theater rooms, which were let from time to time with the furniture thereof—as carpets, lamps and scenery—which furniture was the individual property of the tenant in possession, he is entitled, in the accounting, to a reasonable allowance, to be deducted from the rents, for the use of such furniture, when such use was required in order to let the premises themselves. But he is not entitled to allowances for the use of any individual property in connection with the premises not thus required, nor any allowances for his personal services in taking charge of the building, renting the same, and collecting the rents. *Ib.* 472.

TENDER.

1. Where A had contracted verbally to convey to B a certain lot of land for \$5,000, of which sum \$1,000 was to be paid down, and the balance in two months, with interest at the rate of two per cent. a month, and the time for the payment of the \$4,000 had elapsed long before the commencement of the suit: held, the plaintiff not having paid or tendered \$4,000 with interest, that a specific performance ought not to be decreed. *Hoen v. Simmons*, 1 Cal. 121.

2. A agreed to convey to B a certain vessel, called the *Mariposa*, and B gave his promissory note for the consideration money, payable at a future day: held, that A being still the holder of the note, could not bring an action thereon, without showing that he had conveyed the vessel to B, or had tendered a conveyance; and held, further, that the tender of a bill of sale executed by A as attorney for C, the real owner, was neither performance nor an

offer to perform. *Osborne v. Elliott*, 1 Cal. 338.

3. Where by an agreement for the sale or purchase of land, the price is payable in installments, for which the purchaser executes his notes, payable at certain times, and the vendor agrees to convey on payment of the last installment, the suit is brought on the notes after all the installments have become due; the tender of a conveyance by the vendor is a condition precedent to the right to sue, and the purchaser may insist on the want of such tender against an indorser after maturity. *Folsom v. Bartlett*, 2 Cal. 164.

4. A payment to the sheriff for the redemption of land sold cannot be tendered in certified checks. *People v. Hays*, 4 Cal. 152.

5. In an action for specific performance against a vendor who refused to make a title, it is not necessary that a deed should be tendered him for execution. *Goodale v. West*, 5 Cal. 341.

6. Where a party contracts for a quantity of wheat, to be delivered on demand and paid for on delivery, in an action for nondelivery it is unnecessary for plaintiff to aver and prove a tender of the purchase money at the time of demand or before suit. *Crosby v. Watkins*, 12 Cal. 88.

7. A tender of the money due on a bond and mortgage after the law day of the mortgage, and a refusal to accept the money, do not discharge the lien of the mortgage. *Perre v. Castro*, 14 Cal. 528.

8. In a suit by a vendor for specific performance of a contract of sale, the averment of tender of payment was in general terms, as that the tender had been repeatedly made, and that the plaintiff has been at all times and still is willing and ready to pay: held, that the tender should have been stated with greater particularity as to time, but that the objections in this respect cannot be taken for the first time in the supreme court. *Duff v. Fisher*, 15 Cal. 381.

9. Where plaintiff has two mortgages on the same property—the property being indivisible—and one of the mortgages is not due, he may, nevertheless, file his bill and have a decree for the foreclosure of both. And if the second mortgage becomes due before the decree, then defendant cannot defeat the action as to this mortgage by tendering the money due on

Threats.—Time.

the first mortgage after the maturity of the second. The jurisdiction of the court over the subject matter having attached, the court should close the controversy by settling all things involved in the litigation. *Hawkins v. Hill*, 15 Cal. 500.

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### TESTIMONY.

See EVIDENCE.

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THREATS.

1. Where the court below excluded from the jury evidence of threats on the part of the deceased against the life of defendant, and the record does not show the character of such threats, the supreme court will presume that such proof was properly excluded. Such threats may have been made, and might have been conditional and justifiable. *People v. Glenn*, 10 Cal. 37.

2. The mere fact that one man threatens to kill another, does not justify the latter in killing the former. The threats must be shown to have been communicated to the accused before they are admissible as evidence for him for any purpose, and then the effect and bearing of the testimony should be explained by the judge to the jury before the case is finally submitted to them. *People v. Arnold*, 15 Cal. 480.

3. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting

goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of insolvency of defendants, and complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 206.

4. In such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Id.*

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### TIME.

1. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time for them to file their bond, to entitle them to a stay of proceedings under the statute. *Bradley v. Hall*, 1 Cal. 199.

2. If no time be specified when a statute shall be in force, it ought to go into effect from and after its passage—that is, when its existence is perfected. *People v. Clark*, 1 Cal. 407.

3. To hold that a law operates all that part of the day of its passage prior thereto, is as absurd and as much of a fiction as the old doctrine that by relation it should commence running on the first day of parliament; therefore the hour of the approval of a statute is a fact to be ascertained and proved in all cases where the rights of parties are in any manner to be affected by the time of the approval. *Id.*

4. Where the rights of parties are concerned, a day will not be considered a unit, but inquiry may be made as to the very point of time when an act is done. *People v. Clark*, 1 Cal. 407; *Craig v. Godfroy*, 1 Cal. 416; *People v. Beatty*, 14 Cal. 371.



## Time.

5. A party must move for a new trial within the statute time, unless the same has been enlarged. *Dennison v. Smith*, 1 Cal. 438.

6. In the absence of any custom to the contrary, Tuesdays are computed in the calculation of lay days at the port of discharge, but where the contract specifies working lay days, Sundays and holidays are excluded in the computation. *Brooks v. Minturn*, 1 Cal. 483.

7. Loss of time caused by the failure of a party to perform his contract is not remote, but strictly proximate, and immediate damages ought to be allowed. *Kenyon v. Goodall*, 3 Cal. 259.

8. To create a forfeiture for nonpayment of rent, the rent must be demanded on the day it becomes due, and at a late hour of the day, and where the record shows no demand of the rent there can be no forfeiture. *Chipman v. Emeric*, 3 Cal. 283.

9. If a note is payable in bank, notice of nonpayment may be given to the indorser on the evening of the day on which the note is payable, after the close of banking hours, and if not payable in bank, notice may be given on the evening of the day it is payable, at the close of the usual hours of commercial business. In places where no regular hours of business exist, the notices may be given after sunset of the day of its dishonor. *Toothaker v. Cornwall*, 4 Cal. 30. See *McFarland v. Pico*, 8 Cal. 631.

10. After sentencing a prisoner, but before signing final judgment, the court had the prisoner brought before it and amended the sentence by shortening the time, it was held not to be error. *People v. Thompson*, 4 Cal. 241.

11. The time provided in which a jury shall be returned by the sheriff is directory, and not mandatory. *Mowry v. Starbuck*, 4 Cal. 275.

12. It is always within the power of a court, when exercising proper discretion, to extend the time fixed by law whenever the ends of justice would seem to demand such an extension. *Wood v. Forbes*, 5 Cal. 62.

13. An indictment is sufficiently certain as to time, if it appear from it that the offense was committed at some time prior to the finding of the indictment. *People v. Littlefield*, 5 Cal. 356.

14. In an action for unlawfully holding

over after the expiration of the tenant's term, three days' notice is all that is required. *Garbrell v. Fitch*, 6 Cal. 189.

15. Where the commission of an offense is charged to have been on a particular day, which was anterior to the finding of an indictment, there is no necessity for the averment that the offense was committed before the finding of the indictment. *People v. Lafuente*, 6 Cal. 203.

16. Under our statute, an indictment for murder need not state the time when the crime was committed, except that it was before the finding of the indictment, and within one year and a day before death ensued from the wound or assault. *People v. Kelly*, 6 Cal. 212.

17. The time in which a sheriff makes return to an execution, does not affect the validity of the execution, or of a sale under it. *Low v. Adams*, 6 Cal. 281.

18. In the civil law, a mere nonperformance within a stipulated time does not, ipso facto, annul a contract, unless, indeed, time is the very essence of the contract. *Holliday v. West*, 6 Cal. 527.

19. Notice of time and place having been given, it is a matter of small importance who takes a deposition, particularly in view of the inconvenience and delay which would result from a different rule. *Williams v. Chadbourne*, 6 Cal. 561.

20. Though time is not of the essence of a contract for the sale of real estate, unless made so by the agreement of the parties, yet in every case it will devolve upon the party seeking relief, in a court of equity, to account for his delay. *Brown v. Covillaud*, 6 Cal. 571; *Green v. Covillaud*, 10 Cal. 330.

21. The date of publication of notice to creditors, under our insolvent act, is the first day on which such notice is published. *Clark v. Ray*, 6 Cal. 604.

22. The establishment and enforcement of rules limiting the argument of counsel to a certain time are matters resting on the sound discretion of the court; and, unless it appear that injustice has thereby been done, form no ground of appeal. *People v. Tock Chew*, 6 Cal. 636; *People v. Keenan*, 13 Cal. 584.

23. The consolidation act of San Francisco gives the officers named in the fourteenth section two days after the meeting of the board of supervisors in which to file new bonds. The meeting taking place



## Time.

on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 436.

24. The limitation as to time applied only to the action of the incumbent. The board had a reasonable time allowed them in which to reject or approve the bonds presented. *Ib.*

25. In the case of an absent person, from whom no tidings are received, the presumption of life ceases at the end of seven years: to shorten this time there must be evidence of some specific peril to the life of the individual. *Ashbury v. Sanders*, 8 Cal. 64.

26. The fact that a fugitive from justice had not been heard of for sixteen months, and that he was a passenger on a particular vessel, bound for a specific port, and that neither the vessel nor crew had ever been heard from, is not sufficient to raise a legal presumption of his death. *Ib.*

27. The constitution provides that if any bill presented to the governor (having passed both houses of the legislature) shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature, by adjournment, prevent such return. *Price v. Whitman*, 8 Cal. 415, overruling *People v. Whitman*, 6 Cal. 660.

28. The ten days given by the constitution must be computed by excluding the day on which the bill is presented to the governor. *Price v. Whitman*, 8 Cal. 415.

29. Where it is necessary to give effect to contracts, and carry out the intention of parties, the first day is by the courts included or excluded, as the case requires, there appearing to be no uniform rule on the subject; but when a time for deliberation is allowed, the exclusive rule should be adopted. *Ib.* 417.

30. The presentment and demand of commercial paper, having days of grace, must be made within reasonable hours on the last day of grace, and what are reasonable hours will depend on the question whether or not the bill or note is payable at a bank or place where, by the established usages of trade, business transactions are limited to certain stated hours. *McFarland v. Pico*, 8 Cal. 631.

31. The line upon which a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owners date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Park v. Kilham*, 8 Cal. 79.

32. In California, where such rapid and sudden fluctuations in the affairs and fortunes of men occurred, as in all history is unexampled, and where the work of years was accomplished in months, it is impossible to hold that time, as an element of past contracts, should be measured by the standards which obtain in old and settled States, where every thing is comparatively stable and permanent, where capital is abundant, titles ascertained and interest is low. *Green v. Corillaud*, 10 Cal. 331.

33. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below, on the second of November, between the hours of ten A. M., and five P. M., of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent until the last hour stated in the notice. *Lower v. Knox*, 10 Cal. 480.

34. When an indictment for murder is used as a substitute for, and in place of an indictment for manslaughter, it must, where time is material, contain the averment as to time which would be essential in an indictment for manslaughter. *People v. Miller*, 12 Cal. 294.

35. If defendant is out of the State a portion of the time, it must be so averred in the indictment. Prima facie, the lapse of time is a good defense, and where the statutory exception is relied on, it must be set up. *Ib.*

36. In a criminal case, if the court below impose upon counsel, without their consent, a limitation of time for argument before the jury, it is done at the risk of a new trial, if it be shown by the uncontradicted affidavits of the counsel that the prisoner was deprived by the limitation of the opportunity of a full defense, for this is his constitutional right, without which he cannot be lawfully convicted. *People v. Keenan*, 13 Cal. 584.

37. Paying part of a note when all is

## Time.—Title in general.

due, is no consideration for an agreement to extend the time of payment. *Leining v. Gould*, 13 Cal. 599.

38. The provision of the revenue law that the assessment must be made on or before the first Monday of May is directory. And generally, when a time is fixed by statute, within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered directory unless the nature of the act to be performed, or the language of the legislature, shows that designation of the time was intended as a limitation of the power of the officer. *Hart v. Plum*, 14 Cal. 155.

39. The term of court is sufficiently stated in an indictment when the day on which the indictment was found is given. *People v. Beatty*, 14 Cal. 371.

40. When time is important, courts will inquire into a day, or fractional part of a day. *Ib.*

41. Time, though often a material ingredient in the evidence, is not an indispensable ingredient in the act of dedication of a street or highway. *Harding v. Jasper*, 14 Cal. 647.

42. The rule is, that when time is prescribed to a public body in the exercise of a function in which the public is concerned, the period designated is not of the essence of the authority, but is a mere directory provision. *People v. Murray*, 15 Cal. 223.

43. Provisions in a statute in regard to the time within which an act is required to be done, are generally to be construed to be directory; but such a construction is improper where a consequence is attached to a failure to comply with the statute. *Shaw v. Randall*, 15 Cal. 387.

44. Where a special term of the county court was held on the first day of May, upon notice to that effect given on the twenty-fourth of April preceding, the proceedings of the court were irregular, if not void, the statute requiring a notice of not less than ten, nor more than twenty days. *People v. Riley*, 16 Cal. 187.

## TITLE.

- I. In general.
- II. Estoppel as to Title.

## I. IN GENERAL.

1. A possessory action cannot be maintained under the Mexican law by a person who has acquired title subsequent to the intrusion complained of. *Suñol v. Hepburn*, 1 Cal. 260.

2. The plaintiff not having the real and actual possession of the premises, can adduce no proof of possession other than through the medium of his title, and the defendant is allowed to dispute the validity of his title and retain possession if he fails to show a title under which he could possess. *Ib.* 272.

3. A party cannot, by the Mexican law, acquire possession beyond the metes and bounds of his actual occupancy, unless he claims to hold under what is termed a just title, and a deed void upon its face is not a just title. *Ib.* 285.

4. A grant from an American alcalde during the continuance of the Mexican war is not evidence of title sufficient to maintain an ejectment without a definite and positive possession. *Woodworth v. Fulton*, 1 Cal. 308; *Fisher v. Salmon*, 1 Cal. 414; *Reynolds v. West*, 1 Cal. 325; overruled in *Cohas v. Raisin*, 3 Cal. 450; *Welch v. Sullivan*, 8 Cal. 199, and *Hart v. Burnett*, 15 Cal. 616.

5. A grant of a fifty vara lot at the Mission Dolores by a Mexican alcalde in 1842, where the grantee took possession and occupied the lot, is a title under which a party may maintain ejectment. *Brown v. O'Connor*, 1 Cal. 418.

6. Where the title is inchoate and incomplete, one cannot sustain an ejectment, and the court should exclude such title as evidence. *Leese v. Clark*, 3 Cal. 27.

7. The defendant cannot introduce evidence to show that the title is in a third party, or that the fee of the land in question is in the United States, nor to impeach the validity of the conveyance to plaintiff collaterally as against third persons. *Winans v. Christy*, 4 Cal. 79.

8. The statute regulating sheriffs' sales

## In general.

of real estate does not design to invest a purchaser with the title until six months after the sale. *Duprey v. Moran*, 4 Cal. 196.

9. A mere trespasser cannot set up an outstanding title in a third person. *Bequette v. Caulfield*, 4 Cal. 279; *Gregory v. Haynes*, 13 Cal. 595.

10. A claim of title by virtue of a sheriff's deed is insufficient, without showing the judgment which authorized the sale. *Sullivan v. Davis*, 4 Cal. 292.

11. An ordinary quitclaim deed is sufficient to enable the grantee to maintain ejectment if the grantor could have done so. *Ib.*

12. Where a plaintiff sues for a lot in a former pueblo of San Francisco, and derails his title from the city, it is prima facie evidence of title. *Seale v. Mitchell*, 5 Cal. 402.

13. A sale of land in the city of San Francisco by a portion of the board of commissioners of the funded debt does not pass a legal title upon which ejectment can be maintained. *Leonard v. Darlington*, 6 Cal. 124.

14. The writ of restitution obtained in an action of forcible entry and detainer does not determine either the right of property or the right of possession, and constitutes no defense to an action of ejectment. *Mitchell v. Hagood*, 6 Cal. 148.

15. In an action of ejectment under a Mexican grant: held, that the State court is bound to regard the decision of the United States supreme court, establishing the rule that a conditional grant from Mexico conveys a good title without performance of the conditions sufficient to maintain ejectment, and admissible to qualify the plaintiff's actual possession. *Gunn v. Bates*, 6 Cal. 271.

16. The objection that the deeds through which the plaintiff in ejectment derails title are not properly acknowledged, cannot be maintained by one who has had no privity with the plaintiff's grantors. *Welch v. Sullivan*, 8 Cal. 187.

17. A sale of the municipal land in the city of San Francisco, in 1852, on an execution issued under a judgment against the city rendered in 1851, conveyed a legal title to the land, upon which ejectment can be maintained. *Welch v. Sullivan*, 8 Cal. 187; *Hart v. Burnett*, 15 Cal. 616.

18. An outstanding title in a third per-

son will defeat plaintiff's recovery in ejectment, although defendant does not connect himself with it. *Ib.* 198.

19. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title in a third person, no party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Bird v. Lisbros*, 9 Cal. 5.

20. A mere trespasser cannot show title in a third party as a general rule, but it is not of universal application. *Bird v. Lisbros*, 9 Cal. 5; *Piercy v. Sabin*, 10 Cal. 30.

21. When the plaintiff in ejectment does not rely on prior possession, but on his strict title, the defendant in possession having a good prima facie right may set up and show the true title to be in another party. *Bird v. Lisbros*, 9 Cal. 6.

22. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold under a conveyance with express covenants. *Peabody v. Phelps*, 8 Cal. 229.

23. All previous representations pending the negotiation for the purchase are merged in the conveyance. The instrument contains the final agreement of the parties, and by it, in the absence of fraud, their rights and liabilities are to be determined. *Ib.*

24. If a party takes a conveyance without covenants, he is without remedy in case of a failure of title; if he takes a conveyance with covenants, his remedy upon failure of title is confined to them. *Ib.*

25. Where the following instrument was endorsed on a deed, viz: Know all men by these presents, that I, the within named Avert M. Van Nostrand, of the city of San Francisco, State of California, in consideration of \$8,000 paid to me by Rodman M. Price, of the city of New York, have assigned to the said Rodman M. Price and his assigns all my interest in the within instrument, and every clause, article or thing therein contained, and do hereby constitute the said Rodman M. Price my attorney in my name, but to his use, to take all legal measures that may be proper for the complete recovery and enjoyment of the assigned premises, with

## In general.

the power of substitution. Witness my hand and seal, this thirtieth day of August, 1850, A. M. Van Nostrand; and such instrument was executed without the knowledge of the grantee named therein, and without any consideration therefor, and was not under seal: held, that the instrument did not pass the legal title to the premises, and created only an equity in the grantee. *Dupont v. Wertheman*, 10 Cal. 368.

26. The purchaser of an equitable title takes the property, subject to all existent equities. He is not within the rule which protects a bona fide purchaser for value, and without notice of the real or apparent legal title. *Ib.*

27. The title of a purchaser of real estate at sheriff's sale does not depend upon the return of the officer of the writ. The purchaser has no control over the conduct of the officer in this respect. *Cloud v. El Dorado County*, 12 Cal. 133.

28. Under our system probably an action can be maintained upon any title, legal or equitable, or upon an instrument, sealed or unsealed, which entitles plaintiff to the possession of the property in dispute as against the defendants. *Ortman v. Dixon*, 13 Cal. 37.

29. A grant being of three leagues within a much larger area, and no survey having been made, gives no title to any specific three leagues of land, which would enable him to defend against ejectment on a patent. *Waterman v. Smith*, 13 Cal. 422.

30. A defendant in ejectment, entering under a deed executed by order of a court of competent jurisdiction, enters under color of title. He is not a naked trespasser, and may set up an outstanding title in a third person. *Ib.*

31. S. and B., in 1854, execute a mortgage on their property to H. Subsequently, they execute another mortgage on the same property to plaintiff. Later, in 1855, S. conveys his interests to V., the deed declaring the interest to be sold subject to the two mortgages. Later, V. sells to defendant W., the deed containing the same recital as the last. In February, 1856, a decree of foreclosure of the first mortgage to H., sale of the property thereunder, defendant W. the purchaser, and in due time a sheriff's deed to him and possession. In June, 1856, foreclosure of the second mortgage to plaintiff, sale thereunder, plaintiff

the purchaser; and in March, 1857, sheriff's deed to him: held, that plaintiff cannot maintain ejectment against defendant W. on his sheriff's deed; that defendant, claiming title through foreclosure of the first mortgage, and being in possession, cannot be dispossessed by B. *Brown v. Winter*, 14 Cal. 33.

32. At common law, a bond for title is in effect a mortgage. The legal title remains in the vendor, and an equity vests in the vendee, to have the title on compliance with the conditions. The legal title, as also the equity, goes to the whole estate, and includes fixtures. The vendor can bring ejectment on breach of condition, or foreclosure. *Merritt v. Judd*, 14 Cal. 72.

33. Where defendants deny ownership in plaintiff, and set up ownership in themselves, it is not error to instruct the jury that the only question for them to determine is as to who has the better right to the premises. *Busenius v. Coffee*, 14 Cal. 93.

34. In suits for the possession of land by ditch companies incorporated under the act of April 14th, 1853, by the fourth section of which they are authorized to "purchase, hold, sell, and convey such real and personal estate as the purposes of the corporation shall require," the defendant cannot question the necessity of such land for the purposes of the corporation. This is matter between the government and the corporation. *Natoma W. & M. Co. v. Clarkin*, 14 Cal. 552.

35. If, on an executory contract for the purchase of land, made by plaintiff with the agent during the life of the principal, money due the principal was paid, after his death, to the agent, who settled the amount with the estate, so that the estate received the benefit of the payment, plaintiff would be entitled, in equity, to call for the legal title, and could defend in ejectment by the representatives of the principal. *Travers v. Crane*, 15 Cal. 20.

36. One tenant in common may sue a party in possession by adverse claim, and recover the premises, if plaintiff represents the better title. *Collier v. Corbett*, 15 Cal. 186.

37. A tract of land was held by several tenants in common, and, on partition, a certain portion was set apart and quit-claimed to plaintiff, representing M., who



In general.—Estoppel as to Title.

had conveyed to plaintiff as security for endorsements. Another portion of the land was set apart and quitclaimed to H. The portion thus received by H. was subsequently conveyed to plaintiff, and embraces the land in controversy: held, that plaintiff is not mortgagee of the premises; that even if he hold the premises conveyed by H. to him as security for the endorsements of M., it was as trustee of the legal title; that the title had passed from H., and had never been in M., except of an undivided interest before the partition, and was therefore in plaintiff, who could maintain ejectment. *Seaward v. Malotte*, 15 Cal. 307.

38. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance on the first day of each month. November 1st, 1858, defendant, being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1858, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent. Defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers; denying, among other things, plaintiff's title, and his own relation of tenant: held, that plaintiff is entitled to recover, and that the denial of title and relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

39. R. & Co., defendants, had two mechanic's liens upon property; one filed October 30th, 1854, the other filed December 8th, 1854, against defendant V. In 1855, R. & Co. sign an entry on the record of liens, stating that the liens did not fall due till January 15th, 1856. This was done on the supposition that the act of 1855 permitted such extension of credit with safety. Discovering that such act in this respect did not apply to existing liens, R. & Co., November 16th, 1855, brought suit on the liens, obtained judgment, sold the property, bought it in and

received a sheriff's deed. Plaintiff, as mortgagee of the property subsequent to the liens, obtained judgment, sold the property, bought it in, received a sheriff's deed, and now files his bill to set aside R. & Co.'s judgment and sale on the ground of fraud: held, the only ground for the interposition of equity being fraud, and this being ignored by the findings, the bill is dismissed; but the decree will be confined to the disposition of the fraud alone, leaving plaintiff at liberty to pursue his remedy in ejectment, if he have any, without prejudice from this decree. *Gamble v. Voll*, 15 Cal. 510.

40. The city of San Francisco holds the municipal lands of the pueblo, not legally disposed of as hereinbefore explained; and her title is wholly unaffected by sheriff's sale under execution against her, so far as those sales touch or affect the aforesaid pueblo lands. A defendant in ejectment, holding such lands merely by possession, may set up the invalidity of such sales, or the plaintiff's title derived therefrom, to defeat the plaintiff's action. *Hart v. Burnett*, 15 Cal. 516.

41. The general rule that, in ejectment, the claimant must recover upon the strength of his own title, and not upon the weakness of his adversary's, and that his action will be defeated if defendant shows title out of him, and in a third party, has in this State been qualified and limited. *Coryell v. Cain*, 16 Cal. 572.

## II. ESTOPPEL AS TO TITLE.

42. If the plaintiff proves no title, the defendant, being in possession, cannot be ousted; but if defendant claims under the plaintiff, and in subordination to his title, he is estopped from questioning it. *Horn v. Simmons*, 1 Cal. 120.

43. A person who enters into possession of land under another, cannot question the title of him under whom he holds. *Pierce v. Minturn*, 1 Cal. 472.

44. A defendant entering into possession under a bond for a deed from the plaintiff, cannot be considered as holding adversely from color of title. *Kilburn v. Ritchie*, 2 Cal. 148.

45. In an action of ejectment brought by a purchaser at sheriff's sale, under a



## Estoppel as to Title.—Tort.—Towing.

decree of foreclosure and sale of mortgaged premises; to recover the same against the mortgagor in possession, the mortgagor is estopped from setting up title in another as a defense to the action. *Redman v. Bellamy*, 4 Cal. 250.

46. In an action of ejectment, where the defendants acquired possession from the tenant of plaintiff, with a full knowledge of the tenancy, they are not in a position to deny plaintiff's title. *Anderson v. Parker*, 6 Cal. 199.

47. Where the plaintiff and defendant both derive title to land from the same person, the plaintiff is estopped by his purchase from denying the title of their common grantor, for the purpose of establishing title in himself by virtue of location of the land under school land warrants. *Ellis v. Jeans*, 7 Cal. 416.

48. In an action of ejectment, a tenant cannot deny the title of the vendor of his landlord. *McKune v. Montgomery*, 9 Cal. 576.

49. Where a defendant in ejectment brought upon a sheriff's deed, executed upon a purchase made on a sale under a decree of foreclosure, was also a party to the foreclosure suit, he is concluded by the decree from setting up a title which was in that adjudicated against him. *Clark v. Boyreau*, 14 Cal. 637.

50. In this case, which was ejectment for a lot purchased by plaintiffs of B., it was held that defendant had so recognized the title of B. as to be estopped from now disputing it. *Downer v. Ford*, 16 Cal. 350.

See EJECTMENT, GRANT, LAND.

## TORT.

1. Where the master ejects the servant from his premises, the latter refusing to leave after being discharged and notified, the former should use no more force than is actually necessary to accomplish the object, in which case only nominal damages can be recovered. *De Briar v. Minturn*, 1 Cal. 450.

2. Vindictive damages may be given in a civil action for a personal injury, though the act be also punishable by a criminal

prosecution. *Wilson v. Middleton*, 2 Cal. 56.

3. If the mortgagee acts in bad faith towards the owner, or is guilty of gross negligence, such as will greatly injure the owner, he is liable to such damages as a jury may assess. *Benham v. Rowe*, 2 Cal. 408.

4. A plaintiff has a right to waive a tort, as against factors, and to bring his action to compel them to account and for the net proceeds arising from the loss. *Lubert v. Chauviteau*, 3 Cal. 462.

5. A claim for damages for a personal tort cannot be united with a demand properly cognizable in a court of equity in the same action. *Mayo v. Madden*, 4 Cal. 28.

6. Intoxication of the plaintiff is no defense to an action for damages for injuries caused by falling through an uncovered hole in the sidewalk of a public street. *Robinson v. Pioche*, 5 Cal. 461.

7. A master is bound to use reasonable care and diligence to prevent accident or injury to his servant in the course of his employment, and if he fails so to do, he will be held responsible for damages. *Halloway v. Henley*, 6 Cal. 210.

8. A cause of action arising out of tort is not assignable. *Oliver v. Walsh*, 6 Cal. 456.

9. Where the sheriff wrongfully took possession of the goods and thereby deprived the plaintiff of them, the fact that they were taken by the coroner under a writ against the sheriff before the latter had removed them does not excuse his tort. *Squires v. Payne*, 6 Cal. 659.

10. Where a part owner sues ex delicto, and the objection of defect of parties is not set up in the answer, the damages should be apportioned at the trial. *Whitney v. Stark*, 8 Cal. 516.

11. Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. *Frat v. Clark*, 12 Cal. 90.

See TRESPASS.

## TOWING.

1. It seems that the towing a vessel out to sea by a steamer is the transportation

## Towing.—Treasurer.

of property so as to bring the case within the law of common carriers. *White v. Steam Tug Mary Ann*, 6 Cal. 471.

2. The fact that a vessel lost while being towed out to sea is insured, does not divest the owner of the right of action for damages for her loss, especially in the case of a mere partial insurance; for in such a case the abandonment by the owner only transfers his interest so far as that interest is covered by the policy. *Ib.*

3. A recovery by the owner in such an action will bar another action for the same cause, and therefore the defendant cannot raise the objection that the action is not brought by the real party in interest. *Ib.*

4. Whether a steam tug is a common carrier or not, she holds herself out to the world for engagement in a business for hire, requiring prudence, skill and the use of adequate means to perform the contracts which she undertakes, and this constitutes a stipulation of their existence, which by clear construction enters into the contract and forms part of it. *Ib.*

5. The fact that the owner of the ship lost while being towed to sea was the agent for the owners of the steam tug, does not release the latter from any of the obligations under which they contract with others. *Ib.*

## TREASURER.

1. The act requiring the treasurer to retain certain moneys, approved January 27th, 1852, does not affect money in the treasury prior to its approval. *McDougal v. Roman*, 2 Cal. 80.

2. Where the State has passed an act to fund the indebtedness of a county, the holder of warrants on the county treasurer is not compelled to accept bonds for them, or, in other words, to fund them: they are simply left unprovided for in any other way. *Hunsacker v. Borden*, 5 Cal. 289.

3. Under the statute respecting county treasurers, passed March 22d, 1850, the party who registers his warrants becomes a preferred creditor, and is to be paid as soon as there are sufficient funds in the

treasury and the prior registered warrants are paid. *Taylor v. Brooks*, 5 Cal. 332; *McCall v. Harris*, 6 Cal. 283; *Laforge v. Magee*, 6 Cal. 285; *McDonald v. Maddux*, 11 Cal. 190.

4. The act creating the office of county treasurer provides that the warrants drawn on the treasury shall be paid in the order of their registry, and this order of payment cannot be changed by the supervisors. *Laforge v. Magee*, 6 Cal. 285.

5. The revenue law of 1854 authorized the payment of a portion of the taxes in controller's warrants. The acts of 1855 and 1856 provide for the funding of the State debt, and the collection of the revenue in cash, and forbid the treasurer to liquidate any of the debt except as herein required: held, that the act of 1854, allowing payment in warrants, was thereby repealed. *Scofield v. White*, 7 Cal. 400.

6. The acceptance by a collector of taxes of a warrant is not a liquidation of the debt, but the receipt of it by the State treasurer from the collector would be a liquidation, for which the treasurer would be responsible. *Ib.* 401.

7. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler v. Bates*, 7 Cal. 137.

8. The board of supervisors of a county cannot settle with the county treasurer at a special meeting of such board, unless they have first given notice of such meeting and specified in the notice that such business will be transacted. *El Dorado County v. Reed*, 11 Cal. 131.

9. In order to give the amplest opportunity to the district attorney, or citizens who desire to do so, to contest the allowance of improper demands against the public treasury, the business of the supervisors is required to be transacted at the regular meetings required by law, or if at special meetings, public notice must be given of the business to be so transacted, and unless such notice is given, the acts of the supervisors are a nullity. *Ib.* 132.

10. The county has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald v. Maddux*, 11 Cal. 189.

11. A mandamus will not lie against a county treasurer to compel him to pay in

terest due on county bonds. *People v. Fogg*, 11 Cal. 359.

12. A treasurer is not, in respect to interest money, placed in any direct relation with the creditors; and he is not intrusted with a mere ministerial duty of holding it or paying it to them on demand. *Ib.*

13. Under the consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only \$3,000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for the money paid by them into the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento v. Bird*, 15 Cal. 295.

## TREATIES.

1. The power of taxation over aliens, and the conditions on which they shall be determined to enjoy the protection of the State in a particular place or occupation, cannot be taken away or impaired by acts of Congress or treaties with foreign nations, and the justice or expediency of the tax must be left to the States, subject to the restrictions which may be imposed by their organic law. *People v. Naglee*, 1 Cal. 248.

2. The treaty of Queretaro defined that all Mexicans established in California on the 30th day of May, 1848, and who had not on or before the 30th day of May, 1849, declared their intention to become Mexican citizens, are to be deemed American citizens, and laws applicable to aliens will not apply to them. *Ib.* 251.

3. A grant by a Mexican officer, duly authorized, and made in accordance with the Mexican laws applicable to California, and before the acquisition of the country by the Americans, is a title protected by the laws of nations, as well as by the treaty of Queretaro, and cannot be disturbed. *Reynolds v. West*, 1 Cal. 325.

4. Treaties made by the United States, removing the disability of aliens to inherit, are valid, and within the intent of the constitution of the United States. *People v. Gerke*, 5 Cal. 382.

5. The treaty between the United

States and the Hanseatic towns has not enlarged the rights of natives of those towns in this respect, as the treaty only gives them the right to dispose of land which they are prevented from inheriting by their character as aliens. *Siemssen v. Bofer*, 6 Cal. 252.

6. The power of Congress to regulate commerce with foreign nations and among the States is an exclusive power, and the statute of this State, levying a tax of fifty dollars each on Chinese passengers, is invalid and void. *People v. Downer*, 7 Cal. 171.

7. Under the treaty between the United States and China, of July 3d, 1844, and the act of Congress carrying it into effect, the United States commissioner and consul constitute a judiciary for the government of the citizens of the United States in China, and are governed by the law of nations, the laws of the United States, the common law, and the "decrees and regulations" of the commissioner, until modified and amended by Congress; and such a judicial system is constitutional. *Forbes v. Scannell*, 13 Cal. 281.

## TREES.

1. An action of trover may be maintained against a trespasser who is cutting timber, as soon as the tree is cut. *Sampson v. Hammond*, 4 Cal. 184.

2. An injunction will not be dissolved restraining defendants from felling trees, where the question of boundary is in dispute, especially when the plaintiffs' bond will fully protect the defendant for any delay, if it should turn out that they have the right. *Buckelew v. Estell*, 5 Cal. 108.

3. In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as fire wood, but the injury done to the land by destroying them. *Chipman v. Hibberd*, 6 Cal. 162.

4. The damage should be estimated by all the circumstances, and the purpose for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Ib.*

## Trees.—Trespass.

5. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of the title, an injunction will not be granted on the application of a party claiming title to the land to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528.

6. Where the defendant conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line: held, that in an action of trespass by the plaintiff against the defendant for cutting timber upon the land previous to such agreement, the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the locus in quo, and it was error for the court to instruct the jury that the delivery of the deed and the cutting of firewood on the tract was sufficient evidence of possession. The cutting of timber by itself was neither possession or title as against the owner. *Stockton v. Garfrias*, 12 Cal. 316.

7. A complaint in replevin, alleging that F. was seized and possessed of certain premises at the time of his death; that the plaintiffs were appointed the executors of his last will and testament, and ever since their appointment have been in possession of the premises; that certain persons, whose names are not designated, entered upon the same without authority, and cut down timber growing thereon, to the amount of about three hundred cords; that the defendant afterwards also entered upon the premises, without authority, and removed the wood thus cut, and still detains it from the plaintiffs; that they have demanded the possession of the same from him, and that he refuses to deliver it to them, to their damage of \$1,100—the alleged value of the wood—sufficiently shows plaintiff's ownership of the wood. *Halleck v. Mixer*, 16 Cal. 578.

8. The averments, in such complaint, of "unlawful and wrongful," as applied to the entry upon the premises and the cutting down of the timber, and to his removal and detention of the same, may be stricken out as surplusage. *Ib.*

9. Against the cutting of timber, the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes that kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty, and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong in its removal and use, and sue for the value as upon an implied contract of sale. *Ib.*

10. In suits for damages for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of possession cannot sue for the property severed from the freehold, when the defendant was in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title—in other words, the personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants. *Ib.* 579.

11. But this rule does not exclude the proof of title on the part of the plaintiff in other cases, for it is upon such proof that the right of recovery rests. It is because the plaintiff owns the premises, or has the right to their possession, that he is entitled to the chattel which is severed, and that must be in the first instance established. A mere intruder or trespasser is in no position to raise the question of title with the owner so as to defeat the action. *Ib.*

## TRESPASS.

- I. In general.
- II. Damages in Trespass.
- III. Injunction to Restrain Trespass.



## In general.

## I. IN GENERAL.

1. A trespass dies with the trespasser, and cannot be pursued against an administrator. *O'Connor v. Corbitt*, 3 Cal. 373.

2. An action of trespass may be maintained against a trespasser who is cutting timber, as soon as the timber is cut. *Sampson v. Hammond*, 4 Cal. 184.

3. In an action for nuisance, or trespass, the defendant has no right to inquire into the good faith of the plaintiff's possession. *Eberhard v. Tuolumne Water Co.*, 4 Cal. 308.

4. The plaintiff sued in assumpsit to recover rent for premises, the possession of which he had previously recovered by ejectment against the defendant. After a trial and verdict, which was set aside by the court, he amended his complaint to make it in form of an action of trespass for mesne profits: held, that this was erroneous, and should not have been permitted. *Ramirez v. Murray*, 5 Cal. 223.

5. In an action of trespass against a sheriff, where he is declared against personally, and not as sheriff, it is competent to prove that the defendant was sheriff, and that his deputy, as such, committed the trespass. *Poinsett v. Taylor*, 6 Cal. 79.

6. The fact that the parties in possession of a gold mine are foreigners, and have not obtained a license, affords no apology for trespass. *Mitchell v. Hagood*, 6 Cal. 148.

7. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates v. Nash*, 6 Cal. 194.

8. Where several defendants are declared against jointly, but no joint trespass is proved, the plaintiff can introduce evidence of a several trespass against one of the defendants, and recover against such defendant; aliter if a joint trespass has been proved. *McCarron v. O'Connell*, 7 Cal. 153.

9. The owner of property in the possession of the same has a right to use so much force as is necessary to prevent a forcible trespass. *People v. Payne*, 8 Cal. 343; *People v. Honshell*, 10 Cal. 87.

10. Where a trespasser goes with the intent and means to commit a felony, if necessary to accomplish the end intended,

the owner of the property may repel force with force. *People v. Payne*, 8 Cal. 343.

11. A mere trespasser cannot show title in a third party. This is, no doubt, true as a general proposition, but it is not of universal application. *Bird v. Lisbros*, 9 Cal. 5.

12. If a mere trespasser upon the prior actual possession of a party could justify his act by showing the true title outstanding in a third party to the suit, then a prior possessor might never gain any repose by virtue of his adverse possession, and could never gain a title under the statute of limitations. *Ib.*

13. If the trustee does a wrongful act, then he, by doing the act, consents to be treated as a trespasser or debtor, at the option of the cestui que trust. *Gunter v. Janes*, 9 Cal. 659.

14. The lines of a quarter section of government land, which are distinctly marked by natural boundaries, and stakes placed at convenient distances so that the lines can be readily traced, are sufficient to authorize the occupant to maintain an action for a trespass thereon, under the act of April 11th, 1850. *Taylor v. Woodward*, 10 Cal. 91.

15. In an action for a trespass upon land alleged by the complaint to be in the possession of the plaintiff at the time of the unlawful entry thereon by the defendants, it is not a sufficient traverse of the allegation of possession for the defendants to aver in their answer that to the best of their information and belief they did not commit the grievance upon any land in the lawful possession of plaintiff. *McCormick v. Bailey*, 10 Cal. 232.

16. The lessor of plaintiff is a competent witness in an action of trespass to the leased premises, where the lease does not bind him to protect the plaintiff against trespassers. *Ib.*

17. The statute making possessory rights of settlers on public lands for agricultural or grazing purposes yield to the rights of miners, has legalized what would otherwise be a trespass, and the act cannot be extended, by implication, to a class of cases not especially provided for. *Weimer v. Lowery*, 10 Cal. 112.

18. In an action of trespass for entering upon the mining ground of plaintiff, and digging the same up and converting the gold-bearing earth, the vendor of plaintiff



## Trespass.—Damages in Trespass.

iff is a competent witness, although a part of the purchase money is still due him. *Rowe v. Bradley*, 12 Cal. 230.

19. An officer, when he puts a receiver in possession of the property of another against whom he has no process, or asserts through himself, or another, an unlawful dominion over such property, is a trespasser. *Ib.*

20. No ouster is necessary to maintain an action of trespass; any unlawful entry is enough. *Ib.*

21. Where defendant conveyed by deed to plaintiff a tract of land, and there was subsequently a dispute between the parties respecting the boundary line of the land so conveyed, and the parties subsequently made an agreement fixing the line: held, that in an action of trespass by the plaintiff against the defendant for cutting timber upon the land previous to such agreement the defendant was not estopped by the agreement in showing title in himself previous thereto. It was competent for the defendant to show that the deed did not embrace the locus in quo. *Stockton v. Garfrias*, 12 Cal. 316.

22. In an action against a sheriff for seizing and selling certain personal property alleged to belong to plaintiff, under an execution against one Teal, it being averred in the answer that the property belonged to Teal: held, that evidence tending to prove that it was partnership property of Teal and plaintiff was proper, and that if they were partners, and as such owned the property, plaintiff could not recover. *Hughes v. Boring*, 16 Cal. 82.

23. The relation of landlord and tenant existed between plaintiff and defendant on a parol demise from month to month, rent being payable in advance, on the first day of each month. November 1st, 1858, defendant being in possession, denied plaintiff's title, and refused to pay rent. December 23d, 1857, plaintiff sued defendant in a justice's court for rent due November 1st and December 1st, 1858, and had judgment, which was paid. January 8th, 1859, plaintiff served on defendant notice to quit, on the ground of forfeiture for nonpayment of rent; defendant refused to quit or surrender the premises. Plaintiff brings ejectment. Defendant answers, denying, among other things, plaintiff's title and his own relation of tenant: held, that plaintiff is entitled to recover; that

the denial of title and the relation of tenant made defendant a trespasser, not entitled to notice to quit; that no special demand for payment of rent was necessary to work a forfeiture; that defendant could not deny title, and yet claim the benefit of holding in subordination to it. *Smith v. Ogg Shaw*, 16 Cal. 89; 92.

## II. DAMAGES IN TRESPASS.

24. An action cannot be commenced against A to recover damages for a trespass to real estate committed by B. *Stevenson v. Lick*, 1 Cal. 129.

25. In an action by A against a sheriff for seizing the property of A on an execution against B: held, that no demand was necessary before bringing suit. *Ledley v. Hays*, 1 Cal. 161.

26. A municipal corporation is not liable in damages for the destruction of a building in pursuance of the directions of its officers, as in the case of a conflagration, where no statute exists creating such liability. *Dunbar v. City of San Francisco*, 1 Cal. 356.

27. The destruction of property to check a conflagration must be shown to be clearly necessitous; yet the individual must be regulated by his own judgment, and if done without actual or apparent necessity he is liable for trespass. *Surrocco v. Geary*, 3 Cal. 74.

28. In a complaint for trespass the plaintiff claimed five hundred dollars, the alleged value of the property destroyed, and five hundred dollars damages; defendant demurred on the ground that two causes of action were improperly joined, and the court below sustained the demurrer: held, that this was error. *Tenderson v. Marshall*, 3 Cal. 440.

29. In an action of trespass, the question of damages is a question particularly for the determination of a jury. *Drake v. Palmer*, 4 Cal. 11.

30. Justices of the peace have no jurisdiction in actions to recover damages for injury to a mining claim, or for its detention, when the amount involved is over two hundred dollars. *Van Etten v. Jilson*, 6 Cal. 19.

31. In an action to abate a nuisance, damages are only an incident to an action,

## Damages in Trespass.

and the failure to recover two hundred dollars does not affect the question of costs. *Hudson v. Doyle*, 6 Cal. 102.

32. In an action for damages for cutting down growing trees, the measure of damages is not the value of the trees as firewood, but the injury done to the land by destroying them, considering the purposes for which such trees were used or designed, and not according to the speculative or fancied ideas of the jury. *Chipman v. Hibberd*, 6 Cal. 162.

33. Damages assessed for the value of land taken for a railroad should be paid to the true owner, if he recovers possession before the damages are paid by the company; although at the time of the damage a trespasser was in possession, who had filed his claim to the damages. *Rooney v. Sacramento Valley R. R. Co.*, 6 Cal. 640.

34. Where parties have located mining claims upon the bank of a creek or stream, and are using the bed of said stream for the purpose of working their claims, any subsequent erection, dam or embankment, which will turn the water back upon said claims, or hinder them from being worked with flumes or other necessary means or appliances, is an encroachment upon the rights of said parties, and they are entitled to recover for the damages consequent on such obstruction. *Sims v. Smith*, 7 Cal. 150.

35. Possession in the plaintiff is sufficient to enable him to maintain trespass; and although a higher title may be attempted to be set up, the failure to sustain it will not operate against the right to recover damages. *McCarron v. O'Connell*, 7 Cal. 153.

36. A writ of injunction will lie to restrain trespass or entering upon a mining claim and removing auriferous quartz from it, where the injury threatens to be continuous and irreparable. It comports more with justice to both parties to restrain the trespass than to leave the plaintiff to his remedy for damages at law. *Merced Mining Co. v. Fremont*, 7 Cal. 327.

37. Where parties employed architects, reputed to be skilled in their profession, to construct at a designated point on a creek a dam or embankment of certain specified dimensions, capable of resisting all floods and freshets of the stream for the period of two years, and to deliver it completed by a given time; and before the embank-

ment was completed it was broken by a sudden freshet, and a large body of water confined by it rushed down the channel of the stream, carrying away and destroying in its course the store of plaintiffs with their stock of merchandise. The employers exercised no supervision, gave no directions, furnished no materials, nor had they accepted the work. Plaintiff having brought suit to recover the damage sustained by them against the employers and contractors: held, that the latter alone were liable. *Boswell v. Laird*, 8 Cal. 489.

38. In an action against a sheriff for wrongfully seizing and selling property under an execution, and where there was no wantonness or oppression on the part of such officer in the seizure, the measure of damages is the value of the property at the time it was seized, and legal interest on such amount from the time of seizure up to the time of the rendition of the verdict. *Phelps v. Owens*, 11 Cal. 24.

39. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners of the ditch was taken by plaintiff, and subsequently and before the trial the witness conveyed, by deed, his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball v. Gearhart*, 12 Cal. 47.

40. In an action for injuries to a mining claim, a claim for damages to the plaintiff by the reason of the breaking away of the defendant's dam, and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears' Union Water Co.*, 12 Cal. 557.

41. The want of reasonable care on the part of another, who is injured by the breaking of a dam, cannot be set up in defense to an action for damages for injuries thus suffered. *Ib.* 559.

42. In an action for damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership, or prior appropriation of the water. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

43. Action for damages against defend-

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 Damages in Trespass.—Injunction to Restrain Trespass.
 

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ants, averring that they, "with force and arms, broke and entered upon the premises of plaintiff, and damaged them by causing them to be overflowed and covered with earth, gravel, tailings, etc., deposited thereon by the action of running water:" held, that under our system of pleadings the words "with force and arms, broke and entered," do not confine the proof to the direct and immediate damage as in the old action of trespass; that the facts being clearly set out in the complaint, the addition of these words was surplusage. *Darst v. Rush*, 14 Cal. 84.

44. In an action for damages against a constable for illegal seizure of plaintiff's property, the judgment was for six hundred and fifty dollars, the sum claimed in the complaint, the value of the property being therein fixed at four hundred and fifty dollars and the damages at two hundred dollars. The court found the damages at six hundred and fifty dollars. There was no statement on new trial or appeal: held, that the finding of the court is conclusive, and that the judgment must stand. *Van Pelt v. Littler*, 14 Cal. 201.

45. In actions, for taking and detaining personal property, no circumstances of aggravation being shown, the measure of damages is the value of the property with interest. *Dorsey v. Manlove*, 14 Cal. 555.

46. If circumstances of aggravation be shown in order to increase the damages, then defendant may show all circumstances connected with his acts and explanatory of his motives and intentions. *Ib.*

47. In such actions the rule of damages depends on the presence or absence of circumstances of aggravation in the trespass—as fraud, malice or oppression. *Ib.* 556.

48. Where the trespass is committed from wanton or malicious motives, or a reckless disregard of the rights of others, or under circumstances of great hardship and oppression, the rule of mere compensation is not enforced, and the measure and amount of damages are matters for the jury alone, and they may award punitive or exemplary damages. *Ib.* 558.

49. The rule of compensation, as distinguished from the rule of exemplary damages, applies even though the writ under which the officer committed the trespass was void—there being no circumstances of aggravation. *Ib.*

50. In an action to recover damages for the diversion of the water of a stream from plaintiff's mills, an averment as to the precise quantity of water required for the use of the mills, and to which plaintiff claimed to be entitled, is an immaterial averment, and a recovery of damages would not establish plaintiff's right to the exact quantity of water claimed so as to be res judicata in a subsequent suit. *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 149.

51. In such action for damages no issue could be taken upon the averment as to the particular quantity of water diverted. *Ib.*

52. In an action against a water company, incorporated under the laws of this State, for overflowing plaintiff's claim, the fact that plaintiff could have prevented the damage by pulling off a board from defendant's flume, and permitting the water to discharge above plaintiff's claim, is no defense, because they were not obliged to avoid the injuries complained of by committing a trespass. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

See DAMAGES.

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 III. INJUNCTION TO RESTRAIN TRESPASS.
 

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53. An injunction will not be dissolved restraining defendants from felling trees where the question of boundary is in dispute, especially as the plaintiffs' bond will fully protect the defendants from any delay, if it should turn out that they have the right. *Buckelew v. Estell*, 5 Cal. 108.

54. Questions as to the performance of the conditions contained in the grant can only be made by the grantor, and not by a mere naked trespasser; and an injunction will lie to restrain the trespass, where the grant is admitted. *Ib.*

55. An injunction ought not to be granted in aid of an action of trespass, unless it appear that the injury will be irreparable and cannot be compensated in damages. *Waldron v. Marsh*, 5 Cal. 119.

56. A complaint which sets out a cause of action in trespass, and concludes with a prayer for an injunction, is correct. *Gates v. Kieff*, 7 Cal. 125.

57. A complaint which joins an action

## Injunction to Restrain Trespass.

of "trespass quare clausum fregit," ejectment, and prayer for an injunction, will be held bad on demurrer. *Bigelow v. Gove*, 7 Cal. 135.

58. A writ of injunction will lie to restrain trespass in entering upon a mining claim and removing the auriferous quartz from it, where the injury threatens to be continuous and irreparable. *Merced Mining Co. v. Fremont*, 7 Cal. 320.

59. The removal of gold from a mine is emphatically taking away the entire substance of the estate, and comes within that class of trespass in which injunctions are now universally granted. *Ib.* 321.

60. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by the plaintiffs, and had thereby diverted the water of the stream from plaintiffs' ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 341.

61. Where a suit is brought to test the question as to the propriety of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius v. Bicknell*, 10 Cal. 224.

62. The remedy by injunction to restrain the removal of fixtures, under section two hundred and sixty-one of the code, is only preventive; it is not exclusive of any other remedy. *Sands v. Pfeiffer*, 10 Cal. 265.

63. Where the complaint and evidence show that a defendant is in possession of a tract of land, and claiming and holding under an adverse title, and the weight of evidence is in favor of his title, an injunction will not be granted, on the application of a party claiming title to the land, to prevent the defendant from cutting timber thereon. *Smith v. Wilson*, 10 Cal. 528.

64. Where the bill avers that plaintiffs are the owners and in possession of a tract of land, that defendants are insolvent and threaten to and will enter upon said land, and by excavations, embankments and diverting valuable springs and streams thereon, despoil it of the substance of the inheritance and create a cloud upon plaintiff's title, injunction lies. *Bensley v. Mountain Lake W. Co.*, 13 Cal. 313.

65. Where premises containing deposits

of gold are held under a patent from the United States, an injunction lies to prevent miners from excavating ditches, digging up the soil, and flooding a portion of the premises for the purpose of extracting the gold. *Boggs v. Merced Mining Co.*, 14 Cal. 379; *Henshaw v. Clark*, 14 Cal. 464.

66. In a complaint in ejectment, parties may seek, in addition to a recovery of the premises, an injunction restraining the commission of trespass, in the nature of waste pending the action, but the grounds of equity interposition should be stated subsequently to and distinct from those upon which the judgment at law is sought. *Natoma W. and M. Co. v. Clarkin*, 14 Cal. 548.

67. The complaint avers title in plaintiff to a tract of land, that the possession of defendants is forcible and unlawful, that an action for forcible entry has been commenced by plaintiff against defendants, and is still pending and undetermined, and asks for an injunction to restrain defendants from cutting and removing timber from the land, without seeking in this suit to be restored to the possession, the object of the suit being to preserve the property during the pendency of that action: held, that injunction lies, although no action at law has been brought to try the title; that jurisdiction of equity in such cases to grant, first, a temporary, and subsequently a perpetual injunction, does not depend upon the question whether or not such action at law has been brought; that the rule under the English chancery system was the same, and that our statute is not more restrictive. *Hicks v. Michael*, 15 Cal. 115.

68. Where the title of plaintiff is disputed in the answer, the usual practice has been to ask the assistance of equity in aid of an action at law; but there are many cases in which the powers of a court of equity have been invoked in the first instance. And equity generally directs an issue at law as to the title, and awaits the action of the court of law upon the issue. *Ib.* 116.

69. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity, or when the subject matter of the complaint is free from controversy, or irreparable mischief



## Injunction to Restrain Trespass.—Trial.

will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Ib.*

70. In cases of waste, if anything is about to be abstracted from the land which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Ib.*

71. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Ib.*

72. Plaintiffs file their bill in equity to enjoin defendants from diverting a certain quantity of the water of Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for \$21,000 damages: held, that the averments are insufficient to entitle plaintiffs to an injunction; the scope of the bill being simply to enforce in equity plaintiffs' alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 148.

73. Held, further, that plaintiffs should be permitted, if they desire, so to amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *Ib.*

74. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using

violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of the insolvency of defendants, and the complaint not showing that there is no adequate remedy at law, and that in such case, forcible entry and detainer would be a speedy mode of regaining possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Tomlinson v. Rubio*, 16 Cal. 206.

75. Against the cutting of timber the owner of real property is entitled to the preventive remedy of injunction. Whilst the timber is growing, it is part of the realty, and its destruction constitutes the kind of waste the commission of which a court of equity will, upon petition, restrain. When once cut, the character of the property is changed; it has ceased to be a part of the realty and has become personalty, but its title is not changed. It belongs to the owner of the land as much afterwards as previously, and he may pursue it in whosoever hands it goes, and is entitled to all the remedies for its recovery which the law affords for the recovery of any other personal property wrongfully taken or detained from its owner. And if he cannot find the property to enforce its specific return, he may waive the wrong committed in its removal and use, and sue for the value as upon an implied contract of sale. *Halleck v. Mixer*, 16 Cal. 578.

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TRIAL.

1. The finding of the court upon ques-

Trial.

tions of fact will be regarded as the verdict of the jury, and subject to the same review in the appellate court. *Vogan v. Barrier*, 1 Cal. 187.

2. Where the case is tried by the court without a jury, the appellate court will not inquire into the sufficiency of the evidence, but will presume the issues of fact properly found. *O'Connor v. Stark*, 2 Cal. 155.

3. Upon the trial of an issue of fact by the court, the code requires its decision to be given in writing and filed with the clerk within ten days after the trial takes place. This is not merely directory, and the intention is that the decision shall correspond to the verdict of a jury, and without such a finding the judgment cannot stand. *Russell v. Armador*, 2 Cal. 305; *Semple v. Berkey*, 2 Cal. 231; *Bowers v. Johns*, 2 Cal. 419; *Hoagland v. Clary*, 2 Cal. 475.

4. When a case has been once taken to an appellate court, and its judgment obtained on the points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot, on a second appeal, be altered or changed. *Dewey v. Gray*, 2 Cal. 377; *Clary v. Hoagland*, 6 Cal. 687; *Gunter v. Laffan*, 7 Cal. 592; *California Steam Nav. Co. v. Wright*, 8 Cal. 592; *Cahoon v. Levy*, 10 Cal. 216; *Davidson v. Dallas*, 15 Cal. 82.

5. The plaintiff always, in contemplation of law, has the affirmative, with the right to open and conclude the cause. *Benham v. Rowe*, 2 Cal. 408.

6. A jury was waived by the parties and the cause submitted to the court, the trial made some progress, when on motion of plaintiffs' attorney the case was referred "to ascertain the damages sustained by plaintiff:" held, that the case having been submitted to the court, it was the duty of the court to find upon the facts adduced by the parties, and not the facts presented in a referee's report. *Geeseke v. Brannan*, 2 Cal. 519.

7. It is not the province of the court in its finding, where a jury tries the case, to pronounce upon the facts. *Bessie v. Earle*, 4 Cal. 200.

8. The verdict of a jury must precede a judgment, but this is not necessary when the court sits as a jury; the finding of a court may be filed after the judgment is rendered; the time or relative order re-

quired for the filing is merely directory. *Vermuele v. Shaw*, 4 Cal. 216.

9. The power of opening up a case after it has been once submitted rests in the sound discretion of the court hearing the case, and as a general rule will not be revised. *Pinkham v. McFarland*, 5 Cal. 138.

10. The statute which requires that upon the trial of an issue of fact by the court, the decision shall state separately the facts and conclusions of law, does not apply in chancery cases. *Walker v. Sedgwick*, 5 Cal. 192.

11. The establishment and enforcement of rules limiting the argument of counsel to a certain time, are matters resting in the sound discretion of the court, and unless it appears that injustice has thereby been done, form no ground of appeal. *People v. Tock Chew*, 6 Cal. 636.

12. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation and insist upon points other than those mentioned in the stipulation. *Cahoon v. Levy*, 10 Cal. 216.

13. It would seem that a party cannot try his cause before a judge without objection, and after losing it, complain that the case was not tried by a jury. *Smith v. Brannan*, 13 Cal. 115.

14. The right to a trial of particular cases in particular counties is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 5 Cal. 462.

15. Courts have a large discretion over the conduct of proceedings before them, and may limit counsel to a reasonable time. But in capital cases this should be done, if at all, only in very extraordinary and peculiar instances. *People v. Keenan*, 13 Cal. 584.

16. The trial on the main charge in an indictment will not be postponed because of an appeal on the issue of insanity. *People v. Moice*, 15 Cal. 331.

17. It is irregular for one of the justices composing the court of sessions, on a criminal trial, to retire before the termination of the trial, and another justice, not pres-

ent during the previous stages of it, to come in and participate in the proceedings. The members of the court who act as such when the case is developed should continue to act until the close. Whether such irregularity is sufficient to reverse a conviction otherwise regular, not here decided—but the practice is dangerous and disapproved of. *People v. Eckert*, 16 Cal. 113.

See VENUE.

TROVER.

1. An auctioneer who receives and sells stolen property innocently, and in the ordinary course of his business, is liable to the true owner for the conversion thereof. *Rogers v. Huie*, 1 Cal. 435; overruled in *Rogers v. Huie*, 2 Cal. 572.

2. Conversion is the gist of the action of trover, and without conversion neither possession of the property, negligence, or misfortune, will enable the action to be maintained. *Rogers v. Huie*, 2 Cal. 572.

3. To render a defendant liable for trover, he must have converted the property to his own use; and if not, then any other act to amount to a conversion must be done with a wrongful intent, either expressed or implied. *Ib.* 573.

4. An action in trover may be maintained against a trespasser who is cutting timber, as soon as the timber is cut. *Sampson v. Hammond*, 4 Cal. 184.

5. If the parties were tenants in common, and the defendant sold the chattels held in common, and appropriated the proceeds to his own use, the remedy of the plaintiff is in trover, or by an action for money had and received; and, an action for goods, wares and merchandise, sold and delivered, will not entitle him to a judgment. *Williams v. Chadbourne*, 6 Cal. 561.

6. All the parties in interest should join in an action of trover, and a failure to join may be pleaded in abatement. *Whitney v. Stark*, 8 Cal. 516.

7. Where M. made a bill of sale to G., of forty-two barrels of vinegar, then in possession of G., as keeper of the sheriff, as collateral security for a debt due G.

and G. subsequently gave back the bill of sale to M., without any liquidation of the debt, or change of the possession of the property, and the property was afterwards sold by the defendant as sheriff, M. bringing an action of trover against the defendant, to recover the same: held, that M. had no title to the property upon which he could recover in such an action, as the mere handing back the bill of sale of M. did not revert the title in him. *Middleworth v. Sedgwick*, 10 Cal. 393.

8. In trover, the plaintiffs must either have the possession, or the immediate right to the possession of the property, to entitle them to recover. *Ib.*

9. Plaintiff brought an action of replevin against the defendants to recover certain property, and obtained a judgment for its restitution, and damages for its illegal detention; defendants paid the damages, but the property was not restored, Plaintiffs then brought an action of trover to recover the value; defendants plead the former recovery as a bar: held, that the judgment in replevin did not constitute a bar to the action of trover, the judgment in replevin not being satisfied. *Nickerson v. California Stage Co.*, 10 Cal. 521.

10. Where the defendant contracted with a factor, who was in his debt for certain goods, but before he took them away, was informed that a portion of them belonged to another, his taking such portion was an unlawful assumption of ownership, and a conversion of the property. *Scribner v. Marsten*, 11 Cal. 306.

TRUST AND TRUSTEE.

1. The law which deprives a married woman of the right to make contracts, is not altered by the statute, unless in respect of the property specified by it, and she cannot bring suit, in her own name, upon a contract which she is not authorized by statute to make. *Snyder v. Webb*, 3 Cal. 88.

2. Where land is purchased in the name of one person, and the consideration is paid by another, a trust immediately arises,

and the person in whose name the conveyance is taken is deemed in law to hold as trustee for the one furnishing the money. *Osborne v. Endicott*, 6 Cal. 153.

3. In order to create such a trust, the facts need not appear affirmatively, on the face of the deed, but may be proved by any note or memorandum, in writing, of the nominal purchaser, even though he plead the statute of frauds. *Ib.* 154.

4. A trustee cannot purchase, nor deal with the subject of the trust, nor purchase debts to be paid out of the trust fund, nor place himself in a position antagonistic to the trust. *Page v. Naglee*, 6 Cal. 245.

5. The purchase by a trustee of a debt, to be paid out of the trust fund, and causing an action to be brought, and a judgment obtained thereon, in the name of another, if not a fraud in fact, was a violation of his duties as a trustee, and it makes no difference, in this respect, whether his trust is created by deed or mortgage, or whether the same was void or not. *Ib.*

6. Having accepted the trust and received the rents of the property, the trustee cannot dispute its validity, particularly for his own benefit. *Ib.*

7. A judgment so obtained by a trustee is void in law, and a nullity, and may be enjoined at the instance of the party executing the deed of trust to secure the payment of his debts out of the fund. *Ib.*

8. The transfer of a bond for title to land upon a promise, by the assignee, to pay a certain debt of the assignor, binds the assignee to perform the trust, and the obligation to pay his debt is not affected by any misrepresentations made by the assignor to the assignee, because the rights of the creditor, under the transfer, had already vested. *Connelly v. Peck*, 6 Cal. 353.

9. And where the assignee was a commercial firm, and the assignment was made to an agent, acting as the trustee of the firm, and the agent obtained from the obligor in the bond a deed for the land to the members of the firm; and, subsequently, the firm sold the land to their successors in business, constituting a new firm, of which some of the old firm were members: held, that the purchasers are chargeable with notice of the trust. *Ib.*

10. On the trial of an issue of fact, involving the validity of a will, a subscribing witness thereto is not rendered incom-

petent as a witness by holding land devised therein in trust for the devisee, and without having any interest himself therein. *Peralta v. Castro*, 6 Cal. 357.

11. And where such trustee had executed a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby, by the cestui que trust, and also held, what he thought, a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Ib.*

12. Where the deed to the trustee, and his covenant of warranty, were given in evidence to support the objection to his competency, by which it appeared that the land was conveyed to him absolutely, and that he had conveyed a part, with covenant of warranty, but it appeared from his examination, on his voir dire, that his trust existed by parol, and that he really had no interest therein, and was indemnified against loss by the warranty: held, that the question as to the admissibility of such parol evidence to contradict or vary the terms of the instrument under seal could only properly arise in a suit between the trustee and the cestui que trust, upon a denial of the trust by the grantee, and that, for the purpose of the examination, the evidence on the voir dire is admissible. *Ib.*

13. Where a bill alleges a parol trust, it seems that it must be denied, and a general demurrer will not lie. *Ib.*

14. Where the complaint charged that A was indebted to plaintiff, and had conveyed his property to B to be disposed of for his benefit, and had drawn an order in favor of plaintiff on B, who had accepted it; and further charged that B had subsequently reconveyed a portion of the property to A, without consideration, praying that B be compelled to execute the trust in favor of plaintiff: held, that A was a necessary and proper party to the action. *Lucas v. Payne*, 7 Cal. 96.

15. By the acceptance of the order they became liable to the plaintiffs as trustees, which liability they could not escape by a subsequent fraudulent transfer of the trust property. *Ib.*

16. Where an administrator is sued in equity by the people, to compel him to pay over to the county treasurer money collected by the intestate as the collector: held, that he occupied the position of one

who takes possession without authority of property belonging to another, and that he may be treated as a trustee de son tort. *People v. Houghtaling*, 7 Cal. 351.

17. If the plaintiff alleges an express trust, it is incumbent upon him to prove it as alleged, but such a trust may be proved by circumstances, and to ascertain the intention of the parties, the court will consider the then existing circumstances. *Gunter v. Janes*, 9 Cal. 655.

18. A mortgagee, who is also a trustee, is as strictly bound to execute his trust faithfully as he would be were he not a creditor, but acting for the benefit of another cestui que trust. *Ib.*

19. A party seeking to enforce a trust against the administrator of a trustee, is compelled, from the complex nature of the cause, to ask relief in a court of equity. The claimant of specific property is not a creditor within the meaning of the probate law, and therefore he is not bound to present his claim to the administrator. *Ib.*

20. A trustee cannot, by mingling trust moneys with other funds, change his character from that of trustee to that of mere debtor. *Ib.* 659.

21. The acts of either the trustee or cestui que trust, without the consent of the other, should not be permitted to change the relation or capacity of the parties. *Ib.*

22. In cases of express trust, the capacity and that of the cestui que trust are created by trust, and all the legal rights and duties belonging to the one or the other are but the legitimate results contemplated by the contract itself, and flow from the capacity of each party thus created by the concurrence of the two wills. *Ib.*

23. If the trustee does a wrongful act, then he by the act consents to be treated as a trespasser or debtor, at the option of the cestui que trust. *Ib.*

24. A trustee should never be permitted to defeat the rights of the cestui que trust so long as it is in the power of a court of equity to enforce them. *Ib.* 660.

25. When trustees act with good faith, and without any selfish motive, they are entitled to be treated by a court of equity with liberality and indulgence, and especially when they act under the advice of counsel. *Ellig v. Naglee*, 9 Cal. 695.

26. Trustees act for the benefit of others and not for themselves, and the fair

exercise of their judgments should be a protection to them. Very supine negligence or willful default will render them liable; but to make them liable for mere errors of judgment would tend to discourage good and prudent men from undertaking any trust. *Ib.*

27. Delay on their part in bringing suit to recover the rents of the trust estate, if subsequently approved by the cestui que trusts, will excuse them. *Ib.* 696.

28. Money advanced by the trustees to the cestui que trusts, with the understanding that the same should be repaid out of the rents of the trust property, is a lien only upon the net incoming rents, and not a lien upon the trust property. *Ib.*

29. The same is true respecting the charges for legal services of one of the trustees in the management of the trust property. The rents must be applied to the payment of such allowances until they are liquidated. *Ib.*

30. The condition that the party of the second part shall deliver up the property upon a failure to comply with its terms, to the party of the first part, to be sold by them to pay the debts of the firm outstanding, then to pay the balance over to the party of the second part, is only a trust retained upon the property sold which may be enforced like any other trust. A court of equity would enforce it as a mortgage or vendor's lien. *Cayton v. Walker*, 10 Cal. 454.

31. Where a party signs a promissory note with the addition to his name of the word "trustee," he is personally liable; nor can evidence be admitted to show that at the time of the execution of the note there was a parol agreement that he should not be personally liable, but the note was to be paid out of a trust fund. *Conner v. Clark*, 12 Cal. 171.

32. A deed by a husband of his separate real estate to a trustee for the benefit of his wife, whether executed in compliance with an antenuptial contract, or by way of settlement upon his wife, independent of any previous contract, the husband being at the time free from debts and liabilities is valid. *Barker v. Koneman*, 13 Cal. 10.

33. The law allows, and even regards with favor, provisions made by the husband, when in solvent circumstances, for his wife and family, against the possible

misfortunes of a future day, by setting apart a portion of his property for their benefit. *Ib.*

34. A note, stating that "We, the undersigned, trustees of the First African Methodist Episcopal Church, on behalf of the whole board of trustees of said association, promise to pay," etc., and signed without qualification by two persons having authority, is the note of the church, and not of the signers. *Haskell v. Cornish*, 13 Cal. 47.

35. A mortgagee of land in possession must account for rents and profits; and after payment of the debt for which the mortgage was given, he becomes by operation of law, trustee of the surplus for the mortgagor. *Pierce v. Robinson*, 13 Cal. 121.

36. Where it was agreed between the mortgagor and mortgagee that the land and its proceeds were to be held not only as security for the debt due the latter, but for debts due third persons, laborers on the land for instance: held, that such an agreement was an appropriation of said surplus for the benefit of said third persons, not revocable when they have acted on the faith of it, and the mortgagee is a trustee of the same for said third persons. *Ib.*

37. Such an agreement operates as an equitable assignment of the surplus, so soon as any exists which does not pass to the administrator of the mortgagee as general assets for the benefit of the creditors at large, but is subject in his hands to the same trust which attached to it before the decease of the intestate. *Ib.*

38. If a confidential agent, trusted by a principal with money used in trade, appropriates the money to the purchase of property for his own use and benefit, and the property can be identified as that so bought, the agent will be held as trustee for the owner of the money. *Wells v. Robinson*, 13 Cal. 139.

39. After the assignee of property in trust for creditors takes possession, the title and trust become fixed and executed, and the assignment is not recoverable. The want of a schedule of the property in such case, though sometimes regarded as a circumstance of fraud, will not of itself avoid the assignment. *Forbes v. Scannell*, 13 Cal. 287.

40. That the trustees employ the part-

ner assigning to aid them in winding up the concern, and pay him, and allow his wife some furniture, etc., is not proof of fraud in the assignment, there being no evidence that these benefits were promised at the time of the assignment. *Ib.* 288.

41. Where the wife makes a contract with the husband by which she gives him money, her separate property, for steamboat stocks owned by him: held, that assuming the contract to be void because made between husband and wife, the husband is in a position of having taken his wife's money without her consent and converted it into stock, and that he thereby becomes her trustee; that she can follow the money into whatever property it goes; that being in possession of the stock she can hold it until fully indemnified, and that his creditors cannot reach it. *George v. Ransom*, 14 Cal. 660.

42. A deed of trust, the trustee not being the creditor, but a third party, given to secure a note, and authorizing the trustee to sell the land at public auction and execute to the purchaser a good and sufficient deed of the same, upon default in paying the note, or interest as it falls due, and out of the proceeds to satisfy the trust generally, and to render the surplus to the grantor, is not a mortgage, requiring judicial foreclosure and sale. *Koch v. Briggs*, 14 Cal. 262.

43. In a deed of trust, as here, there can be no forfeiture of the estate, and hence, no equity, as against such forfeiture to foreclose, as in England. Nor should a suit for decree and sale, as under our system, lie, because such suit could be based only on the contract of the parties, and the contract is that the trustee shall sell, upon the happening of a certain event. *Ib.* 463.

44. Relief in equity would be limited to the contract, and a sale could only be made by enforcing the trust. From sales under such trusts there is no equity of redemption, for there is no forfeiture. Performance of the trust carries out the contract of the parties. *Ib.*

45. A party who permits himself to stand on the book of a water company, incorporated under the statutes of the State, as a stockholder, is eligible to office, and is not a competent witness for the company in an action against it for overflowing plaintiff's mining claim. The fact that the stock

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was held in his name in trust for another, the transfer having been made simply to enable him to become an officer of the company, does not relieve him from responsibility. The trust, in such case, is only implied; and the seventieth section of the corporation act of 1853 applies only to the trustee of an express trust. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

46. Defendants were the holders of a mortgage executed by the Yreka Water Co. and B. to them, to secure advances made and to be made, by themselves and others, to said company. Plaintiff had made advances to the company, and was one of the persons intended to be secured by the mortgage, though not a party thereto. Defendants assign the mortgage, receive the consideration therefor, but refuse to pay any portion of the money to plaintiff, who sues for money had and received to his use; held, that defendants occupied toward plaintiff the position of trustees, and that the money sued for was received in that character; that it is of no consequence that the trust was created by a contract to which plaintiff was not a party, as he subsequently assented to it, and defendants cannot now repudiate it and detain money which they would not otherwise have received. *Kreutz v. Livingston*, 15 Cal. 347.

47. Bill avers, in substance, plaintiff to be holder of several notes and mortgages executed to him by defendants, H. and wife, and that the defendant, O'D., proposed to plaintiff to buy said notes and mortgages for a certain sum, which plaintiff agreed to take; that O'D. desired, before closing the purchase, to see H. and wife, and learn whether they could be induced or compelled to pay the notes; asked plaintiff for the notes and mortgages to show H. and wife, and that plaintiff delivered them to him, relying on his honesty; that O'D. saw H. and wife, who were illiterate, and by representing himself as the owner of the notes, etc., which he exhibited, by threatening to sue, etc., induced H. and wife to give him an absolute deed in fee simple of the mortgaged premises for one hundred dollars, the premises being worth many more thousands of dollars; that O'D. then returned the notes, etc., declined purchasing of plaintiff, and concealed the fact of having a deed,

acted as agent and trustee of plaintiff, and for his benefit, and should have taken the deed in his name; that in equity said O'D. ought to be declared such trustee, and execute a deed of the property to plaintiff; that, on account of a defect in the record of one of the mortgages, it does not impart notice, etc., and that if O'D. should sell the property, as he is trying to do, to an innocent purchaser, such sale would injure plaintiff irreparably. Other parties are made defendants, as claiming some interest subsequent to plaintiff. Complaint prays for injunction against O'D., that said trust be declared, that he execute a deed to plaintiff, that H.'s wife execute to plaintiff such further conveyance and assurance and release of equity of redemption as may be just in satisfaction of said mortgages, and that all defendants be barred, foreclosed, etc.; or that the deed by H. and wife to O'D. be declared void and canceled, and he be foreclosed of all equity of redemption thereunder; and if such deed be canceled, that then the plaintiff have judgment against H. and wife on said notes, that all the defendants be barred, etc., and premises sold to pay the judgment, etc. O'D. demurs that inconsistent causes of action are united: held, that the demurrer is not well taken, that the allegations of the complaint make out a homogeneous case as against all the defendants, to wit: a right to enforce the mortgages, and to a decree of foreclosure binding subsequent claimants, of whom O'D., by his purchase, is one, with notice of the mortgages. *De Leon v. Higuera*, 15 Cal. 495.

48. Where plaintiff deposits money with defendant, to be loaned out from time to time, the interest to be collected, and principal and interest to be held by him for plaintiff until called for, there is a continuous trust, and if defendant used the money himself, he would be like a guardian using his ward's money, and be regarded as a borrower upon the same terms upon which he could have loaned to others. *Baker v. Joseph*, 16 Cal. 176.

49. Where a son conveys real estate to his father—the only consideration being a verbal agreement by the father to make a will and devise to the son certain property, and the father dies without having complied with the agreement—the agreement is void, the conveyance is executed without consideration, express or implied, and

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a trust results in favor of plaintiff by implication of law, and he may set aside the conveyance and recover the property—it being shown that the transaction was not a gift. *Russ v. Mebius*, 16 Cal. 355.

50. If, in such case, the conveyance did not express the consideration for which it was given, but acknowledged the payment of a nominal consideration in money, parol evidence would be inadmissible to establish trust in favor of the son. *Ib.* 356.

51. The doctrine of resulting uses and trusts is founded upon mere implication of law, and, generally, this implication cannot be indulged in favor of the grantor, where it is inconsistent with the presumptions arising from the deed. Unless there be evidence of fraud or mistake, the recitals in a deed are conclusive upon the grantee, and no resulting trust can be raised in his favor in opposition to the express terms of the conveyance. *Ib.*

52. No implication of trust arises on the purchase of property by a parent in the name of his child; as is the case when the purchase money is paid by one person, and the conveyance taken in the name of a stranger. Prima facie, such purchase is regarded as an advancement. *Ib.* 357.

UNDERTAKING.

- I. In general.
- II. On Attachment.
 - 1. On Release of Attachment.
- III. On Indemnity to Sheriff.
- IV. On Appeal.
- V. On Injunction.
- VI. In Replevin.
- VII. Bail Bond.
- VIII. Of a Receiver.

I. IN GENERAL.

1. An undertaking exacted by an officer when he has no authority to require it, is void. *Benedict v. Bray*, 2 Cal. 255.

2. An undertaking which is void at law is not legal evidence. *Ib.*

3. No alteration or erasure will defeat

the recovery upon a bond, unless it materially affects the rights or condition of the obligee, or is the result of a fraudulent intent to effect the same object. *Turner v. Billagram*, 2 Cal. 522.

4. If an undertaking has to be executed by the plaintiff, and is executed to the defendant by a wrong name, the latter has his remedy, and may describe it as given to him, and may show that he was the party intended. *Morgan v. Thrift*, 2 Cal. 563.

5. An omission to allege delivery in a suit on a bond can be taken advantage of only on demurrer, or the defect is cured by a verdict. *Garcia v. Sutruestegui*, 4 Cal. 244.

6. In an action on a bond or written undertaking there can be no constructive parties jointly liable with the proper obligors. *Lindsay v. Flint*, 4 Cal. 88.

7. A plaintiff being the real party in interest has a right to sue upon an undertaking, though made payable to the people of the State. *Taaffe v. Rosenthal*, 7 Cal. 518; *Baker v. Bartol*, 7 Cal. 554.

8. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. *Swain v. Graves*, 8 Cal. 551.

9. But conceding that there is a necessary discrepancy between the condition and the penal portion of the bond, it cannot be set up by the obligors, as the bond would be single, and in a suit thereon the plaintiff would be entitled to the full amount. *Ib.*

10. The sureties on an undertaking are entitled to stand on the precise terms of the contract, and there is no way of extending their liability beyond the stipulation to which they have chosen to bind themselves. *Tarpey v. Shillenberger*, 10 Cal. 390.

11. When a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below on the second of November, between the hours of ten A. M. and five P. M., of that day, and the sureties appeared upon such notice soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party being absent until the last hour stated in the notice. *Lower v. Knor*, 10 Cal. 481.

12. Where there are several obligees in

In general.—On Attachment.—On Release of Attachment.

such an undertaking promising to pay "said parties enjoined," etc., suit may be brought in the name of one alone, if he be beneficially entitled to the fruits of the recovery. *Prader v. Purkett*, 13 Cal. 591.

13. Where a surety undertakes that his principal shall pay any judgment to be rendered, etc., the judgment against the principal is conclusive against the surety. *Pico v. Webster*, 14 Cal. 204.

14. No recovery can be had on a bond purporting to be the joint bond of the principal and sureties, but signed by the latter only; otherwise as to the undertaking under our system. They are original and independent contracts on the part of the sureties, and do not require the signature of the principal. *City of Sacramento v. Dunlap*, 14 Cal. 423.

II. ON ATTACHMENT.

15. Damages caused by the depreciation of real estate under an attachment, and injury caused to the credit and reputation of the defendants by reason of the attachment, are too remote to submit to the jury in an action on the undertaking. *Heath v. Lent*, 1 Cal. 412.

16. In an action on an attachment bond for damages accruing from a wrongful suing out of an attachment, counsel fees constitute no part of the damages. *Heath v. Lent*, 1 Cal. 412; overruled in *Ah Thae v. Quan Wan*, 3 Cal. 219.

17. If the affiant had not good reason to believe the matters set forth in his affidavit on attachment, the defendant, whose name and credit have been impaired by the wrongful issuing out of the writ, has no recourse on the bond, if his property has not been attached, but must resort to a criminal action or a private action for the tort. *Heath v. Lent*, 1 Cal. 412.

18. If a justice issue an attachment and take an undertaking in a suit for a sum exceeding his jurisdiction, the proceedings are void, and no action will lie on the bond. *Benedict v. Bray*, 2 Cal. 254.

19. An attachment bond was executed, but before the writ was levied the attachment was dismissed: held, that the bond was void. *Ib.*

20. The undertaking should precede the writ and accompany the affidavit. *Ib.*

21. It is no objection to an undertaking on attachment that it is made payable to the people of the State of California instead of the defendant in the suit, as the latter can sue thereon in his own name. *Taaffe v. Rosenthal*, 7 Cal. 518.

22. A mistake in the recital of the bond as to the amount for which the attachment issued may be explained and corrected by parol. *Palmer v. Vance*, 13 Cal. 556.

1. On Release of Attachment.

23. Where a bond is given for the release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *McQueen v. Ship Russell*, 1 Cal. 165.

24. Where the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if it had remained under seizure, and if the vessel is not liable, the giving of the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

25. A bond given to release property attached only releases it from the custody of the sheriff, and is not an actual substitution of security, compelling the plaintiff to proceed upon the bond alone to collect his judgment. *Low v. Adams*, 6 Cal. 281.

26. In an action on a bond given to release property from attachment, the complaint should state that the property was released upon the execution and delivery of the bond. To charge the obligors, it is necessary to state the consideration of the undertaking, and a mere reference to a condition of the bond itself, wherein such release is stated as a consideration, is insufficient. *Palmer v. Melvin*, 6 Cal. 652; *Curtis v. Richards*, 9 Cal. 37.

27. In a bond given to release property seized on attachment, the obligors undertook to pay on demand to plaintiffs in the action the amount of the judgment and costs, not to exceed \$3,000, which plaintiffs might recover. In the bond the action is recited as for \$1,600. Upon delivery of the bond the property was returned to the debtor. Plaintiffs in the action had judgment for an amount exceeding the penalty of the bond: held, that recovery may be had on the bond to the extent of

the penalty. *Palmer v. Vance*, 13 Cal. 556.

28. Such a bond is not a statutory undertaking, but is valid as a common law obligation; the mistake in the recital as to the amount for which attachment issued may be explained and corrected by parol. *Ib.*

29. Execution against the judgment debtor in such case is not a condition precedent to suit on the bond. *Ib.* 557.

30. A bond given to the sheriff voluntarily on delivery of the property is valid at common law. *Ib.*

III. ON AN INDEMNITY TO SHERIFF.

31. An indemnity bond to the sheriff to retain property seized under attachment is an instrument necessary to carry the power to sue into effect. *Davidson v. Dallas*, 8 Cal. 251.

32. Where property was seized under two attachments, and the property was claimed by a third party, whereupon both attaching creditors indemnified the sheriff, who went on and sold it and paid the proceeds to the first attaching creditor, the amount not equalling his judgment, and afterwards the claimant obtained judgment against the sheriff for the value of the property: held, that the recourse must be had against the first attaching creditor, for whose benefit the property was sold. *Ib.* 253; doubted in the same case, 15 Cal. 80.

33. Where an indemnity bond is given to the sheriff to hold him harmless and pay any judgment which may be rendered against him by reason of his seizure of certain property, his remedy at law on the bond is clear for the amount of any such judgment, whether he be solvent or not, or whether his official sureties could be held or not, and a bill in equity will not lie. *White v. Fratt*, 13 Cal. 524.

34. Where a sheriff seizes goods on two attachments in behalf of different plaintiffs, and the property being claimed by a third person, the plaintiffs in the attachment suits execute to the sheriff separate indemnifying bonds, there is no joint liability between the plaintiffs to the sheriff. Each bond must be sued on as an independent obligation. *Ib.* 525.

IV. ON APPEAL.

35. On an application for justification of bail on appeal, the merits of the appeal will not be considered. *Bradley v. Hall*, 1 Cal. 199.

36. If the appellants have been guilty of no laches in perfecting their appeal, the court may enlarge the time, upon terms, for them to file their bond to entitle them to a stay of proceedings. *Ib.*

37. The omission of the words "to pay to" will not invalidate the obligation of an appeal bond, or leave should be granted to file a good bond. *Billings v. Roadhouse*, 5 Cal. 71.

38. An objection that a county court has no jurisdiction in cases on appeal, where no appeal bond is given, as required by the statute, should be made in the court below; it is too late to raise the question in the supreme court. *Howard v. Harman*, 5 Cal. 78.

39. Where such an objection is made in the proper time, it is the duty of the presiding judge to hear the excuse of the party failing to produce it, and if sufficient, to allow him to file a bond. *Ib.* 79.

40. Where an appeal is dismissed for want of a proper bond and no final judgment has been rendered, an appeal can be taken at any time within the period allowed by law. *Martinez v. Gallardo*, 5 Cal. 155.

41. An objection that there is no undertaking on appeal filed cannot apply in a case where no right of the defendant is infringed, and a State cannot be denied a hearing in her own courts because no bond has been filed for costs, when a fund has been provided by law for such cases. *People v. Clingan*, 5 Cal. 391.

42. To enable the assignee of a judgment to sue on an appeal bond filed in the cause, he must have an assignment of the bond. *Moses v. Thorne*, 6 Cal. 88.

43. Where an appeal is withdrawn or dismissed by consent of both parties, no action can be maintained on the appeal bond. *Osborn v. Hendrickson*, 6 Cal. 175.

44. Giving an appeal bond does not release the lien acquired by docketing the judgment. *Low v. Adams*, 6 Cal. 281.

45. Where the appeal is bona fide, and not taken for delay, appellate courts will always permit a new undertaking to be

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filed where the original is defective. *Coulter v. Stark*, 7 Cal. 245.

46. Where a motion is made in the county court to dismiss an appeal, on the ground that the undertaking filed is insufficient, and before the determination thereof the other party offers to amend his undertaking: held, that it is error to refuse to allow him so to do. *Cunningham v. Hopkins*, 8 Cal. 33.

47. The appellant must show by the certificate that the notice and undertaking on appeal has been filed in due time, and if not shown to be filed, then the respondent must object thereto by motion to dismiss, and not for the first time in his brief. *Bryan v. Berry*, 8 Cal. 134; *Franklin v. Reiner*, 8 Cal. 340; *Whipley v. Mills*, 9 Cal. 641; *Hastings v. Halleck*, 10 Cal. 31.

48. An appeal bond will be so construed as to carry out the obvious intention of the parties. *Swain v. Graves*, 8 Cal. 551.

49. An undertaking on appeal is an independent contract on the part of the sureties, in which it is not necessary that the appellant should unite. *Curtis v. Richards*, 9 Cal. 38; *Tissot v. Darling*, 9 Cal. 285.

50. A district court has no jurisdiction of an action on an appeal bond to pay all costs and damages not exceeding three hundred dollars, when the costs and damages amount to less than two hundred dollars. *Page v. Ellis*, 9 Cal. 250.

51. An averment in the complaint, in a suit on an appeal bond, that execution had been issued on the judgment and returned unsatisfied, is necessary. The nonpayment of the judgment can be shown without issuing an execution. *Tissot v. Darling*, 9 Cal. 285.

52. Where suit is brought in the name of the husband and wife, and no objection is made to the joinder of the wife, and judgment is obtained, and afterwards defendants execute an undertaking on appeal to the husband and wife, and suit is afterwards brought on the undertaking in the name of the husband and wife: held, that the defendants are concluded by the acts of the appellant, and that the wife is properly joined in the suit on the undertaking. *Ib.*

53. It is the duty of a justice of the peace, when an appeal bond is presented to him for his approval, to act promptly. If he receives the bond without objection,

it will be too late to disapprove it the next day. *People v. Harris*, 9 Cal. 572.

54. The service of notice should be made after, or at the time of filing of the notice of appeal, and before or at the time of the filing the undertaking on appeal. *Hastings v. Halleck*, 10 Cal. 31.

55. The period of five days fixed by law for filing the undertaking on appeal cannot be abridged by the error or negligence of the appellant; nor can that appellant, by serving a copy of the notice of appeal before the original is filed, keep the respondent watching the clerk's office to see when it is done. *Ib.*

56. Where a notice of appeal to the supreme court and undertaking were filed in the clerk's office on the sixteenth of December, and on the next day a copy of the notice was served on the respondent, who within five days after filing the undertaking excepted to the sufficiency of the sureties to the undertaking: held, that the respondent was not injured by the failure of the appellant to serve a copy of the notice of appeal on the day the undertaking was filed. *Mokelumne Hill C. and M. Co. v. Woodbury*, 10 Cal. 187.

57. Where the sureties to an undertaking on appeal justify in a sum less than double the amount specified in the undertaking, but more than double the amount of \$300, such undertaking is sufficient, under section three hundred and forty-eight of the code, though insufficient to stay the issuance of the execution. *Ib.*

58. Where the appellant, on an appeal pending from the district court to the supreme court, filed in the clerk's office of the district court his notice of appeal and undertaking, and the respondent within the time allowed by law excepted to the sufficiency of the sureties to the undertaking, and they failed to justify to the satisfaction of the clerk of said court, who issued execution on said judgment: held, that it was error in the judge of said court to make an order of supersedeas staying said execution. *Ib.* 188.

59. No undertaking on appeal is necessary when the appeal is taken by the county. The board of supervisors represent the county in legal proceedings. *People v. Supervisors of Marin County*, 10 Cal. 346.

60. The failure of sureties on appeal to justify where they are excepted to, leaves

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the appeal as though no undertaking had been filed, and ineffectual for any purpose. *Lower v. Knox*, 10 Cal. 480.

61. Where a party gave notice of the justification of the sureties on an undertaking before the clerk of the court below, on the second of November, between the hours of ten A. M. and five P. M. of that day, and the sureties appeared upon such notice, soon after ten of that day: held, that the clerk acted properly in refusing to take their justification, the opposite party, being absent, until the last hour stated in the notice. *Ib.* 481.

62. Where, in an action on an appeal bond, conditioned to pay the judgment appealed from if the same should be affirmed by the appellate court, it appeared that the judgment appealed from was reversed, with directions to enter a different judgment: held, that the conditions of such bond were not broken, and that no action would lie thereon. *Chase v. Ries*, 10 Cal. 517.

63. In an undertaking on appeal, the names of the sureties need not appear in the body of the paper. *Dore v. Covey*, 13 Cal. 507.

64. The stay of proceedings accorded by the statute to the execution of the undertaking on appeal is a sufficient consideration. *Ib.* 508.

65. Noncompliance with the directory provisions of the statute intended for the benefit of the respondent does not vitiate the undertaking. *Ib.*

66. Residence of the sureties and their occupation, and that the penalty must be double the amount of the judgment, are directory provisions. *Ib.* 509.

67. The execution of the paper, the delivery of it to the clerk, filing it among the papers, with the affidavit, and the actual suspension of proceedings, is prima facie as sufficient proof of delivery, if delivery is essential, as if the instrument were sealed. *Ib.* 510.

68. Where an undertaking on appeal is more favorable to the appellee than the statute requires, he cannot complain that the statute has not been followed. *Ib.* 510.

69. Where an instrument, purporting to be a bond on appeal, contains words of obligation, and has a scroll opposite the name of one of the two signers, who contemporaneously verify the instrument as

their bond, it is the bond of both. *Canfield v. Bates*, 13 Cal. 608.

70. On appeal from a justice's court, in forcible entry and detainer, the execution of an appeal bond, within ten days, is not a condition to the jurisdiction of the county court. *Rabe v. Hamilton*, 15 Cal. 32.

71. If the bond be void or defective, through accident or mistake, a new bond may be filed on such terms as the court deems just, the right to the other party being regarded. *Ib.* 33.

72. Dismissal of an appeal in the supreme court for want of prosecution, in accordance with the rules of the court, operates as an affirmance of the judgment below within the statute relative to undertakings on appeal, unless the order of dismissal be vacated during the term. *Karth v. Light*, 15 Cal. 326; *Chamberlin v. Reed*, 16 Cal. 207.

73. By the code, the undertaking on appeal, providing for the liabilities of the sureties upon condition of the affirmance of the judgment, operates as a stay, and if by a mere neglect to prosecute the appeal, and for that reason suffering it to be dismissed, after the respondent has been deprived of his rights under the judgment by the undertaking, the sureties could be released, upon the pretense that the judgment was not affirmed, it is evident that great injustice would be in many instances perpetrated, and a fraud practised upon respondents. *Karth v. Light*, 15 Cal. 327; *Chamberlin v. Reed*, 16 Cal. 207.

74. After notice of exception to the sufficiency of the sureties on an undertaking on appeal to the supreme court, they cannot justify without notice to the adverse party; and in this case, the justification being made without notice, the appeal was ordered to be dismissed, unless appellants, within ten days, file a new undertaking, and the sureties thereon justify upon notice to the respondent. *Stark v. Barrett*, 15 Cal. 364.

75. An appeal will not be dismissed on the ground of insufficiency in the justification of the sureties on the undertaking, where the undertaking was both to render the appeal effectual and to stay execution, and the justification was sufficient for the former purpose. *Dobbins v. Dollarhide*, 15 Cal. 375.

76. Where the examination of the

On Appeal.—On Injunction.

sureties does not disclose sufficient property to make the undertaking operate as a stay, but does disclose sufficient to render the appeal effectual, respondent's remedy is by motion in the court below for leave to proceed on the judgment, notwithstanding the undertaking, and not by motion in the supreme court to dismiss the appeal. *Ib.*

77. The undertaking on appeal to the supreme court must, in all cases, be filed within five days after filing notice of appeal, and the court has no power to extend the time. *Elliott v. Chapman*, 15 Cal. 384.

78. Construing sections three hundred and forty-eight and three hundred and thirty-seven of the code together, they provide that an appeal is not effectual for any purpose, unless an undertaking be filed, or a deposit made with the clerk within five days after filing the notice, and failure to so file the undertaking or make the deposit will be fatal to the appeal, and it must be dismissed. *Ib.*

79. Where an appeal is taken by a party, and as a condition to give it effect, a bond or undertaking, with or by sureties, is annexed—the undertaking being executed for the benefit of appellant—the law presumes it was executed at his request, and probably no proof of that fact is requisite in a suit by the surety against the appellant, for money paid on account of the suretyship. At all events, very slight proof of such request would be required. *Bostic v. Love*, 16 Cal. 72.

80. If an undertaking on appeal to the supreme court be sufficient in amount to stay proceedings, the lien of the judgment is not extended by the appeal beyond two years from the time of its docketing; and this, where the undertaking was excepted to, there being no effort to enforce the judgment pending the appeal. *Chapin v. Broder*, 16 Cal. 420.

See UNDERTAKING.

V. ON INJUNCTION.

81. An order for an injunction must be deemed inoperative until an undertaking be given, otherwise the party enjoined would have no security for any damages which he might sustain by reason of the

injunction. *Elliott v. Osborne*, 1 Cal. 397.

82. In an action upon an injunction bond to recover damages for the wrongful issuing out of an injunction, counsel fee to procure a dissolution of the injunction was properly allowed as part of the damages. *Ah Thais v. Quan Wan*, 3 Cal. 217; *Summers v. Farish*, 10 Cal. 353; *Heyman v. Landers*, 12 Cal. 111; *Prader v. Grim*, 13 Cal. 587: overruling *Heath v. Lent*, 1 Cal. 412.

83. Where an injunction is dissolved, and the suit in which it issued is dismissed by the party obtaining it, that is no admission that the injunction was improperly sued out. In such case, to maintain an action on the bond, it must be shown that there was no proper cause for the injunction. *Gelston v. Whitesides*, 3 Cal. 311.

84. In an action for an injunction bond the judgment of dissolution is conclusive, and the only question is the amount of damage sustained. *Ib.*

85. In an action on an undertaking for an injunction, the sureties cannot plead that the business which was enjoined was a public nuisance. *Cunningham v. Breed*, 4 Cal. 385.

86. An injunction to prevent a defendant from felling trees will not be dissolved where a question of boundary is involved, especially as plaintiff's bond will fully protect the defendants for any delay if it should turn out that he has the right. *Buckelew v. Estill*, 5 Cal. 108.

87. An injunction bond, though given to all the obligees by name, and using no words decidedly expressing a several obligation, yet necessarily creates a several liability. *Summers v. Farish*, 10 Cal. 351.

88. In an action against the sureties on an injunction bond, the condition of which is that the plaintiff in the suit for whom the sureties undertake should pay all damages and rents that should be awarded against the plaintiffs by virtue of the issuing of said injunction by any competent court, and the complaint did not aver that any damages had been awarded: held, that such complaint is fatally defective. *Tarpey v. Shillenberger*, 10 Cal. 390.

89. In a suit on an injunction bond, defendant, to show that the injunction suit was still pending, offered in evidence an order from the supreme court directing the

court below to fix the amount of a suspensive appeal bond, that court having dissolved the injunction: held, that the order was properly rejected, the defendant not offering to show that the bond and notice of appeal were given, and the transcript filed in the appellate court. *Woodbury v. Bowman*, 13 Cal. 635.

90. The usual bond being given, an order was made to show cause why an injunction should not issue; a restraining order "in the meantime" was issued. The case was continued a while, and on hearing the order, was dissolved, injunction denied and suit dismissed. Suit was brought on the bond, and it was held, that the restraining order embraces the time between its issuance and the hearing, and that damages may be had beyond the continuance, and that counsel fees may also be recovered. *Prader v. Grim*, 13 Cal. 587.

91. An undertaking on injunction, reciting that it is made in pursuance of the order of court requiring a bond in the suit in which a restraining order was already in force, sufficiently expresses a consideration. The order for the bond and the undertaking must be taken together. *Prader v. Purkett*, 13 Cal. 590.

92. On an injunction bond given to plaintiff and others, as obligees, plaintiff alone may sue, if the property on which the injunction operated was his sole property, and the injury his alone, the complaint averring these facts. *Browner v. Davis*, 15 Cal. 11.

93. In an action on such bond, no demand for payment of unliquidated damages need be made on the parties for whom the sureties—that is, the obligors—stipulated. *Ib.*

VI. IN REPLEVIN.

94. If an action of replevin be improperly commenced, the party bringing it, having obtained the benefit, cannot avoid the undertaking he has given by pleading his own misfeasance. *Turner v. Billigram*, 2 Cal. 522.

95. A replevin bond was made to the sheriff instead of the party to be protected by it, by mistake, and then corrected; this did not invalidate the bond. *Ib.*

96. Where a replevin bond substantially conforms to the act, and no variation exists, the assignee of the defendants can maintain an action upon it. *Wingate v. Brooks*, 3 Cal. 112.

97. A party who sues out a replevin from a justice's court, having no jurisdiction, and obtains the property, cannot in an action on the bond set up as a defense the want of jurisdiction of the justice. *McDermott v. Isbell*, 4 Cal. 114.

98. Where the defendant in a replevin suit failed to claim the return of the property in his answer, and on the trial the jury found a verdict for the defendant, on which the court rendered judgment against plaintiffs for costs, which was paid: held, that the payment of the judgment as taken was a complete discharge of plaintiffs' sureties on the undertaking. *Chambers v. Waters*, 7 Cal. 390.

99. In an action of replevin, where the defendant has required the return of the property, and given an undertaking for such purpose, a judgment for plaintiff, in order to hold the sureties on the undertaking, must be in the alternative as required by the code. *Nickerson v. Chatterton*, 7 Cal. 570.

100. The sureties only bind themselves to make good any judgment that plaintiff may lawfully obtain against defendant. *Ib.*

101. Where the recovery of the property is the primary object of the suit, as in some case where damages will not compensate plaintiff, he should frame his bill in equity specifying the reasons therefor, and then a decree can be made to compel specific delivery. *Ib.*

102. In an action against the sureties on replevin bond, it is necessary to allege and prove that the property was delivered to the party requiring it, and for whom the bond was given. *Ib.* 572.

103. The liability of the sureties cannot be more than the value of the property fixed by the judgment in the original suit. *Ib.*

104. Where the plaintiff in replevin gives the statutory undertaking and takes possession of the property in suit, and is afterwards nonsuited and judgment entered against him for the return of the property and for costs: held, that his sureties are liable for damages sustained by defendant by reason of a failure to return the goods, but not for damages for the original taking

On Replevin.—Bail Bond.—Of a Receiver.—Use and Occupation.

and detention, the value of the goods not having been found by the jury. *Ginaca v. Atwood*, 8 Cal. 448.

105. The facts which upon a trial by jury would have been found in the original replevin suit, are by a nonsuit therein left to the jury called in the suit on the undertaking, so far as the conditions of the undertaking will authorize an inquiry into them. *Ib.*

106. T. commenced suit against J. by attachment; the writ was levied upon certain personal property by the plaintiff H., as sheriff. M. J., wife of J., claimed the property as sole trader, and brought her action of replevin for the property, and obtained possession of the same by the delivery of the statutory undertaking. The undertaking was executed by defendants R. and S. The replevin suit was decided February 5th, 1855, in favor of H. T. obtained judgment in the attachment suit against J., November 30th, 1854. On the eighteenth of February, 1855, executions in favor of other creditors of J. coming into the hands of H., as sheriff, he levied them on the same property, sold them and paid the proceeds into court. H. then brought suit against the sureties in the replevin bond: held, that the lien of T.'s attachment continued after the replevy of the goods by M. J. *Hunt v. Robinson*, 11 Cal. 277.

107. When the same property came into the hands of H., as sheriff, the condition of the replevin bond to return the property was fulfilled. *Ib.*

108. In an action on a replevin bond, the defendant's liability is limited to the damage sustained by a failure to return the property. *Ib.* 279.

VII. BAIL BOND.

109. Where a bail bond is given to appear and answer an indictment, the complaint must aver that the indictment was found or is pending. *People v. Smith*, 3 Cal. 272.

110. If the condition be "to appear whenever the indictment may be prosecuted," and there is no averment in what court it was prosecuted, it is error, and a loose statement "that the accused was called" in

the said court of sessions is not sufficient. *Ib.*

111. A bail bond need not state in what court the defendant shall appear, as the law provides in what court he shall be tried. *People v. Carpenter*, 7 Cal. 403.

112. Sureties to a bail bond cannot avail themselves, in defense to an action thereon, of an insufficiency of the justification of the undertaking. *Ib.*

113. The sureties on the bail bond of a defendant arrested in a civil action are not bound to surrender the defendant within ten days after judgment against him, unless the plaintiff takes such measures as would authorize the officer to hold defendant in custody. *Allen v. Breslauer*, 8 Cal. 554.

VIII. OF A RECEIVER.

114. Where plaintiff filed a bill in equity for the appointment of a receiver and other relief, and the court refused to appoint a receiver on condition that defendant file a bond to account as receiver, which defendant did, a judgment for \$20,000 dollars was rendered against defendant in the suit, and proper demand being made and refused, suit was brought by plaintiff on the bond, which was made payable to the people of the State of California: held, that the plaintiff could recover thereon. *Baker v. Bartol*, 7 Cal. 553.

115. The defendant having received the benefit of this bond, is estopped from denying its legality. *Ib.*

USE AND OCCUPATION.

1. A subtenant can be made liable to the original lessor in an action for use and occupation, or for rent, only for the time during which the occupancy of the premises by the subtenant continued. *Pierce v. Minturn*, 1 Cal. 474.

2. A description of premises in a lease, though imperfect, is sufficiently certain if the boundaries of the premises can be ascertained with a reasonable degree of cer-

Use and Occupation.

tainty, and they have been taken possession of and occupied under the lease. *Ib.*

3. Under our code, plaintiff may recover real property, and damages for withholding it, and rents and profits, all in one action. *Sullivan v. Davis*, 4 Cal. 292.

4. A claim for possession of real property, with damages for its detention, cannot be joined in the same complaint, under any system of pleading, with a claim for consequential damages arising from a change of a road by which a tavern keeper may have been injured in his business. *Bowles v. Sacramento Turnpike and Plank Road Co.*, 5 Cal. 225.

5. In an action of ejectment where no proof is introduced to show damages, it is no error to refuse to allow the defendant to prove the value of the improvements made by him on his property. *Ford v. Holton*, 5 Cal. 321.

6. Where the prayer for damages for more than two hundred dollars is inserted in a complaint in a justice's court, in an action for the recovery of possession of a mining claim, it should be disregarded or stricken out, and the plaintiff allowed to try his right to the claim. *Van Etten v. Jilson*, 6 Cal. 19; *Grass Valley Q. M. Co. v. Stackhouse*, 6 Cal. 414.

7. Where the defendant in ejectment occupied and improved the land bona fide under color of title, the improvements erected by him constitute an equitable set-off, to the extent of their value, to the damages recovered by the plaintiff for the withholding of possession. *Welch v. Sullivan*, 8 Cal. 511.

8. Where claimants to land had prior to the issuance of a patent published a notice that they had become the owners of the grant, specifying its boundaries and warning off trespassers, it might possibly operate as a protection against any demand for damages until the approved survey was made. *Moore v. Wilkinson*, 13 Cal. 489.

9. Where in ejectment against several defendants the judgment for damages is several instead of joint, the damages may be remitted and the judgment for the land stand. *Curtis v. Herrick*, 14 Cal. 120.

10. In ejectment, the value of improvements, even when defendant holds under color of title adversely to plaintiff, can only be allowed as a set-off to damages. *Yount v. Howell*, 14 Cal. 466.

11. Damages which a plaintiff can recover in an action of ejectment for the use and occupation of the premises are such as arise subsequent to the accruing of his right of possession, and when his right depends upon a sheriff's deed, he cannot recover in this form of action for the use and occupation for the six months intervening the sale and the execution of the deed. *Yount v. Howell*, 14 Cal. 468; *Clark v. Boyreau*, 14 Cal. 637.

12. Where the complaint in ejectment avers the ownership and right of plaintiff, and the possession and withholding by defendant in general terms, without stating any time when plaintiff's title accrued or existed, and without making any allegation as to damages for rents and profits, but simply praying judgment therefor in a given sum, and the complaint is demurred to as not stating facts sufficient, and a general judgment for possession and \$2,250 damages is given: held, that damages cannot be recovered for any period preceding the commencement of the action; but that this point, to wit: that the complaint does not support the judgment for damages, cannot be raised for the first time on petition for rehearing in the supreme court—the defendant on the first hearing in this court having put his objection to the general judgment for damages on the ground of error in the charge of the court below to the jury, and of error in the admission of evidence as to the rents and profits, the point of his objection being that a recovery for rents and profits beyond three years was barred by the statute, and this court having decided against him because the point was not properly made by the record. *Payne v. Treadwell*, 16 Cal. 248.

13. In this case the judgment for damages must stand, as this court has no means of determining the manner in which the damages were made up by the jury, or whether any damages for the period preceding the commencement of the action were found. *Ib.*

14. Where damages are claimed for use and occupation prior to the commencement of the action, the complaint must state the title of plaintiff as existing at some prior date (to be designated) and as continuing up to the commencement of the action, and the entry of defendant at some date subsequent to that of the alleged title. *Ib.*

15. Where in ejectment the facts found by the court authorized a judgment for possession but not for damages, the judgment being for possession and damages was affirmed in the supreme court upon respondents remitting the damages and paying costs of appeal. *Doll v. Feller*, 16 Cal. 434.

See EJECTMENT, LAND, LANDLORD AND TENANT, LEASE, RENT.

USURY.

1. To establish usury, the party must show that the rate agreed upon was greater than the customary rate at the time and place of the contract. *Fowler v. Smith*, 2 Cal. 570.

VACANCY.

1. The absence of a judge from the State is not such a vacancy as can be supplied by the executive under legislative authority. *People v. Wells*, 2 Cal. 198, 610.

2. Vacancy in office is a fact, the existence of which, like any other fact, is susceptible of being ascertained. It can only be said to exist when the office or place has no legal incumbent to discharge the duties. The law does not presume every temporary absence from the discharge of the duties of the office creates a temporary vacancy. *Ib.* 204.

3. An office is not vacant for the reason that the incumbent is not at present discharging his duties; it cannot become vacant without the proper judgment of law. *Ib.*

4. The legislature may provide how a legal vacancy may be supplied, but it has no power to say what will constitute one. *Ib.* 205.

5. The constitutional power of filling vacancies vested in the governor applies

only to vacancies occurring under circumstances where the appointing power or electing power cannot act. *People v. Fitch*, 1 Cal. 535.

6. Such power is limited by the period when the people or the legislature can elect or appoint, on the arrival of which his power ceases, and the right of appointment returns to the original appointing power. *Ib.*

7. The power to fill an office carries by implication the power to fill a vacancy. *People v. Fitch*, 1 Cal. 535; *People v. Campbell*, 2 Cal. 137.

8. An appointment to fill a vacancy in the office of State printer, under the act of 1850, made by the governor during the session of the legislature, is void. *People v. Fitch*, 1 Cal. 535.

9. Elections to fill vacancies occasioned by the death or resignation of an officer are special elections, and the proclamation of the governor is necessary to fill them. *People v. Porter*, 6 Cal. 28; *People v. Weller*, 11 Cal. 65; *People v. Weller*, 11 Cal. 339; *People v. Martin*, 12 Cal. 411; *People v. Rosborough*, 14 Cal. 187.

10. There can be no vacancy in the office of sheriff caused by the death, removal or resignation of the incumbent; for upon the happening of such an event, the coroner by operation of law becomes the sheriff. *People v. Phoenix*, 6 Cal. 93.

11. The act to establish an insane asylum provided that the resident physician shall hold his office for two years, and until his successor is appointed and qualified: held, that on failure of the legislature to elect at the expiration of the incumbent's term, the office becomes de jure vacant, and can be filled by the governor, under article five, section eight of the constitution. *People v. Reid*, 6 Cal. 289; *People v. Mizner*, 7 Cal. 524; *People v. Langdon*, 8 Cal. 14.

12. In an action by one claiming to have been elected to an office, against his predecessor, to compel a surrender of the books, papers, etc., belonging to the office, plaintiff must show prima facie that a vacancy existed in the office, and that he was elected to fill it. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 436.

13. The consolidation act of San Francisco gives the officers named in the fourteenth section two days after the meeting

Vacancy.—Vacation.

of the board of supervisors, in which to file new bonds. The meeting taking place on the ninth of July, the officers had the whole of the tenth and eleventh of July to execute and present their bonds. *Doane v. Scannell*, 7 Cal. 395; *People v. Scannell*, 7 Cal. 436.

14. Taking the different provisions of the statutes together as constituting one entire system, and it would seem clear that the law does not intend there should be a continued vacancy in any office, and for that reason it gives certain inferior jurisdictions the right to make a prompt, summary and ex parte declaration that the office is vacant, and at once to fill the vacancy by appointment, so that the question may be as speedily settled as possible by proceedings in the nature of a quo warranto. *People v. Scannell*, 7 Cal. 439.

15. Where the appointment to an office is vested in the governor, with the advice and consent of the senate, and the term of the incumbent expires during a recess of the legislature, and the governor appoints a successor in office: held, that this appointment vested in the appointee a right to hold his office for the full term, subject only to be defeated by the non-concurrence of the legislature. *People v. Mizner*, 7 Cal. 523.

16. Vacancy in office can only be said to exist when the office or place has no legal incumbent to discharge the duties of the office. *Ib.*

17. The power to fill vacancies had to be vested in some department of the government, and the constitution was compelled to vest it in the executive, because the only department that could be properly and efficiently charged with such a duty. But the constitution carefully limited this power to fill vacancies, for the time only, and when the appointing power for the whole time can act, the appointment of the executive for the time being ceases. *Ib.* 525.

18. Power to fill a vacancy and power to fill an office are distinct and substantial in their nature. *People v. Langdon*, 8 Cal. 15.

19. When the constitution clearly enumerates the events that shall constitute a vacancy in a particular office, we must suppose all other causes of vacancy excluded, especially when this construction can lead to no injurious consequences. *People v. Whitman*, 10 Cal. 45.

20. The power to declare an office va-

cant is vested under the statute where the duty to approve of the bond of the officer is lodged. That duty is imposed upon the county judge and not the supervisors, and where the supervisors of Marin county declared the office of constable vacant because the constable failed to comply with their order to file a new bond: held, that they had exceeded their jurisdiction. *People v. Supervisors of Marin County*, 10 Cal. 346.

21. The governor might fill a vacancy, but the appointee would only hold, by virtue of his appointment, until the next general election, or at most, until the qualification of the person to be then chosen by the people. *People v. Rosborough*, 14 Cal. 187.

22. The act of 1851, providing for the election of a district attorney in each county, at the general election of that year, and every two years thereafter, etc., and the act of 1855, providing that the board of supervisors in each county shall fill vacancies in the office of district attorney, their appointee to hold until the next general election, the person then elected to hold for the balance of the term of the person whose place he is elected to fill, apply to the city and county of San Francisco, and are not repealed by the ninth, nor by the last section of the consolidation act of 1856. *People v. Brown*, 16 Cal. 443.

VACATION.

1. A judgment rendered by a district court in vacation and after the time appointed for the adjournment of the term, is invalid, and will be set aside. *Smith v. Chichester*, 1 Cal. 404; *Coffinberry v. Horrill*, 5 Cal. 493; *Peabody v. Phelps*, 7 Cal. 53; *Wicks v. Ludwig*, 9 Cal. 175.

2. After the adjournment of the term, no power remains in the district court to set aside the judgment, or grant a new trial, except as provided by statute, unless the right is saved by proper motion. *Baldwin v. Kramer*, 2 Cal. 583; *Morrison v. Dopman*, 3 Cal. 257; *Suydam v. Pitcher*, 4 Cal. 281; *Carpentier v. Hart*, 5 Cal. 407; *Robb v. Robb*, 6 Cal. 22; *Shaw v. McGregor*, 8 Cal. 521.

VAN NESS ORDINANCE.

1. If the city of San Francisco has any title by virtue of the act of Congress, and can by her own charter make a voluntary disposition of her lands, then all such lands are relinquished by virtue of the so-called Van Ness ordinance to those in actual possession, without regard to rights of third parties. *Welch v. Sullivan*, 8 Cal. 201; *Hart v. Burnett*, 15 Cal. 614; *Holladay v. Frisbie*, 15 Cal. 637.

2. The act of the State legislature of March, 1858, confirming the so-called Van Ness ordinance, was a legal and proper exercise of the sovereign power; and this act gave full effect to the provisions of that ordinance, and vests in the possessors therein described, as against said city and State, a title to the lands in said ordinance mentioned. *Hart v. Burnett*, 15 Cal. 616.

3. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in the beach and water-lot property, on the first day of January, 1855, was transferred to and vested in the parties who were in the actual possession thereof on that day—provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process—by virtue of the Van Ness ordinance and the act of March 11th, 1858, ratifying and confirming the same, and such parties can defeat the claim of plaintiff who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Holladay v. Frisbie*, 15 Cal. 637.

4. The act of the legislature of 1858, validating the alcalde grants, mentioned in the proviso to the second section of the Van Ness Ordinance, is effectual for that purpose, whether the grants were originally valid or not, or whether the title of the city of San Francisco came by grant to the old pueblo, or had its origin, by presumption or grant, in the act of Congress. *Payne v. Treadwell*, 16 Cal. 232.

See ORDINANCE, SAN FRANCISCO.

VARIANCE.

1. Where the plaintiff declared upon a note made by one McKinley and one Campbell, and gave in evidence a note signed by H. C. McKinley and C. Campbell & Co.: held, that the variance was important and substantial, and the evidence could not be admitted. *Cotes v. Campbell*, 3 Cal. 191.

2. Where the declaration was upon the note, and there was but one count, and the court found that the note was never given, but that the indebtedness of defendant to plaintiff was for merchandise sold: held, that the finding was against the averment, and could not support the judgment. *Lewis v. Myers*, 3 Cal. 476.

3. The allegata and probata must correspond, and it therefore follows that when forcible entry is alleged, a forcible entry must be proven. *Frazier v. Hanlon*, 5 Cal. 159.

4. The plaintiff alleged that Hull & Co. were indebted to him, but failed to prove that there were others in company with Hull in the transaction: held, that the words "and company" might be treated as surplusage, and the action proceed as against Hull alone. *Milliken v. Hull*, 5 Cal. 246.

5. In an action of assumpsit for goods sold and delivered, the plaintiff cannot recover for goods alleged to have been delivered to a third party, and charged to defendant's account. *Williams v. Chadbourne*, 6 Cal. 561.

6. Where the complaint in an action on a bill of exchange describes it as payable to the order of A, whereas the bill offered in evidence is drawn payable to B, it is a variance to be taken advantage of by objecting to the evidence, or by a motion for a nonsuit. *Farmer v. Cram*, 7 Cal. 136.

7. In an action for an alleged libel, a variance between the date of the libel as set forth in the complaint, the twenty-third of June, and the date as shown in the evidence, the twenty-fourth of June, is not material, unless the defense is misled by it. *Thrall v. Smiley*, 9 Cal. 536.

8. It is a cardinal rule in equity as in all other pleading, that the allegata and probata must agree, and that the averments material to the case omitted from the

Variance.—Vendor and Vendee.

pleading cannot be supplied by the evidence. *Green v. Covillaud*, 10 Cal. 331.

9. In chancery cases the party must recover according to the pleadings, and not the proof, where there is a variance. *Tryon v. Sutton*, 13 Cal. 494.

10. The variance between the date of the alleged seizing and right of possession of the plaintiff on the first of January, 1857, and the date of the conveyance to him, May 22nd, 1858, is immaterial, the latter being previous to the commencement of the action. *Stark v. Barrett*, 15 Cal. 365.

11. In a foreclosure suit on bond and mortgage, the fact that the bond offered in proof on the trial does not answer the description of the bond as recited in the mortgage, is matter of identity merely, and not properly matter of variance—the bond offered answering to the description given in the complaint. *Blankman v. Vallejo*, 15 Cal. 643.

12. In an action of forcible entry and detainer, the complaint described the premises as “about ten rods square, situated within and comprising the northwesterly corner of that certain piece or parcel of land, bounded and described as follows, to wit:” (the complaint then goes on to give the metes and bounds of a tract containing one hundred and forty-six acres.) “The said ten rods square being situated from twenty to fifty feet, more or less, south-easterly from the house of defendant, and near the gate aforesaid, and near the junction of the San Bruno turnpike road with the road leading from the city of San Francisco to Hunter’s Point.” Said gate was where this last road passed through. The proof, among other things, showed this ten rods to be called the north-easterly instead of the north-westerly corner of the tract. The judgment for plaintiff followed the description in the complaint. Defendant appeals: held, that the variance in the description of the premises did not prejudice appellant; that the question was one of identity, and the fact that the corner of the small tract was called the north-easterly, instead of the north-westerly corner, was itself insufficient to defeat the action, if the other and more definite marks of description sufficiently indicated and identified the premises. *Paul v. Silver*, 16 Cal. 75.

13. Distinction between proof of alle-

gations of matter of substance and allegations of matter of description, stated. *Castro v. Wetmore*, 16 Cal. 380.

See ANSWER, COMPLAINT, EVIDENCE, PLEADING.

VENDOR AND VENDEE.

1. Damages which do not legally result from the breach of the contract cannot be recovered unless they are specially claimed and set forth in the pleading; thus, damages sustained by a vendee of goods by reason of his inability to comply with a contract made by him with a third person, do not legally result from a breach of the contract of his vendor to deliver the goods to him, and in an action by his vendor against him, cannot be recovered from the plaintiff’s claim, unless such damages are specially alleged and set forth in the answer. *Cole v. Swanston*, 1 Cal. 54.

2. Where a contract is made to convey land, by a quit claim deed, at a future time, an action cannot be maintained by the vendee against the vendor, on the ground that a third person has intruded upon a portion of the land, and the vendee cannot obtain possession, there being no stipulation in the contract that the vendee shall be put in possession. *Tewksbury v. Laffan*, 1 Cal. 130.

3. Nor can such action be sustained on the ground that the vendor, long after the execution of the contract, gave the vendee a certificate to the effect that at the time of making the agreement he consented and agreed that the vendee should take possession of the lot forthwith. *Ib.*

4. The memorandum required by the statute of frauds to be entered by an auctioneer in his sale book must be made at the very time of the sale, or the vendee will not be bound by the contract; and the memorandum made in the afternoon or next day after the sale is insufficient. *Craig v. Godeffroy*, 1 Cal. 415.

5. The memorandum of an auctioneer is looked upon as a contract between the vendor and vendee reduced to writing, and executed by their mutual agent, who ceases to be such after the sale is closed. *Ib.*

Vendor and Vendee.

6. Where the defendants stipulated to sell to the plaintiffs certain merchandise, "shipped" from Batavia, in the island of Java, for the port of San Francisco, and the parties agreed that the contract should be considered as binding until the arrival of the vessel: held, that the fulfillment of it, on either side, depended on the contingency of the ship's arrival, and an action could not be maintained by the vendee of the goods, it appearing that the ship had never arrived at her port of destination. *Middleton v. Ballingall*, 1 Cal. 446.

7. In an action for the purchase money of land conveyed by deed without covenants, want of title in the vendor is no defense unless the vendee has been evicted. *Fowler v. Smith*, 2 Cal. 44.

8. A vendor has a lien on the land sold for the purchase money, unless he has taken security for its payment, though he has executed the conveyance. *Salmon v. Hoffman*, 2 Cal. 142.

9. Where a vendor, under a power to sell in a mortgage, received instead of money an article of fluctuating value, he is chargeable with the highest value of the lot sold. *Benham v. Rowe*, 3 Cal. 408.

10. In a suit for the recovery of the purchase money of land, founded on a contract, in which the plaintiff contracted to deliver a warrantee deed for the land, the defendant, in his answer, denied that the plaintiff was the lawful owner, or that he held any title to the land: held, that to enable him to rescind the contract, the defendant was bound to aver and to show a paramount title in another, and that, failing in this, his defense to the action was defective. *Thayer v. White*, 3 Cal. 229.

11. A vendee may avail himself of fraud, breach of warranty, or failure of consideration, by way of defense in an action upon a contract. *Flint v. Lyon*, 4 Cal. 21.

12. When an auctioneer sells a balance of goods, without specifying their quantity, he has a reasonable time to ascertain it. When this is done, and a bill of particulars is made out and delivered to the purchaser, who pays the purchase money, or a portion of it, the contract becomes executed, and the auctioneer will not afterwards be permitted to allege a mistake as to quantity. *Burgoyne v. Middleton*, 4 Cal. 66.

13. A vendor of real estate, who makes

no conveyance, but gives a bond, conditioned for the execution of a conveyance, on payment of the purchase money by the vendee, has an equitable lien on the land for the purchase money, and holds the legal title as a security for the enforcement of his lien. *Gouldin v. Buckelew*, 4 Cal. 111.

14. A failure on the part of a vendee to pay the purchase money, for two years and more, does not forfeit his right under the contract, as the vendor may proceed to enforce the payment of the debt at any time after it becomes due. *Ib.*

15. When the vendor, under a power of sale reserved in such a contract, sells the property either at public or private sale, the surplus beyond the purchase money due belongs to the vendee, and the payment of it may be decreed by judgment of the court against the vendor. *Ib.* 112.

16. In order to rescind a contract for the sale of land, on the ground that the vendor cannot perform it, because he has no title to the land, it is necessary for the vendee to aver and show an outstanding paramount title in another. *Riddell v. Blake*, 4 Cal. 267.

17. A vendor of real estate made a conveyance of it to the vendee, leaving a balance of the purchase money unpaid: the vendee afterwards mortgaged the same property to a third party, who knew of the vendor's claim for unpaid purchase money: the vendor brought an action at law against the vendee, obtained judgment for the balance due, issued execution and sold the interest of the vendee in the property: the mortgagee afterwards foreclosed his mortgage and was about to sell the property: the purchaser at the previous sale obtained an injunction to stay the sale, which was afterwards dissolved by the court on the ground that he had purchased merely the vendee's equity of redemption, as the sale was subject to the rights of the mortgagee: held, that the judgment of the court below was correct, and that the claim of the purchaser to be subrogated to the equitable lien of the vendor, if available at all, must be asserted in a separate equitable action. *Allen v. Phelps*, 4 Cal. 258.

18. A conveyed land to B, and allowed part of the purchase money to remain unpaid; B afterwards sold part of the land to C, who had no notice of A's lien as vendor, and gave a mortgage to B for part of the purchase money. A ob-

Vendor and Vendee.

tained judgment against B for the unpaid purchase money, and levied upon and sold B's interest in the land: held, that the purchaser at sheriff's sale did not acquire title to the mortgage debt due from C to B. *Bryan v. Sharp*, 4 Cal. 350.

19. C sold a lot of lumber to B, and A, who claimed it, notified B that the lumber belonged to him, and brought an action to recover the price: held, that the notice and form of action recognized the right of C to sell the lumber. There was no privity of contract between the plaintiff and the defendant. C was pro tanto the agent of A, and was entitled to collect the price, and the mere notice of A to B was insufficient to interrupt the completion of the performance of the contract between C and B. *Argenti v. Brannan*, 5 Cal. 353.

20. A vendor of real estate has a lien on the same in the hands of the administrator of the purchaser for the unpaid purchase money. *Cahoon v. Robinson*, 6 Cal. 226.

21. The right of a vendor to a stoppage in transitu exists until the goods arrive at their final destination or come into the possession of the consignee. Depositing the goods at an intermediate point with an agent of the vendee, to be forwarded, does not terminate the transitus. *Markwald v. His Creditors*, 7 Cal. 214.

22. Where the plaintiff sold a number of bales of drillings to A for the purpose of making sacks, deliverable to A as fast as he needed them for manufacturing, and A agreed to store the sacks as fast as made, subject to plaintiff's order, with the privilege of retaking the sacks as he should make his payments: held, that upon the delivery of the drills to A the title thereto vested in him, and that plaintiff had no lien thereon or on the sacks until they were delivered to him. *Hewlett v. Flint*, 7 Cal. 264.

23. Fraud in the vendor would not of itself vitiate the sale to an innocent purchaser without notice, and for a valuable consideration; but the fraudulent intent of the vendor being established, the jury must determine from the circumstances of the case whether the purchaser participated in the fraud. *Landecker v. Hough-taling*, 7 Cal. 392; *Visher v. Webster*, 8 Cal. 113; 13 Cal. 61; *Cohn v. Mulford*, 15 Cal. 62.

24. As a general rule, the vendor of

goods is not a competent witness to impeach the sale made by himself. *Howe v. Scannell*, 8 Cal. 327.

25. Where evidence is introduced showing a collusion between vendor and purchaser to defraud the creditors of the former, the admissions of the vendor are admissible, and a fortiori, his sworn statement. *Ib.*

26. A vendor's lien on the land conveyed is not lost by his taking the notes of the purchaser for the purchase money. And the lien equally exists, whether the instrument amounts to a conveyance or merely to an executory contract. *Walker v. Sedgwick*, 8 Cal. 403.

27. A purchaser at sheriff's sale may have a lien upon the property prior to that of the redemptioner, the fact that he is a creditor does not divest the lien; he may be both a creditor and a purchaser and still have a prior lien to that of the redemptioner; this can only be so on the principle that the legal estate is still in the judgment debtor until the delivery of the sheriff's deed. *Knight v. Fair*, 9 Cal. 118.

28. In all cases where a mere lien exists, the legal estate may lie in some other party than the mortgagee; this legal estate and the consequent right to discharge the lien and save the estate is of value and can be sold. *Ib.*

29. No eviction is necessary to enable a vendee to recover back the purchase money of real estate, where the sale was void under the statute of frauds. *Reynolds v. Harris*, 9 Cal. 329.

30. Where a party contracts orally for the purchase of a house and lot and furniture therein, and enters into possession under such oral agreement, and the vendor subsequently fails to make a conveyance, the vendee has the right to quit the premises and return the personal property. *Ib.* 340.

31. Where the vendee's agent in the purchase of a tract of land, has actual notice of a mortgage on the premises at the time of purchase, the vendee will be presumed to have taken the property subject to the mortgage. *May v. Borel*, 12 Cal. 91.

32. A vendor's lien does not exist in this State where a mortgage security is taken for purchase money. The silent lien is extinguished, whenever he mani-

Vendor and Vendee.—Venue.

feats an intention to abandon or not to look to it. *Hunt v. Waterman*, 12 Cal. 305.

33. The fact that such mortgage is defective does not revive the lien, as it is the intention of the vendor which controls, and this is as well shown by an informal mortgage as one properly done. *Ib.*

34. A general averment in the complaint to enforce the vendor's lien, that the mortgage is defective as a security, is not sufficient to withdraw the case from the general rules above stated. *Ib.*

35. Equity raises no lien in relation to real estate, except that of a vendor for the purchase money. *Ellison v. Jackson Water Co.*, 12 Cal. 554.

36. Land on which a vendor's lien exists for the purchase money may become a homestead, but the homestead right is subordinate to the lien. *McHendry v. Reilly*, 13 Cal. 76.

37. The lien which the vendor of real property retains, after an absolute conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the property, but a mere equitable right to resort to it upon failure of payment by the vendee. *Sparks v. Hess*, 15 Cal. 192.

38. This equitable right may be enforced in the first instance, and before the vendor has exhausted his legal remedy against the personal estate of the vendee. The court, after determining the amount of the lien, can, by its decree, either direct a sale of the property for its satisfaction, and execution for any deficiency, or award an execution in the first place, and a sale only in the event of its return unsatisfied, as the justice of the case may require. *Ib.* 193.

39. Where the contract of sale of real property is unexecuted, the vendor retaining the legal title for security until all the purchase money is paid, the vendor's lien retained is different from the ordinary lien of a vendor after conveyance executed. In the latter case, the vendor has parted with the legal and equitable title, and possesses only a bare right, which is of no operative force or effect until established by the decree of the court. In the former case, the vendor's position is somewhat similar to that of a party executing a conveyance and taking a mortgage back. He may sue at law for the balance of his purchase money, or file his bill in equity for the specific performance of the contract,

and take an alternative decree, that if the purchaser will not accept a conveyance and pay the purchase money, the premises will be sold to raise such money, and that the vendee pay such deficiency remaining after the application of the proceeds arising from such sale. *Ib.* 194.

40. In such case of an executed conveyance, the vendor may ask either a decree directing performance, and in case of refusal, a sale of the premises, or a decree barring the right of the vendee to claim a conveyance under the contract. He may, however, insist upon a sale where performance is refused, and is not bound to make a mere foreclosure of the vendor's right to a deed. *Ib.*

41. In suit to recover money due on a promissory note, and to establish a lien for the amount upon certain real estate, purchased with money advanced by plaintiff to defendant, and for which advance the note was given, the clerk entered judgment by default for the amount of the note. Plaintiff, having exhausted his remedies on this judgment, by executions and proceedings supplementary thereto, obtained from the court a decree for the equitable relief sought in the complaint, to wit: for a lien upon, and a sale of the real estate: held, that this decree was coram non judice, and void—assuming the judgment by the defendant to be valid. Such judgment, if valid, terminated the controversy, and whatever related to the merits of the case was merged in the judgment. *Kittridge v. Stevens*, 16 Cal. 382.

See CONTRACT, DEED, LIEN, SALE, SPECIFIC PERFORMANCE.

VENUE.

1. Affidavits on a motion to change the venue of a criminal action must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had in the county in which the indictment was found. *People v. McCauley*, 1 Cal. 383.

2. It is insufficient to state that a jury cannot be selected from a certain portion

Venue.

of the county who would give the prisoner a fair and impartial trial, on the motion to change the venue. *People v. Baker*, 1 Cal. 404.

8. The granting of a change of venue is discretionary with the courts, subject to revision only in cases of gross abuse, yet they should be carefully guarded against, as they usually result in a total loss of all the rights involved. *Sloan v. Smith*, 3 Cal. 412.

4. The facts in the affidavit on motion to change the venue should be stated in such a manner as to enable the court to draw its own inference whether an impartial trial could be had in the particular case. *Ib.*

5. Where a motion was made to change the venue on the ground that neither of the parties resided in the district, where no objection was made in the answer, and nearly six months elapsed: held, that it was too late, and the motion could not be heard. *Tooms v. Randall*, 3 Cal. 440.

6. Causes may be removed from one district or county to another district or county in the manner provided by statute. *Reyes v. Sandford*, 5 Cal. 117.

7. The supreme court having complete power over the right to change the venue, it is not to be presumed it will trust implicitly in the discretion of inferior courts. *People v. Lee*, 5 Cal. 354.

8. Where one hundred citizens united in employing counsel to prosecute the defendant, held to be a sufficient ground for a change of venue. *Ib.*

9. Where a justice is interested in the event of a suit, the statute requires that he should transfer the case before another justice. *Larue v. Gaskins*, 5 Cal. 509.

10. An order refusing a change of venue, on the application of defendant in a criminal prosecution, will only be reviewed in cases of gross abuse of discretion. *People v. Fisher*, 6 Cal. 155.

11. An appeal does not lie from an order granting a change of venue. *Juan v. Ingoldsby*, 6 Cal. 440.

12. An order refusing to change the place of trial is not an appellate order, though it may be reviewed on appeal from the final judgement in the case. *People v. Stillman*, 2 Cal. 118; *Martin v. Travers*, 7 Cal. 253.

13. It is not error in the court on a trial for murder to postpone the consider-

ation of a motion, on the part of a defendant, for a change of venue, until an attempt is made to empanel a jury. *People v. Plummer*, 9 Cal. 309.

14. Where a motion is thus postponed, and counsel for prisoner afterwards declines, on the intimation of the court, to renew the motion, he cannot take advantage, on appeal, of the failure of the court to order a change of venue. *Ib.*

15. Proceedings for a mandamus to compel the execution of a sheriff's deed to a redemptioner, after sixty days from the redemption, under section two hundred and thirty-two of the code, can be commenced in the county where the relator resides; the provision of the statute that actions against a public officer for acts done by him in virtue of his office shall be tried in the county where the cause, or some part thereof, arose, applies only to affirmative acts of the officer, by which, in the execution of process, or otherwise, he interfere with the property or rights of third persons, and not to mere omissions or neglect of official duty. *McMillan v. Richards*, 9 Cal. 420.

16. Where the provision of the code requires an action to be tried in a particular county, there would be an exception in the case where a party seeks to enjoin several judgments fraudulently confessed in several counties against one judgment debtor. He may bring his action in any one of the counties. *Uhlfelder v. Levy*, 9 Cal. 615.

17. The right to have a cause tried in a particular county is one which a party may waive, either expressly or by implication. *Pearkes v. Freer*, 9 Cal. 642.

18. The writ of habeas corpus should not issue to run out of the county, unless for good cause shown, as the absence, inability, or refusal to act, of the local judge, or other reason, showing that the object and reason of the law requires its issuance. *Ex parte Ellis*, 11 Cal. 225.

19. The exhibition, by a judge, of partisan feeling, or the unnecessary expression of an opinion upon the justice or merits of a controversy, though exceedingly indecorous, improper and reprehensible, as calculated to throw suspicion upon the judgment of the court, and bring the administration of justice into contempt, are not, under our statute, sufficient to authorize a change of venue on the ground

Venue.—Verdict in general.:

that the judge is disqualified from sitting. *McCauley v. Weller*, 12 Cal. 523.

20. Where a suit for real estate is brought in the wrong county, a motion to change the venue, and not demurrer, is the proper remedy. And, in such case, there is no discretion in the court, the change being matter of right. *Watts v. White*, 13 Cal. 324.

21. The right to try particular cases in particular counties is a mere privilege, which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 5 Cal. 462.

22. Defendant has a right to have the action tried in the county of his residence, except in certain cases specified in the statute. *Loehr v. Latham*, 15 Cal. 419.

23. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon an application, for this cause, to transfer the trial to another county. The affidavit must state the names of the witnesses. *Ib.*

24. As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist, by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of defendant; but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. *Ib.* 420.

25. The act of 1858 authorizes suit to be brought in any county designated in the complaint, when the residence of the defendant is unknown. But, to resist the application of defendant to change the place of trial, on the ground that he resides in a different county, plaintiff must show that he used all due diligence to ascertain the residence. *Ib.*

26. The practice upon this subject being unsettled, the parties, on the return of the

cause, should have an opportunity of fully presenting the merits of the motion. *Ib.*

27. Query, whether in a foreclosure suit in the seventh district as to land situate in Contra Costa county, a party can appear and contest the case in San Francisco, before the judge of the seventh district, under a stipulation, and without exception as to the place of trial, and afterwards assign that fact as error. *De Leon v. Higuera*, 15 Cal. 495.

28. In actions to recover real property, the complaint need not state the residence of either of the parties; the statute provides for the trial in certain counties, and the situation of the premises, not the residence of the parties, determines the county. *Doll v. Feller*, 16 Cal. 433.

VERDICT.

- I. In general.
- II. When set aside.
 1. For Excessive Damages.
 2. For Incompetent Juror.
 3. For Mistake or Fraud.
 4. As against Law.
 5. As against Evidence.
 6. For improper Evidence.
- III. On Conflicting Evidence.
- IV. Jurors, impeaching their Verdict.
- V. Amendment of a Verdict.

I. IN GENERAL.

1. The verdict of a jury upon a question of fact, in an action at law, is final and conclusive. *Perry v. Cochran*, 1 Cal. 180.

2. If the jury fails to find the fact of a lien, the court cannot render a judgment essentially different from the verdict, and the judgment so far will be reversed. *Walker v. Hauss-hijo*, 1 Cal. 186.

3. A stipulation that a verdict should be entered in favor of the defendant, saving to the plaintiff the same rights which he would have had in case a jury had actually rendered a verdict for the defendants, should be regarded in precisely the same light as a verdict, and be followed

In general.

by the same legal results. *Suñol v. Hepburn*, 1 Cal. 258.

4. The report of a referee on the facts of a case will be considered the same as the verdict of a jury. *Walton v. Minturn*, 1 Cal. 362.

5. If the statement discloses no refusal on the part of the judge of the court below to charge the jury on any matter submitted, nor is any erroneous charge assigned as error, the verdict of the jury must be considered as having settled all the facts of the case. *George v. Law*, 1 Cal. 364.

6. Where the court orders a new trial to be had, unless the judgment creditor will file a stipulation agreeing to remit a part of the verdict, and the judgment creditor acquiesces and files the remittitur, he waives his right to question the verdict. *Ib.* 365.

7. A jury should render their verdict from the facts and according to the law as given them; and it is improper to charge them "to take into consideration all the facts and do equal justice between the parties," inasmuch as it is so general in its terms that it may mislead them. *Kelly v. Cunningham*, 1 Cal. 367.

8. The verdict may conform to the issues. If the court, instead of having the verdict corrected by the jury, attempt to correct it by the judgment and go beyond the verdict, it is error. *Ross v. Austill*, 2 Cal. 192.

9. The verdict must be confined to the matters put in issue by the pleadings. *Benedict v. Bray*, 2 Cal. 256; *Truebody v. Jacobson*, 2 Cal. 285.

10. Where a declaration states a condition precedent, and fails to aver performance, the defect must be urged on demurrer; it comes too late after verdict. *Happe v. Stout*, 2 Cal. 461.

11. The court below, sitting as a jury, must find, separately, the facts and conclusions of law, or they will be set aside; but this does not apply to a judgment by default where there are other defendants who go to trial. *Brown v. Brown*, 3 Cal. 111.

12. Where a jury has been waived by the parties, and the court finds the facts, they are not subject to review, but are conclusive. *Wheeler v. Hays*, 3 Cal. 286.

13. When the jury found the only issues involved in the controversy, an exception to the verdict, that it was not found

upon the issues presented by the pleadings, will not be sustained. *Burritt v. Gibson*, 3 Cal. 399.

14. The court may direct special issues to be framed in equity cases and submitted to the jury with directions to find a special verdict. *Smith v. Rowe*, 4 Cal. 8.

15. The plaintiff in ejectment may sue one or more defendants, and they may answer separately, or demand separate verdicts; unless they do so, however, they will be concluded by a general verdict. *Winans v. Christy*, 4 Cal. 80.

16. An omission to allege delivery in an action on a bond, can be taken advantage of only on demurrer and not after verdict. *Garcia v. Satrustegui*, 4 Cal. 244.

17. Where an informal verdict is received and recorded by the consent of the plaintiff, and judgment in form is afterwards entered thereon; on appeal the informality will be disregarded. *Treadwell v. Wells*, 4 Cal. 263.

18. The appellate court must infer in favor of the verdict of the court below, unless error is clearly manifest. *Allen v. Phelps*, 4 Cal. 259.

19. The court should direct the verdict to be recorded as rendered by the jury. That will be treated as the verdict which the jury actually bring in. *Moody v. McDonald*, 4 Cal. 299.

20. A verdict arrived at, where each juror sets down a sum according to his own judgment, and the aggregate should be divided by twelve and the quotient should be returned as the verdict, is irregular and will be set aside, unless such means were merely adopted to arrive at a proper result, and they subsequently agreed on that sum. *Wilson v. Berryman*, 5 Cal. 45.

21. The verdict of the jury, which finds the defendant guilty of an assault with a deadly weapon with intent to commit great bodily injury, is irregular, and we deem that it finds the defendant guilty of a public offense. *People v. Davidson*, 5 Cal. 134.

22. When property is delivered and accepted pending the suit and before verdict, the damages for the detention should be merely nominal; if after verdict, then interest on the highest value between the time of conversion and the verdict, except special damage was declared upon. *Conroy v. Flint*, 5 Cal. 328.

In general.

23. A joint verdict against the defendants answering, and a defaulting defendant, is conclusive against all defendants, when a separate verdict has not been demanded. *Anderson v. Parker*, 6 Cal. 200.

24. On a trial under an indictment for murder, a verdict of "guilty" imports a conviction on every material allegation in the indictment, and is therefore a conviction for murder. *People v. March*, 6 Cal. 547.

25. The party in whose favor a judgment is rendered on a special verdict must move for a new trial, if he is not satisfied with the verdict, as the latter must otherwise be conclusive upon the facts in the appellate court. *Garwood v. Simpson*, 8 Cal. 108; *Duff v. Fisher*, 15 Cal. 380.

26. Where the failure to present the issues for a special verdict was the result of the plaintiff's own motion, he cannot be allowed to take advantage of it. *Brewster v. Bours*, 8 Cal. 505.

27. Defects in the indictment are not cured by verdict, but may be taken advantage of by motion on arrest of judgment. *People v. Wallace*, 9 Cal. 32.

28. The verdict of a jury is a matter of record, and copies thereof may be sufficiently authenticated by the certificate of the clerk. *Reynolds v. Harris*, 8 Cal. 618.

29. The objection to the form of the verdict should have been made on motion for a new trial. *Douglass v. Kraft*, 9 Cal. 564.

30. Where it is manifest from the testimony stated in the record, that the verdict of the jury must have been given under a state of great excitement, preventing a fair and just trial, and the court below has refused a new trial, this court will reverse the judgment and order a new trial. *People v. Acosta*, 10 Cal. 196.

31. Counsel in the trial of a cause cannot object that the court did not render judgment on the special verdict of the jury, where they have stipulated that such additional facts may be found by the judge as would in his judgment be sufficient to present all the questions raised by the pleadings. *Marius v. Bicknell*, 10 Cal. 224.

32. Where a jury are instructed to bring in a sealed verdict, and they retire, and after agreeing upon a verdict, seal it up and give it to the officer in charge of them—the clerk being absent—and re-

quest him to give it to the clerk, which is done; and after the meeting of the court the following morning the verdict is opened in the presence of the jury, and read by the clerk without exception: held, that this is not an error sufficient to warrant a new trial. The possession by such officer left the verdict as much in the possession of the court itself as if it had been directly delivered to the clerk. *Paige v. O'Neal*, 12 Cal. 493.

33. The opportunities of tampering with jurors after separation are so numerous, and in important cases the temptation is so great, and the ability of detection so slight, as to make it a matter of grave doubt whether sound policy does not require an adherence to the verdict as sealed, even as against a subsequent dissent of one or more of the jurors. *Ib.* 494.

34. In chancery cases the court below may disregard the verdict of a jury. *Goode v. Smith*, 13 Cal. 84.

35. Where, on suit against defendants as members of a quartz company, one defendant pleads that he was not a member of the company, and the finding of the court is that the allegations of the complaint are true, and that said defendant was a member of the company, as to plaintiff Parke, the finding supports a judgment for plaintiff. *Parke v. Hinds*, 14 Cal. 418.

36. An objection that the finding is qualified by the words "as to plaintiff Parke," and that the facts showing the special relation to him ought to have been found, should have been taken below, and cannot be raised for the first time on appeal. *Ib.*

37. In ejectment, the verdict may be joint against several defendants, without specifying their respective lots in a whole tract, where they file a joint answer which contains no averment as to the particular portion of land occupied by each, no proof being offered on the point, no damages being claimed, and defendants being in possession. *McGarvey v. Little*, 15 Cal. 31.

38. On an indictment for murder, the verdict must state whether it be murder in the first or second degree, and if on the return of the verdict it does not specify the degree, the court should order the jury to retire and return a specific finding of the degree. *People v. Marquis*, 15 Cal. 38.

39. In suit against several defendants

In general.—When set aside.—Excessive Damages.—Incompetent Juror.

known as "Table Mountain Water Co.," for possession of a ditch, the verdict was, "we find for the plaintiff and against L.," one of the defendants. Judgment was entered that defendant surrender possession of the ditch to plaintiff, and that plaintiff recover of L.," one of said defendants, the sum of —, his costs," etc.: held, that there is no error in the judgment; that it must be construed by the verdict which is confined to plaintiff and L. *Treat v. Laforge*, 15 Cal. 41.

40. A general verdict does not operate as an estoppel, except as to such matters as were necessarily considered and determined by the jury. A verdict is never conclusive upon immaterial or collateral issues. *McDonald v. Bear River and Auburn W. and M. Co.*, 15 Cal. 148.

41. A verdict found on any fact or title distinctly put in issue is conclusive in another action between the same parties or their privies in respect of the same fact or title. *Kidd v. Laird*, 15 Cal. 182.

42. When a verdict is general, its effect will be limited to such issues as necessarily controlled the action of the jury. *Ib.*

43. Where a jury is waived and the cause tried by the court, the court should find the facts, and not merely state the proof. *Heredink v. Holton*, 16 Cal. 104.

44. On the rendition of a special verdict the trial is terminated, and notice of motion for new trial must be given within two days thereafter, or the proceedings based upon such notice will be disregarded. *People v. Hill*, 16 Cal. 117.

45. A special verdict settles the facts, and by its judgment pronounces the conclusions of law upon the facts found. If the court errs in this respect, the error may be reviewed without any motion for new trial; but the right to correct the verdict does not depend upon the judgment, and the steps necessary for that purpose must be taken within the statutory time. *Ib.*

II. WHEN SET ASIDE.

1. For Excessive Damages.

46. Courts reluctantly interfere with the

findings of a jury in an action for unliquidated damages for reason that the damages are excessive; and the verdict ought never to be set aside for such a cause unless beyond a doubt the verdict be unjust and oppressive, or obtained through some undue advantage, mistake, or in violation of law. *Payne v. Pacific Mail S. S. Co.*, 1 Cal. 36.

47. Courts will not interfere with the verdicts of a jury where the question upon which they have passed is one solely of unliquidated damages, unless the verdict be beyond doubt unjust and oppressive, especially if the judgment creditor remit one-half of it. *George v. Law*, 1 Cal. 364.

48. A verdict will be set aside where the damages are unjustifiably outrageous. *McDaniel v. Baca*, 3 Cal. 338.

49. Where damages are laid at a certain sum in a declaration, the judgment will be reversed if the jury render a verdict for a greater sum. *Palmer v. Reynolds*, 3 Cal. 396.

50. It is the proper exercise of the discretion of a court to grant a new trial on the ground of excessive damages, when the verdict is grossly inconsistent in its relations to the facts. *Potter v. Seale*, 5 Cal. 411.

51. In an action for a malicious prosecution wherein an attachment was issued, the jury gave \$15,000 damages, and where no misconduct was shown on the part of the jury, and it was not charged that the verdict was given under the influence of passion or prejudice, the court could not disturb the verdict, unless it clearly appear that injustice had been done. *Weaver v. Page*, 6 Cal. 685.

See DAMAGES.

2. For Incompetent Juror.

52. A verdict of a jury will not be set aside on the ground that one of the jurors "knew and was aware of the circumstances connected with the affair," the subject matter of the suit, where no objection to him was raised until after the verdict was rendered, and it not appearing that he had formed or expressed an opinion before the trial, or was in any way biased in favor of plaintiff. *Lawrence v. Collier*, 1 Cal. 37.

When set aside.—For Mistake or Fraud.—Against Law.—Against Evidence.

3. *For Mistake or Fraud.*

53. Where the jury pass upon a question purely of fact, their verdict should not be set aside unless for mistake, fraud, misconduct or other improper influence. *Payne v. Jacobs*, 1 Cal. 40.

54. Courts cannot interfere with the finding of a jury unless impeached for fraud, mistake or other improper conduct, and the appellate court will not attempt to exercise a power over the verdicts of juries which is denied to the courts in which the verdict may have been rendered. *Ib.* 41.

4. *As against Law.*

55. If it appears from the evidence spread upon the record that the verdict was against law, the appellate court will not hesitate to reverse the order of the court below refusing to grant a new trial. *Payne v. Jacobs*, 1 Cal. 40.

56. A new trial will be ordered although a verdict may not be excessive, if the court is satisfied that an improper charge went to the jury, and the fact that it had no effect upon them does not clearly appear. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

57. Though the charge of a jury may in the abstract be too broad, yet if it could have had no effect upon the verdict, it will not be reviewed. *Clark v. Mc Carthy*, 1 Cal. 454.

58. A new trial will be granted when the court is satisfied that the jury were misdirected in the charge, and thereupon founded their verdict. *Gunter v. Geary*, 1 Cal. 468.

59. Where no error is disclosed in the record, the verdict of the court below will not be set aside by the appellate court. *Wilson v. Middleton*, 2 Cal. 56; *Porter v. Barling*, 3 Cal. 73; *Thompson v. Monrow*, 2 Cal. 100.

60. Where, from the whole case, it appears that justice has been done, though errors were committed which did not materially affect the merits, the court will not disturb the verdict. *Clayton v. West*, 2 Cal. 382.

61. The court will require a case of very

palpable mistake or error to be made out before it will overrule the verdict of a jury on issue of fact found in an action for the diversion of water. *Brown v. Smith*, 10 Cal. 571.

5. *As against Evidence.*

62. To authorize a court to set aside a verdict which is clearly contrary to evidence, the finding must be impeached for some legal cause, and the appellate court will examine the evidence embodied in the record to ascertain whether an outrage upon the rights of any of the parties has been committed by the jury. *Payne v. Jacobs*, 1 Cal. 41.

63. Where the defense to an action is that there was no contract in writing of the sale, but the evidence given at the trial did not appear to be fully returned, and there appeared to have been no objection raised or exception taken to the insufficiency of the evidence, the appellate court will presume that the evidence was sufficient to warrant the verdict. *Bunting v. Beideman*, 1 Cal. 182.

64. Where the verdict is clearly contrary to evidence, the appellate court may reverse the judgment on that account. *Acquital v. Crowell*, 1 Cal. 193.

65. A verdict will not be disturbed unless it clearly appears to be erroneous, and if no evidence be submitted in the statement for the examination of the appellate court, the correctness of the verdict will not be doubted. *Folsom v. Root*, 1 Cal. 376.

66. The verdict of a jury will not be disturbed because the weight of the testimony seems to be against it. *Brown v. O'Conner*, 1 Cal. 44.

67. The appellate court will decline to review the facts of the case, unless an assignment of errors shows that the court below refused an application for a new trial, made on the ground that the verdict was contrary to evidence, and that only as an appeal from the refusal to grant a new trial. *Smith v. Phelps*, 2 Cal. 121; *Griswold v. Sharpe*, 2 Cal. 23; *Brown v. Graves*, 2 Cal. 119; *Ingraham v. Gildermeester*, 2 Cal. 484; *Whitman v. Sutter*, 3 Cal. 179; *Brown v. Tolles*, 7 Cal. 399; *Garwood v. Simpson*, 8 Cal. 108; *Marziou*

As against Evidence.

v. *Pioche*, 8 Cal. 537; *Liening v. Gould*, 13 Cal. 599; *Duff v. Fisher*, 15 Cal. 380.

68. Although the question of fraudulent intent is made a question of fact in all cases, yet, wherever the law declares that certain indicia are conclusive evidence of fraud, a verdict against such conclusions should be, in all cases, set aside; but where the facts are merely presumptions, the jury may find against such presumptions. *Billings v. Billings*, 2 Cal. 113; *Chenery v. Palmer*, 6 Cal. 122.

69. Where there is proof of damages, the amount is simply a question of fact within the province of the jury. The appellate court will not examine the proofs or declare that the evidence was insufficient to justify the verdict. *Bartlett v. Hogden*, 3 Cal. 58.

70. Where the verdict of the jury is clearly against the evidence a new trial will be awarded. *Bagley v. Eaton*, 8 Cal. 164; *Kimball v. Gearhart*, 12 Cal. 48; *Easterling v. Power*, 12 Cal. 89.

71. A verdict will not be disturbed if there is any evidence to support it. *Escolle v. Merle*, 9 Cal. 95.

72. Whenever facts are not expressly stated which are so essential to a recovery that without proof of them on the trial the verdict could not have been rendered under the direction of the court, there the want of the express statement is cured by the verdict, provided the complaint contains terms sufficiently general to comprehend the facts in fair and reasonable statement. *Garner v. Marshall*, 9 Cal. 269.

73. To justify an interference with the verdict of the jury in a criminal action, there must be an absence of evidence against the prisoner, or a decided preponderance of evidence in his favor. *People v. Ah Loy*, 10 Cal. 301.

74. To set aside the verdict, it must be clearly against the evidence. *Williams v. Covillaud*, 10 Cal. 426.

75. Where, in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed, among other things, to find specially as to the negligence of the captain or crew of the steamer, and they found, generally, for plaintiff, four hundred dollars damages; and also, that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good in the

absence of any objection at the time of its rendition, that it was not responsive to the special direction. *Algier v. Steamer Maria*, 14 Cal. 170.

76. Probably the finding, apart from the general verdict, was a finding of negligence, for an insufficient spark-catcher is hardly distinguishable from none at all, and this is proof of negligence. *Ib.* 171.

77. There being some proof of negligence, the supreme court will not review the verdict. *Algier v. Steamer Maria*, 14 Cal. 171; *Hull v. Sacramento Valley R. R. Co.*, 14 Cal. 389.

78. Where the motion for new trial, though made, does not appear to have been acted on, the appellate court will not consider the sufficiency of the evidence to sustain the verdict. *Myers v. Casey*, 14 Cal. 543.

79. Where a verdict is supported by any evidence at all, we will not review an order of the court of original jurisdiction refusing a new trial, unless the order is manifestly an abuse of the legal discretion of the court. *Burnett v. Whitesides*, 15 Cal. 36; *People v. Wyman*, 15 Cal. 75.

80. Where there are separate defenses, each of which is sufficient to defeat the action, and these defenses are submitted to the jury, with evidence in support of each, and the verdict is general for the defendants, it cannot be set aside if it be right as to any one issue, though wrong as to all the others. *Kidd v. Laird*, 15 Cal. 182.

81. But the fact or title must be material and relevant, must be distinctly in issue; must be tried by the jury, and constitute the base of the verdict, and unless specially found, must have been necessarily passed upon by the jury. *Ib.*

82. The court, whether sitting in equity or on trial of a common law action, may, of its own motion, set aside the verdict of a jury when it is clearly and palpably against the evidence, but when the court is satisfied with the verdict, the parties can only question its correctness by following the course pointed out by the statute. *Duff v. Fisher*, 15 Cal. 380.

83. On motion for new trial, on the sole ground that the verdict is not sustained by the evidence, the court below, in passing on the motion, cannot disregard any portion of the evidence before the jury. The question as to the competency of the evi-

As against Evidence.—For Improper Evidence.—On Conflicting Evidence.

dence cannot be raised on such a motion. *McCloud v. O'Neal*, 1 Cal. 397.

84. A verdict obtained upon incompetent evidence may be set aside; but this cannot be done if the evidence were admitted without objection, nor can it be done upon the ground that effect was given to the evidence by the jury, even if objected to. *Ib.*

85. In such cases, that which vitiates the verdict is the error of the court in admitting the evidence, and if the party seeking to set aside the verdict be not in a position to take advantage of this error, he cannot object that the evidence was improperly admitted. *Ib.*

See EVIDENCE.

6. For Improper Evidence.

86. Unless the improper testimony could have had no influence upon the verdict, the presumption is that it did have some weight with the jury, and a new trial should be granted. *Santillan v. Moses*, 1 Cal. 93.

87. A verdict will be set aside and a new trial granted if improper evidence went to the jury, and the court cannot clearly see that it had no effect or weight with the jury. *Mateer v. Brown*, 1 Cal. 224.

88. The rejection of proper, or the admission of improper evidence, if it could in no way materially affect the verdict, will not be cause to set aside the same. *Persse v. Cole*, 1 Cal. 370.

89. The admission of improper testimony is no ground for disturbing a verdict where it is evident by the verdict itself that no injury was done thereby to the party objecting to its admission. *Priest v. Union Canal Co.*, 6 Cal. 171.

III. ON CONFLICTING EVIDENCE.

90. The finding of a jury or court, deciding upon the weight of testimony, will not be reviewed on appeal unless such finding be impeached for fraud, misconduct, mistake or improper influences. *Payne v. Jacobs*, 1 Cal. 41.

91. The verdict of a jury should not

be disturbed when rendered upon a question of fact, where the evidence is conflicting, and where no rule of law appears to have been violated. *Gunter v. Sanchez*, 1 Cal. 49; *Johnson v. Pendleton*, 1 Cal. 133; *Hoppe v. Robb*, 1 Cal. 373; *Vogan v. Barrier*, 1 Cal. 187; *Dwinelle v. Henriquez*, 1 Cal. 389; *Davis v. Smith*, 2 Cal. 423, 476; *Brown v. O'Conner*, 1 Cal. 421; *Griswold v. Sharpe*, 2 Cal. 23; *Taylor v. McKinley*, 4 Cal. 104; *Duell v. Bear River and Auburn W. & M. Co.*, 5 Cal. 86; *McHenry v. Moore*, 5 Cal. 93; *Ritchie v. Bradshaw*, 5 Cal. 229; *Pickett v. Sutter*, 5 Cal. 413; *Conroy v. Flint*, 5 Cal. 329; *Adams v. Pugh*, 9 Cal. 17; *White v. Todd's Valley Water Co.*, 8 Cal. 444; *People v. Ah Ti*, 9 Cal. 17; *Williams v. Gregory*, 9 Cal. 77; *Scannell v. Strahle*, 9 Cal. 177; *Weddle v. Stark*, 10 Cal. 303; *Bensley v. Atwill*, 12 Cal. 240; *Ritter v. Stock*, 12 Cal. 402; *McGarrity v. Byington*, 12 Cal. 432; *Ortman v. Dixon*, 13 Cal. 40; *Visher v. Webster*, 13 Cal. 60; *Beckman v. McKay*, 14 Cal. 253; *McGarvey v. Little*, 15 Cal. 31; *Weaver v. Eureka Lake Co.*, 15 Cal. 273; *Stevens v. Irwin*, 15 Cal. 504; *Paul v. Silver*, 16 Cal. 75; *Baker v. Joseph*, 16 Cal. 180.

92. On a question of fraud, where there is conflicting evidence which was proper to have been submitted to a jury to pass upon, and the court granted a nonsuit, the appellate court in determining the question of nonsuit will presume that the fraud was not proven. *Ledley v. Hays*, 1 Cal. 161.

93. The finding of a referee is conclusive on the facts, where the evidence is conflicting. *Knowles v. Just*, 13 Cal. 621.

94. Where in a suit for conversion by an administrator, the complaint averred the facts necessary under the statute to maintain the action, and the answer denied the facts; but it is agreed by counsel that the proof is conflicting; and the court below instructed the jury, that if they believed from the evidence that defendant did receive the property mentioned in the complaint, belonging to the estate of G., deceased, and converted and appropriated it to his own use, and refused to deliver the same when demanded, etc., they will find for the plaintiff; and it is objected to upon appeal that this instruction was wrong, because it ignores all reference to the time

On Conflicting Evidence.—Jurors Impeaching their Verdict.—Amendment of a Verdict.

of the alienation by defendant, whether before or after the issuing of letters of administration upon the estate of deceased: held, that there being no statements of facts, the appellate court cannot tell whether there was any discrepancy in the proof as to the time of alienation, assuming that there was such alienation; and that in favor of the judgment, it must be presumed, unless there be direct evidence to the contrary, that the court did not err in giving the instruction in this form, for there may have been no controversy as to the time of alienation, if any was made, though there might have been conflict in the proof as to the fact of alienation, and this the court left to the jury. *Beckman v. McKay*, 14 Cal. 252.

95. In suit by an administrator against defendant, for conversion of the property of the estate, under the one hundred and eleventh section of the statute to regulate the settlement of estates, the proof as to the right, title or possession of plaintiff, and the taking or interference by defendant being conflicting, it is error to instruct the jury that a mere demand on the defendant, and refusal by him to surrender the property, charge him with a conversion. *Ib.*

96. Whether plaintiffs, who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes, began their surveys, etc., and prosecuted their work to completion with due diligence as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict on conflicting testimony will be conclusive. *Weaver v. Eureka Lake Co.*, 15 Cal. 274.

97. This court will not set aside the findings of the court below on conflicting proofs, especially in regard to the value of rents, or damage to property, both being of uncertain ascertainment. *Paul v. Silver*, 16 Cal. 75.

IV. JURORS IMPEACHING THEIR VERDICT.

98. A new trial should not be granted on the affidavit of a juror made after the verdict, and for the purpose of moving for

a new trial, that he had formed and expressed an opinion before the trial. *People v. Baker*, 1 Cal. 405.

99. A juror cannot be allowed to impeach his own verdict on account of his fellow jurors' misconduct. *Amsby v. Dickhouse*, 4 Cal. 103.

100. The affidavit of jurors will not be admitted to contradict their verdict. *Castro v. Gill*, 5 Cal. 42; *People v. Wyman*, 15 Cal. 75.

101. The affidavit of jurors will not be admitted to impeach their verdict, but will be allowed in order to substantiate it.* *Wilson v. Berryman*, 5 Cal. 46.

102. Where the affidavit of a juror is sworn to be correct by the sheriff, it may properly be treated as his original affidavit. *Ib.*

103. The affidavit of a juror, purging his conduct from the imputation of corruption or impropriety, will not be admitted, for he would not hesitate to conceal the same by perjury.* *People v. Backus*, 5 Cal. 276.

V. AMENDMENT OF A VERDICT.

104. It is competent for the court to instruct the jury to amend their verdict as to form, not affecting the substance, and in such manner as to be unexceptionable in law. *Truebody v. Jacobson*, 2 Cal. 284.

105. The court may amend the verdict of a jury when it is defective in something merely formal, and which has no connection with the merits of the cause, where the amendment in no respect changes the rights of parties. *Perkins v. Wilson*, 8 Cal. 139.

See INSTRUCTIONS, JUROR, JURY.

VERIFICATION.

1. A party is not required to deny an endorsement under oath, and an endorsee

*The above conflicting decisions are both by C. J. Murray; but the former case is an obiter dictum, while in the latter case it received the attention of counsel and the bench, and the latter opinion may be relied on as the law.

Verification.

cannot give the notes in evidence without proof of their endorsement. *Grogan v. Ruckle*, 1 Cal. 159; *Youngs v. Bell*, 4 Cal. 202.

2. It is no error to allow the defendant to verify his answer before trial, unless it in some way took the plaintiff by surprise, and this must be shown. *Angier v. Masterson*, 6 Cal. 62.

3. The objection to the want of verification to the declaration should have been made either before answer or with the answer. It comes too late after answer. *Greenfield v. Steamer Gunnell*, 6 Cal. 68.

4. When the complaint is verified, the answer shall contain a specific denial of each allegation controverted by defendant, or a denial thereof according to his information and belief. Every material allegation which is not so denied shall, for the purposes of the action, be taken as true. *Anderson v. Parker*, 6 Cal. 200; *Swartz v. Hazlett*, 8 Cal. 126; *Dewey v. Bowman*, 8 Cal. 149.

5. By verification of the complaint, the plaintiff can prevent the defendant from interposing a general denial in suits on promissory notes, by requiring a sworn answer. *Brooks v. Chilton*, 6 Cal. 642.

6. Where a complaint is verified, and there is no denial either of the ownership of the house during the period stated or of the occupancy of the premises by the defendant, there was in fact no denial of the amount claimed for the use and occupation of the premises. *Osborn v. Hendrickson*, 8 Cal. 32.

7. The object of verifying a complaint is to avoid the necessity and expense of producing proof to sustain the allegations of the complaint, in cases where the plaintiff would swear they were true and the defendant would not deny the truth of the alleged facts under oath. *Dewey v. Bowman*, 8 Cal. 149; *Thompson v. Lee*, 8 Cal. 279.

8. It is truly painful to witness the reckless ease with which defendants, in too many cases, make "general and specific" denials, under oath, of "each and every allegation of the complaint," when it is clear that some of the material allegations of the complaint would never have been separately denied. *Dewey v. Bowman*, 8 Cal. 150.

9. If the facts in the complaint alleged are presumptively within the knowledge

of the defendant, he must answer positively, and a denial upon information and belief will be treated as an evasion. If the facts alleged in the complaint are not personally within the knowledge of the defendant, he must answer according to his information. *Curtis v. Richards*, 9 Cal. 38.

10. In no case can an allegation of the complaint be controverted by a denial of sufficient knowledge or information upon the subject to form a belief. *Ib.*

11. There are but two forms in which a defendant can controvert the allegations of a verified complaint so as to raise an issue: first, positively, when the facts are within his own personal knowledge; and second, upon information and belief, when the facts are not within his own personal knowledge. *Curtis v. Richards*, 9 Cal. 38; *Humphreys v. McCall*, 9 Cal. 62; *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 474; *Stewart v. Street*, 10 Cal. 373; *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

12. Where both complaint and answer are verified, the denial in the answer of an allegation in the complaint, in the following terms, is not sufficient, viz: "And the said defendants deny for want of information to enable them to admit the sale and transfer of the said Georgia ditch to them, plaintiffs as alleged," &c. *Humphreys v. McCall*, 9 Cal. 62.

13. An answer, unaccompanied by a required verification, may be stricken out, and judgment ordered for plaintiff as upon a default. *Drum v. Whiting*, 9 Cal. 423.

14. The language of the statute is imperative, and makes only one exception in which the verification of an answer may be omitted when the complaint is duly verified, and that is when the admission of the truth of the complaint might subject the party to a prosecution for a felony. *Ib.*

15. Inability of counsel to obtain defendant's verification in time, may be good ground for an extension of time to answer, but cannot avail in resisting a motion to strike out, and for judgment after the answer is filed. *Ib.*

16. The statute imposes upon the defendant, if a natural person—and if a corporation, upon its officers and agents—the duty of acquiring the requisite knowledge or information respecting the matters alleged in the complaint, to enable them to answer in the proper form. *San Fran-*

Verification.—Actions against Vessels.

cisco Gas Co. v. City of San Francisco, 9 Cal. 466.

17. An answer is fatally defective in not denying any of the allegations, either positively or according to information and belief, the only forms in which the allegations of a verified complaint can be controverted so as to raise an issue. *Ib.*

18. To a complaint verified the defendant filed a copy of the original verified answer by mistake; parties took depositions under the pleading and subsequently went to trial. After the close of the plaintiff's evidence his counsel then, for the first time, brought the mistake to the notice of the court by moving for judgment by default, which motion the court sustained, and refused to allow defendant then to verify his answer: held, that the court erred, and should have allowed the defendant to verify his answer. *Arrington v. Tupper*, 10 Cal. 464.

19. A copy of the note sued on being attached to and made part of the complaint, the answer not verified, admits the genuineness and due execution of the note, and entitles the plaintiff to judgment. *Horn v. Volcano Water Co.*, 13 Cal. 69.

20. In a verified answer an evasion of the controlling fact in issue is a strong circumstance against the defendant. *Baker v. Baker*, 13 Cal. 98.

21. Where the pleadings are verified, every matter of defense not directly responsive to the allegations of the complaint must be set up in the answer. *Terry v. Sickles*, 13 Cal. 430.

22. In an action upon an account stated, evidence that the items of the account are overcharged is not admissible, the complaint being verified, and the answer not averring fraud or mistake in the accounting. *Ib.*

23. A verification to an answer before a county recorder is good under the statute. *Pfeiffer v. Rhein*, 13 Cal. 648.

24. An allegation in a verified complaint that "defendants wrongfully and unlawfully entered upon and dispossessed" plaintiffs, is not sufficiently denied by a denial that "defendants wrongfully and unlawfully entered and dispossessed" plaintiffs, because such answer admits entry and ouster. *Busenius v. Coffee*, 14 Cal. 92.

25. A sworn answer must be consistent in itself, and must not deny in one sentence

what it admits to be true in the next. *Hensley v. Tartar*, 14 Cal. 509.

26. Where a complaint is verified, an answer denying "generally and specifically each and every allegation in the complaint, the same as if said allegations were herein recapitulated," and also denying each allegation in the same form, with certain qualifications and exceptions, does not raise an issue upon any fact stated in the complaint. *Ib.*

27. In equity, the general denials made by traversing literally and conjunctively the statements of a sworn bill are not legitimate for the purpose of putting in issue specific allegations, for in this way a party may deny the entire charges in form as stated against him, in consistency with admitting the truth of the specific charge, or even the substantial fact. *Blankman v. Vallejo*, 15 Cal. 644.

28. The rules of pleading, both under the old equity system and under our present system, are intended to prevent evasion and to require a denial of every specific averment in a sworn bill in substance and in spirit, and not merely a denial of its literal truth, and whenever the defendant fails to make such denial he admits the averment. *Ib.*

VESSELS.

I. Actions against Vessels.

1. For Breach of Contract.
2. On Statute Penalties.
3. By Foreign Seamen.
4. Attachment against Vessels.

II. Ownership of Vessels.

1. Registry.
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III. Damages caused by a Vessel

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I. ACTIONS AGAINST VESSELS.

For Breach of Contract.—On Statute Penalties.—Attachment against Vessels.

1. *For Breach of Contract.*

1. An action brought by husband and wife against a steamer for breach of a contract to carry the wife to New York via Nicaragua, the alleged breach consisting in carrying the wife to Panama, and causing her detention there, and consequent illness and other injuries, though based on a contract sounds in tort, and the wife is a proper and necessary party plaintiff. *Warner v. Steamer Uncle Sam*, 9 Cal. 729; *Ord v. Steamer Uncle Sam*, 13 Cal. 372.

2. Where in an action to recover damages occasioned to the plaintiff from his detention by the defendants as common carriers, a witness was permitted to give his estimate of the value of plaintiff's services per day, which he placed as high as one hundred dollars, and stated as ground for his opinion that the plaintiff was a speculator, possessed of large property, money invested in stocks, rents and other sources of income, and frequently made from one to five hundred dollars per day: held, that the testimony was inadmissible. *Hastings v. Steamer Uncle Sam*, 10 Cal. 341.

3. A contract for the transportation of passengers from San Francisco to New York is an entirety, whether the entire voyage is to be performed in one vessel or not. *Ord v. Steamer Uncle Sam*, 13 Cal. 371.

See COMMON CARRIERS.

2. *On Statute Penalties.*

4. Where a statute required the owners or consignees of every vessel entering a harbor to give a several bond to the State in a penalty of two hundred dollars for every passenger and member of the crew on board of such vessel, but no penalty was given by the statute for a neglect to give the bond, and an action was brought to recover two hundred dollars for each passenger as a penalty for neglecting to give such a bond: held, that the action could not be sustained. *Board of Health v. Pacific Mail S. S. Co.*, 1 Cal. 198.

5. If, in such case, any action at all can be brought, it must be to recover such

damages as the plaintiffs can show they have actually sustained by reason of the refusal to give the bond. *Ib.*

3. *By Foreign Seamen.*

6. A British seaman, on board a British vessel, of which a British subject is master, may, when discharged by the master in a port of the United States, without any fault on the part of the seaman, sue for and recover his wages in a State court. *Pugh v. Gillam*, 1 Cal. 485.

4. *Attachment against Vessels.*

7. An act of the legislature authorizing the issuing of attachments against boats and vessels "used in navigating the waters of the State," does not apply to vessels belonging to a foreign port, and which visit one of the harbors of this State for a few days only.* *Souter v. Ship Sea Witch*, 1 Cal. 163; *Ray v. Bark Henry Harbeck*, 1 Cal. 451.

8. Where a bond is given for a release of a vessel attached by virtue of a statute which does not apply to vessels of that peculiar class: held, that the principal and sureties were not liable on the bond. *McQueen v. Ship Russell*, 1 Cal. 165.

9. When the bond is given the vessel shall be released, leaving the action to proceed in the same manner against the vessel as if the vessel is not liable; the giving the bond cannot vest a jurisdiction over the subject matter. *Ib.* 166.

10. The rule that requires seizure of the thing to give jurisdiction in actions in rem, is altered by our statute. Service on a person standing in particular relation to the thing, confers jurisdiction on the court from which process issues. *Averill v. Steamer Hartford*, 2 Cal. 309; *Meiggs v. Scannell*, 8 Cal. 408; *Fisher v. White*, 8 Cal. 422.

11. As soon as a vessel is seized by a court of admiralty, a lien attaches in favor of the party at whose instance the seizure is made. *Meiggs v. Scannell*, 7 Cal. 408.

* These cases were decided under the code of 1850. The code of 1851 permits these attachments to issue.

Attachment against Vessels.—Ownership of Vessels.—Registry.—Lien.—Mortgage.

12. If it was the intention of the legislature to provide that a lien should only be acquired by attachment, this would virtually be denying a right to creditors for small sums. It would be almost impossible for a mechanic or merchant of small capital or credit, who had a claim of a few hundred dollars against one of our large steamers or some sea-going vessel, to give the necessary bonds to detain her until his suit could be determined, and in the meantime she might be run off and sold free of all such debts or incumbrances. *Ib.*

See ATTACHMENT.

II. OWNERSHIP OF VESSELS.

13. Under proceedings in admiralty in rem, the interest of one part owner cannot be sold to satisfy a demand due from the vessel itself. *Loring v. Illsley*, 1 Cal. 29.

14. The voluntary transfer of a minority interest in a ship does not confer upon the purchaser any more extensive control than the vendor himself enjoyed; nor can a forced sale under execution have a greater effect. *Ib.* 31.

15. The register of a vessel is admissible in evidence for the purpose of proving who are the owners of a vessel. *Brooks v. Minturn*, 1 Cal. 482.

16. The owner of a ship chartered by and in the name of his agent may, although he is not mentioned in the charter party, be shown by extrinsic evidence to be the principal in the contract, and will be allowed to avail himself of its provisions. *Ib.*

17. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence, with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 273.

18. The rule of law, that possession of personal property is prima facie evidence of ownership, is uniform in its application. The question of the ownership of a vessel forms no exception to the rule. *Ib.*

19. The complaint showed that the vessel was in 1855 the property of the plaintiffs; that they appeared and defended the action against the vessel as owners, and there is nothing in the record to raise a

presumption that they are not now the owners of it, and a judgment against them will be satisfied out of the vessel. *Russell v. Conway*, 11 Cal. 101.

1. Registry.

20. The register of a vessel is admissible in favor of the person claiming to be the owner, in connection with other evidence tending to establish the ownership. *Brooks v. Minturn*, 1 Cal. 482.

21. The rules of action prescribed in the shipping acts of congress are very strict, and everything necessary to constitute a "vessel of the United States," is required to appear affirmatively, and for this purpose it requires the oath of the interested party. *Davidson v. Gorham*, 6 Cal. 346.

2. Lien.

22. A part owner of a vessel has no lien on the shares of the other part owners, for his advances and disbursements. *Sterling v. Hanson*, 1 Cal. 480.

3. Mortgage.

23. In an order to maintain that a mortgage on a vessel is void as to creditors, because not properly registered, it is absolutely necessary to show that the vessel in controversy was a "vessel of the United States," within the meaning of the registration acts of congress, at the time of her seizure; and to do this it is necessary to show affirmatively every incident which entitles her to that privilege, or to show as much as would under those acts entitle her to a new register. *Davidson v. Gorham*, 6 Cal. 347.

24. Where a new owner under such sale mortgaged the vessel still at sea, neither the bill of sale nor the mortgage being registered at the port of departure where the vessel was registered: held, that the mortgage was good against attaching creditors of the new owner, who levied immediately on her arrival, neither

Mortgage.—Sale.—Delivery.—Damage caused by a Vessel.

party taking the requisite steps to obtain a new registry; as the vessel had lost her national character, and was not therefore subject to the provisions of the law requiring the registry of sales and mortgages. *Ib.* 348.

25. To make a mortgage valid on a sea-going vessel, the act of congress requires it to be recorded, while our statute requires actual possession to be taken of the property itself. The entire right of the party to the same description of property depends in the contemplation of each act solely and exclusively upon that which it alone prescribes. *Mitchell v. Steelman*, 8 Cal. 370.

26. Where A, the owner of a sea-going vessel, executes to B a mortgage thereon, which is recorded in the custom house of the home port; B commences suit to foreclose the mortgage, and makes C a party defendant thereto, on the ground that he has purchased the vessel subject to the lien of plaintiff's mortgage; C in his defense avers that the mortgage was void under our statute of frauds, and that he now holds the vessel discharged from the same: held, that the mortgage was a valid lien, and that the record of the mortgage was sufficient notice thereof to C. *Ib.*

27. To require a mortgagee in all cases to take possession of the vessel is a harsh provision, and must operate greatly in restraint of commerce. How the master of a vessel who is a part owner could execute a mortgage, and still remain on board, under the stringent provisions of our statute, it is difficult to see. *Ib.* 374.

See MORTGAGE.

4. Sale.

28. A sale of a vessel of the United States at sea, to a foreigner, forfeits her national character, unless the new owner pursues all the requisites of the law to obtain a new registry within five days after her arrival at a port of the United States. *Davidson v. Gorham*, 6 Cal. 347.

29. To authorize the captain of a vessel to pledge or sell the property of his owners for necessities, certain facts must be established. The vessel must be in a foreign port, the voyage must be unfinished, the pledge of sale must be indispen-

sable to enable the ship to complete her voyage. *Marziou v. Pioche*, 8 Cal. 534.

30. Where a sale of a vessel is made part cash and the balance of the purchase money to be paid upon delivery by the vendor to the vendee of a good title and register of a vessel, to recover the balance the vendor must show an offer on his part to comply with the agreement. *Fowler v. Fisk*, 12 Cal. 112.

5. Delivery.

31. Where a contract stipulates for the delivery of a vessel, but designates no particular place for such delivery: held, that a notice of a readiness to deliver must be treated under the contract as an actual delivery. *Albretson v. Hooker*, 5 Cal. 178.

III. DAMAGE CAUSED BY A VESSEL.

32. The declarations of a master of a steamboat, whilst running the river, respecting fire communicating from the chimneys of the boat to the crops of grain on the banks of the river, by which the crop was consumed, were admissible in evidence to establish the liability of the owners, in an action against them to recover damages for the destruction of the crop. *Gerke v. California Steam Navigation Co.*, 9 Cal. 255.

33. Where in an action against a steamer for setting fire to plaintiff's fence, the jury was instructed among other things to find specially as to the negligence of the captain and crew of the steamer, and they found generally for plaintiff, four hundred dollars damages; and also that the steamer's spark-catcher was not sufficient to prevent the sparks from communicating with the shore and endangering property, the verdict was held good, in the absence of any objection at the time of its rendition that it was not responsive to the special direction. *Algier v. Steamer Maria*, 14 Cal. 170.

See DAMAGE.

IV. MASTER OF A VESSEL.

34. The conduct and management of a ship are always entrusted to a master, whether he has or has not a partial property in it, and in either case he is the confidential servant or agent of the owners at large. *Loring v. Illsley*, 1 Cal. 31.

35. The master of a vessel, as such, has no interest in it which can be the subject of levy and sale, under execution. He is but a naked agent, and has no substantial interest in the property which can be levied upon and sold. *Ib.*

36. If a master of a vessel be a part owner, his interest in the vessel may be levied on and sold, but his agency as master will be in no wise affected. *Ib.*

37. The responsibility of taking a position or berth for a vessel in port rests upon the master of the vessel or the harbor master, therefore the owner is not exempt from liability for injuries committed by taking an improper berth, although such berth may have been selected by the pilot who brought the vessel into port. *Griswold v. Sharpe*, 2 Cal. 24.

38. Where the master of a vessel was in possession, and the record did not disclose any other owner, the admissions of the master were admissible in evidence with the same effect as if the suit had been against the master himself. *Bailey v. Steamer New World*, 2 Cal. 373.

39. The captain of a vessel drew on the owner for six hundred dollars to defray the expenses of the first mate, who was ill. In an action against the owner by the captain for wages, the owner endeavored to set off the draft: held, that this could not be done without producing the draft or showing payment of it. *Wakeman v. Vanderbilt*, 3 Cal. 382.

40. Where the defendant, a master of a vessel, received certain goods of plaintiff to be delivered at a certain place, which he failed to do, and in the action brought thereupon he offered to prove that the goods belonged to a third party, who had forbidden such delivery, and that plaintiff had obtained possession of the goods by fraud: held, that he was entitled to prove such facts. *Hayden v. Davis*, 9 Cal. 574.

See ADMIRALTY, BILL OF LADING, CHARTER PARTY, COLLISION, TOWING.

VETO.

1. The constitution provides that if any bill presented to the governor, having passed both houses of the legislature, shall not be returned within ten days after it shall have been presented to him, Sundays excepted, the same shall become a law in like manner as if he had signed it, unless the legislature by adjournment prevent such return; and the ten days must be computed by excluding the day on which the bill is presented to the governor. *Price v. Whitman*, 8 Cal. 416; overruling *People v. Whitman*, 6 Cal. 660.

VOTES.

1. When the judges of election have administered the oath to a voter, the right to vote is concluded, and it is error to deny it. *People v. Gordon*, 5 Cal. 236.

2. The fact that the candidate receiving the highest number of votes at an election by the people is ineligible, does not give the office to the next highest on the list. *Saunders v. Haynes*, 13 Cal. 153.

3. In a proceeding to contest the election of defendant as district judge, the ineligibility of the candidate receiving the highest number of votes, the defendant being next on the list, is no defense, because this matter, if true, could not protect the incumbent from the consequences of an unauthorized possession of the office. *Ib.*

4. The mere fact that a man is a soldier in the United States army does not disqualify him from voting in this State. But he cannot vote unless he has been a citizen of the State and of the county in which he votes for the constitutional period. *People v. Riley*, 15 Cal. 49.

5. And a mere residence or sojourn in the county as a soldier does not make him a citizen, or prove him to be such. The rule, as fixed by the constitution, is, that the fact of such sojourn or residence as a soldier neither creates nor destroys citizenship—leaving the political status of the soldier where it was before. *Ib.*

6. Where the right of a United States soldier to vote is contested, the burden of proof is upon the contestant. *Ib.* 50.

7. A surviving partner has a right to vote, at an election for officers of a corporation formed under the general incorporation act of this State of 1853, the stock in his hands as assets of the partnership—the business of the firm being unsettled. *People v. Hill*, 16 Cal. 118.

8. The fact that a portion of the stock voted by such surviving partner stood upon the books of the corporation, at the time of the election, in the name of the deceased partner alone, does not affect the right to vote, if in fact the stock belonged to the partnership. *Ib.* 119.

WAGES.

1. In an action against a common carrier for nonperformance of his contract to carry a passenger, remote and contingent damages cannot be recovered: so held in a case where the plaintiff, through a violation of the agreement of defendants, was detained at New Orleans and at Panama, on his way to California, an unreasonable length of time, and the court charged the jury that the measure of damages would be the wages at the then rates in San Francisco during the period of such detention. *Yonge v. Pacific Mail S. S. Co.*, 1 Cal. 354.

2. Semble, that evidence showing that the plaintiff was a good book-keeper was proper to be submitted to the jury to enable them to form an estimate of the damages which the plaintiff had probably sustained. *Ib.*

3. A British seaman on board of a British vessel, of which a British subject is master, may, when discharged by the master in a port in the United States, without any fault on the part of the seaman, sue for and recover wages in a State court. *Pugh v. Gillam*, 1 Cal. 486.

4. Where a person agrees to work for a certain period at a certain price, or to perform certain services for a fixed amount, he cannot break off at his own pleasure and maintain an action for the work so far as he has gone; performance is a condi-

tion precedent to payment. *Hutchinson v. Wetmore*, 2 Cal. 312.

5. The plaintiff introduced two witnesses to prove the value of his services in going twice to Europe to negotiate the purchase of an estate, etc.; but it was not shown that he undertook these voyages at the request of defendant, or in what capacity he went: held, that the court erred in admitting the testimony, as the question was hypothetical, and assumed a state of facts not in proof. *Dopman v. Hoberlin*, 5 Cal. 414.

6. Where a hired person continues in employment after the expiration of the contract, and without any new contract, the fair presumption is that both parties understood that the same salary was to be paid, and it is therefore error in a suit by the servant to allow him to recover upon a quantum meruit. *Nicholson v. Patchin*, 5 Cal. 475.

7. A witness in an action for a disputed mining claim, who was in employ of the party in possession, at fixed wages to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

8. Where the plaintiff was the step-mother of the defendants by whom she was supported, and for whom she performed domestic services, for the value of which she sued the defendants; held, that as she stood in "loco parentis" to defendants, the law does not imply any contract to pay for such services. *Murdock v. Murdock*, 7 Cal. 513.

9. When the father promises his infant child a certain reward for doing that which he was already bound to perform, the agreement has no consideration whereon to rest. *Swartz v. Hazlett*, 8 Cal. 123.

10. The principle upon which the infant is allowed to collect his wages is that of agency. The infant can be his father's agent, and whether he is so or not is a question of fact, like any other question of agency, which may be proven by either direct or circumstantial testimony. *Ib.* 124.

11. Where a parent executes to his infant son a conveyance of property, in consideration of services performed, it must be considered as a voluntary conveyance, without legal consideration, as he is not

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legally bound to pay for his son's services. *Ib.* 125.

12. The salaries of teachers of the city and county of San Francisco, under the consolidation act, should be paid in the same manner as other claims against the treasury. *Knox v. Woods*, 8 Cal. 546.

13. Where the owner of a mining claim contracts verbally with J. for the working thereof, and agrees to pay him a certain sum out of the proceeds of the mine, and J. goes into possession thereof, and while he is working it the owner sells it to a third party, who takes without notice of J's contract: held, that his claim is not subject or liable to J's contract. *Jenkins v. Redding*, 8 Cal. 603.

14. Where a party employed received a regular specific monthly salary for his services, the presumption of law is that all services rendered by him for his employer during that period, which are of nearly a similar nature to those of his regular duties, are paid for by his salary, and to this presumption he must show an express agreement for this extra pay, otherwise he cannot recover. *Cany v. Halleck*, 9 Cal. 201.

15. The statute of April 4th, 1857, fixing the compensation of the county clerk of the county of Placer at \$3000 per annum, was intended in lieu of all fees for services rendered. *Mitchell v. Stoner*, 9 Cal. 293.

16. A sheriff cannot maintain an action against a county for compensation for "taking care of the court house, and keeping and guarding the jail of the county during his incumbency of the office of sheriff." The law fixes his compensation for the performance of such official duty. *Stockton v. Shasta County*, 11 Cal. 114.

17. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and calculation of warrants drawn on the county treasurer. *People v. Supervisors of El Dorado County*, 11 Cal. 174.

18. A jury cannot give compensation for loss of time, remuneration for wages paid, etc., unless there is an allegation in the complaint as to these matters. *Dabovich v. Emeric*, 12 Cal. 181.

19. Where the principal of a line of stages, by letter to one acting as his agent in such business, wrote "you will do bet-

ter by getting new drivers and agents, and horses," and such agent employed a sub-agent, and subsequently the principal was informed of such employment and made no objection, in an action for the wages of the sub-agent: held, that the facts were sufficient to authorize the jury to find the fact of authority in the agent to employ the plaintiff. *McConnell v. McCormick*, 12 Cal. 143.

20. A district judge inducted into office with a commission from the governor, showing him to be entitled to it from a certain date, draws the salary annexed to the office from that date. *Turner v. Meloney*, 13 Cal. 623.

21. In suit to recover wages for half a year, under a contract to work a whole year, plaintiff having quit the employment of defendant, it requires slight evidence of assent or agreement to apportion the contract and allow plaintiff to recover. *Hogan v. Titlow*, 14 Cal. 256.

22. Some proof of a promise on the part of defendant to settle with plaintiff will sustain a verdict for him in such case. *Ib.*

23. In a suit by a female against two parties in a ranch, for services as servant to the firm, under an implied contract as on a quantum meruit, proof that plaintiff is the wife of one of defendants is good under the general issue, as showing that there was no implied contract to pay for the services. *Angulo v. Sunol*, 14 Cal. 402.

24. In a suit by a physician against a county, on a contract for his services for one year as examining physician of the hospital, the objection that he is not a graduate of a legally constituted medical institute, if good at all, cannot be taken by demurrer, unless it distinctly present the objection. *McDaniel v. Yuba County*, 14 Cal. 445.

25. The term "compensation" in section twenty-one, article four, of the constitution of this State, means the income of the office, not the profit over and above the necessary expenses of the office. *Searcy v. Grow*, 15 Cal. 122.

26. Under the Sacramento consolidation act of 1858, the treasurer of the city and county of Sacramento is entitled to receive for his official services only \$3000 per annum. He is not entitled to the percentage allowed by the State to county treasurers for money paid by them into

the State treasury. This percentage belongs to the city and county of Sacramento. *City of Sacramento v. Bird*, 15 Cal. 295.

27. In a suit by a stockholder in a private corporation against the corporation, and four of the trustees, who owned stock sufficient to enable them to control the business of the company, for an account and settlement of its affairs, alleging fraud and mismanagement on the part of the trustees, the court below, by its decree, deprived one of said trustees of his salary as superintendent of the business of the corporation: held, that this was error; that, although such superintendent was also trustee and treasurer of the corporation, contrary to a positive provision of the by-laws; and although, in the management of the business of these offices, no attention had been paid to the by-laws and regulations of the corporation, yet, as no fraud was shown, and as the superintendent had faithfully performed his duty as such, he was entitled to his salary. *Neall v. Hill*, 16 Cal. 149.

28. Under the consolidation act of 1858, the board of supervisors of the city and county of Sacramento has no power to create the office of assistant clerk to the board, nor to raise the salaries fixed in the twenty-fourth section of the act, and its action in creating such office and raising such salaries may be reviewed on certiorari. *Robinson v. Supervisors of Sacramento County*, 16 Cal. 211.

WAGON ROAD.

1. The act of April 8th, 1855, providing for the construction of a wagon road to the Sierra Nevada mountains, and authorizing the board of commissioners to contract for the same at a price not exceeding three hundred thousand dollars, passed while the aggregate existing indebtedness of the State, without counting that incurred by the first legislature, exceeded three hundred thousand dollars, and it containing no provision for the submission of the question to the people, was unconstitutional and void. *People v. Johnson*, 6 Cal. 504.

WAIVER.

1. Where defendant moved for nonsuit, and afterwards introduced evidence supplying the defect in the plaintiff's testimony on which the motion for nonsuit was founded: held, that the defendant waived his motion, and could not insist upon it on appeal. *Ringgold v. Haven*, 1 Cal. 117; *Smith v. Compton*, 6 Cal. 26; *Winans v. Hardenbergh*, 8 Cal. 293; *Perkins v. Thornburgh*, 10 Cal. 190.

2. Where a demurrer to a complaint is put in and overruled, and the defendant then answers, the answer is a waiver of the demurrer.* *DeBoon v. Priestly*, 1 Cal. 206; *Pierce v. Minturn*, 1 Cal. 471; *Brooks v. Minturn*, 1 Cal. 481.

3. Where an order granting a new trial was made in the court below upon the payment of costs, and defendant paid the costs, and plaintiffs appealed from the order: held, that the acceptance of the costs was not a waiver of the right of appeal. *Tyson v. Wells*, 1 Cal. 379.

4. An express notice of nonpayment is equivalent to an admission that the note has been presented or need not be presented. *Matthey v. Galley*, 4 Cal. 63.

5. The mere act of filing an answer does not operate as an appearance at the trial, so as to prevent the waiver of the jury trial. *Zane v. Crowe*, 4 Cal. 113.

6. Proceedings having been transferred to a justice who had jurisdiction, by consent of parties, the appearance of defendant and his consent fixing the time of trial were a waiver of his right to be brought in by complaint and summons. *Cronise v. Carghill*, 4 Cal. 122.

7. An appearance by attorney at common law and by our statute amounts to an express waiver of service. *Suydam v. Pitcher*, 4 Cal. 281.

8. A waiver of the performance of a written contract under seal may be shown by parol, and this waiver excuses the performance. *Whiting v. Heslep*, 4 Cal. 330.

9. Where a defendant appears for the purpose of taking advantage of irregular summons by a motion to dismiss, it does not amount to a waiver of his rights so as

*These decisions were made when the code permitted appeals from an interlocutory order, which were restricted by the amendment of 1854. See note, p. 98.

to cure the defect. *Deidesheimer v. Brown*, 8 Cal. 340.

10. A failure to file a statement setting forth the grounds upon which a party intends to rely, on motion for a new trial, operates as a waiver of the rights to the motion. *Adams v. City of Oakland*, 8 Cal. 510; *Wing v. Owen*, 9 Cal. 247.

11. When the deposition of a witness is taken, objections to his competency must be taken at the time and not reserved till the trial, or they will be deemed waived. *Jones v. Love*, 9 Cal. 70.

12. On motion for a new trial, the filing of a counter statement is a waiver of objections to want of notice of the intention to move for a new trial. *Williams v. Gregory*, 9 Cal. 76.

13. The failure of the defendant to appear on the trial of replevin when the cause is called, is a waiver of a jury under the one hundred and seventy-ninth section of the code. *Waltham v. Carson*, 10 Cal. 180.

14. Where counsel in a cause pending in the supreme court stipulate to submit the case to the court on two grounds only, it is a clear waiver of all other assignments of error, and they will not be allowed to go behind such stipulation and insist upon points other than those mentioned in the stipulation. *Cahoon v. Levy*, 10 Cal. 216.

15. The supreme court will not examine errors assigned on appeal where, after the service of the motion of appeal, the parties stipulated that all errors in the record, referee's report, decree and judgment were waived. *Glitzback v. Foster*, 11 Cal. 37.

16. Where personal property is tortiously taken, the party aggrieved may waive the tort and sue in assumpsit for the value of the property. *Fratt v. Clark*, 12 Cal. 90.

17. The right to try particular cases in particular counties is a mere privilege which may be waived. It is not matter in abatement of the writ. The privilege must be claimed by motion to change the venue at the proper time and place. *Watts v. White*, 13 Cal. 324; overruling *Vallejo v. Randall*, 5 Cal. 462.

18. The record of the proceedings in a justice's court in which judgment was rendered, must affirmatively show that the suit was brought in the proper township, or the proceedings are coram non iudice

and void; and the failure of defendant, after summons served to appear and object that suit was brought in the wrong township, is no waiver of the objection. *Lowe v. Alexander*, 15 Cal. 301.

19. Where a jury is waived, and the cause tried by the court, the court should find the facts, and not merely state the proofs. *Heredink v. Holton*, 16 Cal. 104.

20. A party having secured a mechanic's lien under the statute, does not forfeit or waive it by causing an attachment to be issued and levied upon property of the debtor to secure the same demand. The two remedies are cumulative, and both may be pursued at the same time. *Brennan v. Swazey*, 16 Cal. 142.

21. Demurrer to an indictment for perjury being sustained, the district attorney took no exception, but moved for and obtained an order submitting the case to another grand jury. Subsequently the people appealed from the order sustaining the demurrer: held, that the failure to except and taking this order was an acquiescence in the judgment on demurrer, and a waiver of any right to appeal. *People v. Wooster*, 16 Cal. 435.

WAREHOUSE.

1. Warehousemen who give their receipt for goods on storage are estopped from setting up a want of segregation of the goods receipted for from other goods, in an action against them by the holder of the receipt for the conversion of the goods by a seizure in an action against a vendor of plaintiff. *Goodwin v. Scannell*, 6 Cal. 543.

2. And this, although the warehousemen are attaching creditors, and although the sheriff making the seizure was not liable by reason of there being no segregation. *Id.*

3. When the plaintiff took a mortgage on one thousand sacks of flour, and took the warehouseman's receipt therefor, and subsequently requested the warehouseman to segregate this flour from a large quantity belonging to the mortgagor, and the warehouseman accordingly put plaintiff's

Warehouse.

mark on a pile of eleven hundred and ninety-six sacks of the mortgagor, standing separate from the rest: held, that it was a good segregation. *Squires v. Payne*, 6 Cal. 659.

4. This delivery destroyed the privity between the warehouseman and the mortgagor, and made the former agent of the mortgagee alone, with whom he might adjust for the excess. *Ib.*

5. Where the plaintiff bought eight hundred sacks of flour, on storage in a warehouse, which stood therein as a separate pile, the number of sacks of which was ascertained by counting the outside rows, and the number in the pile marked on one of the sacks, and it was thus delivered to the purchaser, who permitted it to remain in the same place, where it was several days afterwards attached as the property of the vendor: held, that the delivery was sufficient and the sale valid. *Cartwright v. Phoenix*, 7 Cal. 282.

6. A sale of merchandise by bill of sale, the goods remaining in the possession of the vendors as warehousemen, at a regular charge, and their receipt given for the goods on storage, the vendors doing business as commission merchants, and sometimes receiving goods on storage, is void as to the creditors of the vendors. *Stewart v. Scannell*, 8 Cal. 83.

7. Where the owner of a certain number of barrels of flour on storage in a warehouse sold them all to different purchasers, giving them orders on a warehouseman which were given by the purchasers to the warehouseman, and new receipts given to them in their own names by the latter, and entries made on his books charging the vendors and crediting the purchasers with their respective lots: held, that there was a sufficient delivery of possession, without a separation of the various lots. *Horr v. Barker*, 8 Cal. 607.

8. Where the vendor only sells a part of goods on storage, those sold, if all together and of the same mark, must be separated from a larger mass in order to change the possession; but when all of the goods of the vendor, in the hands of a third party, are sold, the change of possession is complete by delivery of the order, taking a new receipt and entry of the transactions on the books of the warehouseman. *Ib.*

9. A delivery of a warehouse receipt,

stating that the goods named therein are deliverable on return of the receipt, is sufficient prima facie to pass the title. There is no substantial difference, in this respect, between a warehouse receipt and a bill of lading. *Ib.* 8 Cal. 614; 11 Cal. 403..

10. Where the defendants, warehousemen, deliver wheat to third persons who bought from a broker for his own debt, on the ground that they held the storage receipt of defendants to one J., who had loaned money to E. & H. on the wheat as collateral, and had endorsed the receipt "deliver to bearer or E. & H.," the defendants knowing at the time of said delivery that E. & H. claimed the wheat as their property, they are liable to E. & H. for a commission. *Hanna v. Flint*, 14 Cal. 75.

11. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiffs' title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of the insolvency of defendants, and the complaint not showing that there is no adequate remedy at law. *Tomlinson v. Rubio*, 16 Cal. 206.

12. In such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the threatened trespass, is not alone a ground for equitable interference. *Ib.*

13. On trial for burglary, the court instructed the jury that, if they found from the evidence that defendant entered a cer-

tain warehouse in the night time, and took therefrom certain goods and chattels, he was guilty as charged: held, that the instruction was wrong, because it ignores the felonious intent of the entry, and the character of it. *People v. Jenkins*, 16 Cal. 431.

WARRANT OF ARREST.

See ARREST, CRIMES AND CRIMINAL LAW.

WARRANTS.

1. There is nothing in the act of 1855, creating boards of supervisors in the counties of the State, which entitles a warrant drawn on the fund for the current expenses during that year to a priority in payment over a warrant of the same class drawn the year before. *McCall v. Harris*, 6 Cal. 284.

2. A board of supervisors has no power to set apart a portion of the revenue of the county as a fund for current expenses. The order of payment of warrants is established by law and cannot be changed by the supervisors. *Laforge v. Magee*, 6 Cal. 285.

3. Where the right of a holder of county scrip to payment thereof had become fixed by presentation, there being money for such payment then in the treasury, a subsequent act of the legislature cannot intervene to divest rights already acquired. *Ib.* 650.

4. In the absence of an unexhausted specific appropriation to meet a warrant of the controller on the State treasurer, a warrant on the treasurer is absolutely void. *Butler v. Bates*, 7 Cal. 137.

5. Under the act of 1851, the county auditor can only draw warrants where the claim is audited by himself. This is a defect in the law which the court cannot

remedy on the pretext of public convenience. *Draper v. Noteware*, 7 Cal. 278.

6. The revenue law of 1854 authorized the payment of a portion of taxes in controller's warrants. The act of 1855 and 1856 provide for the funding of the State debt and the collection of the revenue in cash, and forbade the treasurer to liquidate any of the debt except as therein provided: held, that the act of 1854, allowing payment in warrants, was therefore repealed. *Scofield v. White*, 7 Cal. 400.

7. The acceptance, by a collector of taxes, of a warrant, is not a liquidation of the debt, but a receipt of it by the State treasurer from the collector would be a liquidation, for which the treasurer would be responsible. *Ib.* 407.

8. The provisions of the act of April 27th, 1855, requiring all persons holding certain warrants upon the treasurer of Calaveras county to present the same for registry before a certain day, or be forever barred from enforcing the payment thereof, are therefore unconstitutional. *Robinson v. Magee*, 9 Cal. 85.

9. Where the account of a deputy assessor for \$1,650 was audited and allowed by the board and ordered to be paid, the order being in the following words: "Ordered, the sum of four thousand one hundred and twenty-five dollars be paid out of the fund for current expenses to equal sixteen hundred and fifty dollars in cash, at the rate of forty cents on the dollar, October 29th, 1856," and in pursuance of such order the county auditor drew his warrant for \$4,125 upon the treasurer and delivered it to the deputy assessor, who presented it to the treasurer, and by him it was endorsed and registered in its order of presentation among the legal warrants against the county: held, that the order was made without authority, and was void, and the fact that the market or cash value of county warrants was only forty per cent. of the nominal amount, and the object of the action of the board was to give that which was, at the time, an equivalent to cash, did not justify the action of the board. *Foster v. Coleman*, 10 Cal. 281.

10. A county may assign and transfer a warrant drawn in its favor by another county, on its treasurer, so as to invest the holder with the right to demand payment thereon. *Beals v. Evans*, 10 Cal. 460.

Warrants.—Warranty.

11. Payment may be demanded of the treasurer of Amador county by the holders of warrants issued in pursuance of that act, at any time when there are funds in the hands of the treasurer to meet the same, and a receipt and corresponding credit endorsed on the warrant, will be sufficient to protect the county and the officer making the payment. *Ib.* 461.

12. The board of supervisors of a county possesses no power to allow the county auditor compensation for the issuance and cancellation of warrants drawn on the county treasurer. *People v. Supervisors of El Dorado County*, 11 Cal. 174.

13. County warrants acquire no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they may have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time. *Ib.* 175.

14. The protection which attends the purchaser of negotiable paper before maturity, without notice of the illegality of its consideration, does not extend to like purchasers of county warrants. *Ib.*

15. The board of supervisors therefore has no power to direct and authorize the treasurer to pay warrants in violation of the provisions of the statute. *McDonald v. Maddux*, 11 Cal. 190.

16. Warrants drawn by the controller of State, delivered to the payees thereof, and by them indorsed in blank, were presented by the holders to the State treasurer, and on payment were delivered to him. They were afterwards stolen from the office of the treasurer. The warrants, on their face indicating a just and legal claim against the State, came into the hands of defendants, ignorant that they had been stolen. Defendants present them to the treasurer, and in lieu thereof, receive State bonds payable to bearer, under the funding act of 1857, and part with them. The State sues for the bonds or their value: held, that the action does not lie; that defendants having received the bonds bona fide, and without fraud, for warrants apparently good against the State, are not liable in this form of action. *State of California v. Wells*, 15 Cal. 341.

17. The mere reception of the bonds, though issued by mistake, does not render defendants liable. *Ib.* 342.

18. Bonds so issued are negotiable, and bind the State, in the hands of an innocent assignee. *Ib.*

19. The bonds, in this case, constituted a payment of the warrants; and if the rule that voluntary payments are not recoverable be not applicable, still the equity of the defendants is equal to that of plaintiff, and courts will not interfere. *Ib.* 343.

20. The warrants in this case, drawn by the controller and countersigned by the mayor of San Francisco, upon the treasurer, to pay for certain street improvements, will not support an action. They cannot be treated as bills of exchange or promissory notes, for they are drawn upon a particular fund, and their payment is made to depend upon the sufficiency of that fund, while bills and notes must be payable absolutely. *Martin v. City of San Francisco*, 16 Cal. 286.

21. These warrants are ineffectual for any purpose, except, perhaps, as evidence in an action founded upon the consideration for which they are given. *Ib.*

22. These warrants, with few exceptions, do not comply, in their form, with the requirements of the city charter, and would not constitute any authority to the treasurer to pay them, even if funds were in the treasury especially appropriated for their payment, because they do not specify the appropriation under which they were issued, and the date of the ordinances making the same. *Ib.*

WARRANTY.

1. In the common as well as the civil law, the defendant cannot avoid the payment of the purchase money on the ground that the title existed elsewhere than in the grantor; in order to constitute a breach of warranty or quiet enjoyment, there must be an eviction under the judgment of a competent court on a paramount title. *Fowler v. Smith*, 2 Cal. 44.

2. The use of a given name in a sale note for the goods sold is a warranty that the goods bear that name. *Flint v. Lyon*, 4 Cal. 21.

3. In case of a sale and delivery of a

Warranty.

special cargo with warranty, and a breach of the warranty, the plaintiffs might recover on the contract, and the defendants would be obliged to sue on the warranty or in the same action to recoup the damages, under proper averments in the pleadings. *Ruiz v. Norton*, 4 Cal. 358.

4. Where land is sold with covenants of warranty, accompanied with a delivery of possession, for which a purchaser gives a note for the purchase money, the promise to pay and the warranty are independent covenants, and the enforcement of one is not dependent upon the performance of the other. *Norton v. Jackson*, 5 Cal. 264.

5. Where there is a covenant of warranty, the payment of the purchase money cannot be resisted as long as the grantee remains in possession. *Ib.*

6. A warranty will not be implied except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use. *Moore v. McKinlay*, 5 Cal. 473.

7. Where the plaintiff inspects the goods before purchasing, the case is taken from the operation of the rule of implied warranty. *Ib.*

8. To constitute a warranty no precise words are necessary; it will be sufficient if the intention clearly appear. *Ib.* 474.

9. There is no warranty in the following words of a sale note: "We have this day sold you two shipments of seeds for arrival." *Ib.*

10. Where a trustee had executed a covenant of warranty to a purchaser of a portion of trust lands, but was fully indemnified against loss thereby by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Peralta v. Castro*, 6 Cal. 358.

11. An action for a false and fraudulent representation as to the naked fact of title in the vendor of real estate cannot be maintained by the purchaser, who has taken possession of the premises sold, under a conveyance with express covenants. *Peabody v. Phelps*, 9 Cal. 226.

12. If a party takes a conveyance without covenants, he is without remedy in case of failure of title; if he takes a conveyance with covenants, his remedy, upon failure of title, is confined to them. *Ib.* 228.

13. Generally a vendor with warranty of title is not a competent witness for the vendee in a controversy concerning the title. *Blackwell v. Atkinson*, 14 Cal. 471.

14. In real estate, the covenant of warranty runs with the land, and the vendor is liable directly to the person evicted, and is not a competent witness for plaintiff. *Ib.*

15. A covenant of nonclaim in a deed amounts to the ordinary covenant of warranty, and operates equally as an estoppel. *Gee v. Moore*, 14 Cal. 473.

16. But this covenant is confined to the estate granted, and where that is "the right, title and interest" of the grantor, instead of the land itself, the covenant does not estop him from setting up an after-acquired interest. *Ib.*

17. In a contract for the sale and purchase of land, which is silent as to the possession, there is no implied license for the purchaser to enter. *Gaven v. Hagen*, 15 Cal. 211.

18. Z., the owner of land, contracts in writing to sell it to K., nothing being said as to the possession. K. is to give three notes, falling due at different periods, for the purchase money. The first two notes become due at very short dates, and after they are paid Z. is to make a deed to K., with covenants against his own acts. First note is paid before the second falls due; Z. deeds the land to plaintiff, subject to the contract with K., the deed containing covenants of warranty against acts of the grantor. Later, and on the day the second note is due, K. sells the land to McE., one of the defendants. K. took possession under the contract. Shortly after, plaintiff demanded of K. the payment of the second note, and tendered him a deed from himself (plaintiff) to K., with the covenants mentioned in Z.'s contract. K. said he could do nothing. Plaintiff then formally demanded payment and execution of the mortgage. K. wished to see his attorney. After the third note fell due, plaintiff demanded of McE. payment of the two notes, tendering the deed from Z. to him, (plaintiff) and also a deed from himself to McE., offering also a mortgage to be executed by McE. to secure the third note, and demanding possession. McE. refused: held, that, under the contract, the purchaser was not entitled to possession at once; that payment of the first two notes or tender was a condition

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precedent to his right of possession; that until then, the vendor Z., or his assignee, had the legal title, and could maintain ejectment against the vendee. *Ib.*

19. In an action for the price of goods sold and delivered, there being a warranty as to the quality of the goods, the breach of the warranty may be relied on in defense, by way of recoupment, to mitigate the amount recovered; but it is not available as a complete defense to the action. *Earl v. Bull*, 15 Cal. 425.

20. In such an action, complaint contained two counts: one upon a special contract for the sale and delivery of the goods, the other upon a claim for goods sold and delivered. Answer denied the contract, and the other allegations of the complaint; but set up a contract between the parties somewhat different, containing a guaranty as to quality, and alleging that the quality of the goods was not in accordance with the contract, and the breach was relied on as a complete defense. Evidence was introduced upon all the issues made by the pleadings. The court instructed the jury that, "if the plaintiffs, on the day the contract matured, presented their account and offered to deliver the goods, they fulfilled the contract on their part; and if the defendants did not, within a reasonable time, and within the custom of the trade, make their objection to the article sold, and offer to rescind the contract, they are bound by it, and plaintiffs should recover." Plaintiffs had verdict and judgment for the price: held, that in a subsequent action by the defendants against plaintiffs, on the breach of the warranty, for the difference in value between the goods delivered and those contracted for, the former suit is no bar; that the matter in dispute, to wit, this breach of warranty, was not adjudged; that the instruction of the court took that question from the jury, and directed them to decide the rights of the parties upon other considerations. *Ib.*

WASTE.

1. At common law there is no forfeiture of an estate for years for the commission of waste, but it was made so by the statute of 6 Edward I, and it was expressly confined to the place wherein the waste was committed; but the statute of California confines the remedy to the recovery of treble damages. *Chipman v. Emeric*, 3 Cal. 283.

2. In an action for waste, when treble damages are given by statute, the demand for such damages must be expressly inserted in the declaration, which must either recite the statute or conclude to the damage of the plaintiff against the form of the statute. *Ib.* 240.

3. Injunctions to restrain injuries in the nature of waste should not be issued before the hearing on the merits, except in cases of urgent necessity or when the subject matter of the complaint is free from controversy, or irreparable mischief will be produced by its continuance. But in all cases where the right is doubtful, the court should direct a trial at law, and in the meantime grant a temporary injunction to restrain all injurious proceedings, if there be danger of irreparable mischief. *Hicks v. Michael*, 15 Cal. 116.

4. In cases of waste, if anything is about to be abstracted from the land which cannot be restored in specie, it is no objection to the injunction that the party making it may possibly recover what others may deem an equivalent in money. *Ib.*

5. On application for injunction to restrain waste, or mischief analogous to waste, plaintiff may read affidavits contradicting the answer upon all matters in controversy, including questions of title. *Ib.*
See TRESPASS.

WATER COURSES.

- I. In general.
- II. Appropriation of Water.
- III. Diversion of Water.
- IV. Abandonment of Water.
- V. Injuries caused by Water.

In general.

I. IN GENERAL.

1. The State has absolute right to control, regulate and improve the navigable waters within its jurisdiction as an attribute of sovereignty. *Gunter v. Geary*, 1 Cal. 467; *Eldridge v. Cowell*, 4 Cal. 80.

2. In a controversy between two mining companies, it was competent to prove the execution of certain receipts for water purchased by the plaintiffs, as tending to show the existence of the company, and that it had actually located, and was in operation, at the time the receipts purport to be signed. *Lone Star Co. v. West Point Co.*, 5 Cal. 447.

3. A river, beyond the ebb and flow of the tide, may be navigable when it has sufficient depth and width to float a vessel used in the transportation of freight or passengers; and this has been extended to its capacity to float rafts of lumber. *American River Water Co. v. Amsden*, 6 Cal. 446.

4. To go beyond this, and declare a stream navigable which can float a log, would be to turn a rule intended for the benefit of the public into an instrument of serious detriment to individuals, if not of actual private oppression. *Ib.*

5. The only other instance in which a stream is navigable, is when it is so declared by statute; and when so declared navigable to a certain point, by implication it is declared nonnavigable above that point. *Ib.*

6. Plaintiff made a written contract with the defendants to dig for them a certain mining ditch, to be paid for by the defendants in a specified manner. Plaintiff dug the ditch and subsequently assigned his interest in the contract to L. & Co., to secure them certain payments due, and authorized them to receive the amounts due on the contract until their debt was paid. L. & Co. gave defendants notice of this assignment, and the defendants made several payments thereon: held, that plaintiff had no right to demand payment himself or sue upon the contract, while this assignment was outstanding. *Myers v. South Feather Water Co.*, 10 Cal. 582.

7. A court cannot judicially know that any article, much less water, contracted for at twenty-five cents per inch and proved on a certain day or at certain

times to be worth a dollar an inch, is always, or is at any other time than that proved, worth the sum proved at the given time. *Ib.*

8. Plaintiff contracts to dig a ditch for a water company, the company agreeing to pay three dollars per rod, one-third of it in money on the completion of each mile, the other two-thirds to be paid in water at the rate of twenty-five cents per square inch delivered through an orifice under six inches of pressure, any where along and at the main ditch; the company having the right of paying the two-thirds in cash, instead of water, if they so elect: held, that said two-thirds, if elected to be paid in cash, need not be paid, as the other third, on the completion of each mile. *Ib.* 14 Cal. 277.

9. If payment could be made in water it could not be claimed before the completion of the ditch, and the cash cannot be required sooner. *Ib.*

10. Plaintiff having assigned this contract to L. & Co. as security for a debt due them by plaintiff, they demanded of the company payment of whatever was coming to plaintiff. The company elected to pay and did pay in cash on a statement as of so much money due: held, that even if L. & Co. had no right to receive money instead of water, yet the payment binds the plaintiff, for they were acting ostensibly for him or by his authority; that if he denied their authority the payment would not discharge his debt to L. & Co.; the assignment would remain in force and the plaintiff would have no cause of action here; that if he affirmed the arrangement made by L. & Co. in part, he must confirm the settlement as the liquidation of a money demand. *Ib.*

11. If the company paid L. & Co. more than was due them from plaintiff he must look to L. & Co. The assignment being general, L. & Co. were authorized to receive the entire amount, and became trustees of plaintiff for the excess. *Ib.*

12. A person has no right to construct a ditch through the inclosure of another without his consent. *Weimer v. Lowery*, 11 Cal. 112.

13. Plaintiff entered into a contract with defendants, by which the latter purchased of the former certain ditches for \$14,500, payable \$5,000 in cash, and \$12,000 as follows, to wit: the expenses of

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keeping said ditches in good order, of employing agents to attend to the same, being first deducted from the proceeds of the sale of water, the balance of the proceeds was to be applied to the liquidation until the whole was paid, "and to hasten and make certain the timely and early payment of said sum of money, by the sales as aforesaid, said company promise to furnish from their ditch, to be used in the above named ditches, so much water, which, added to the water supplied to said ditches from other sources, shall be sufficient to effect sales to the amount of \$1000 per month; and when said company shall fail to furnish water as aforesaid, the said company hereby obligate themselves to pay to said Blen, interest at the rate of ten per cent. per annum on said monthly deficiency until met by receipts from sales over and above the said \$1000 per month: held, that this contract is not an agreement on the part of defendants to pay the balance over the \$2,000 only from the proceeds of the ditches named therein; but that it is a guarantee on their part that the mode of payment prescribed shall be effectual to pay the debt within a given time. *Blen v. Bear River and Auburn W. and M. Co.*, 15 Cal. 99.

14. The company were bound, by the contract, to furnish and sell the stipulated quantity of water, and apply the proceeds monthly to the payment of plaintiff's claim, and failing to do this, were responsible in damages. *Ib.*

15. The last clause in the contract does not give defendants a right to refuse to supply this water, but simply provides a measure of damages for the breach of it. *Ib.*

II. APPROPRIATION OF WATER.

16. The foundation of a right to water is the first possession, and this is unfructuary and consists not so much in the fluid itself as in its use. The owner of the land over which it flows has the right to use it during its passage, but not in the corpus of the water, except while it continues in his possession. *Eddy v. Simpson*, 3 Cal. 251.

17. From the policy of our laws it has been held in this State that the right to

running water exists, and without private ownership of the soil, and upon the ground of prior location upon the land, or prior appropriation and use of the water. *Hill v. Newman*, 5 Cal. 446.

18. The right to water must be treated in this State as a right running with the land, and as a corporeal privilege bestowed upon the occupier or appropriator of the soil. *Ib.*

19. The erection of a dam across a natural water course is an actual appropriation of the water at that point, but not below it, even though the water flowing over the dam is brought into the water course by canals constructed by the owners of the dam. *Kelly v. Natoma Water Co.*, 6 Cal. 108.

20. Possession or actual appropriation must be the test of priority of all claims to the use of water, wherever such claims are not dependent on the ownership of the land through which the water flows. Such appropriations cannot be constructive. *Kelly v. Natoma Water Co.*, 6 Cal. 108; *Hoffman v. Stone*, 7 Cal. 48; *Macris v. Bicknell*, 7 Cal. 262.

21. In constructing canals, under the license of the State, the survey of the ground, planting stakes along the line, giving public notice, and actually commencing and diligently pursuing the work, is as much possession as the nature of the subject will admit, and forms a series of acts of ownership which must be conclusive of the right. *Conger v. Weaver*, 6 Cal. 558.

22. The inclosure of the ground used in digging a canal, not being necessary for the work, would give its proprietors no higher rights, nor is it necessary, as notice to those who have received actual notice of the intended line of the canal. *Ib.* 559.

23. Where the owners of a ditch had commenced their ditch, and run their line before the location and appropriation of a lot of land by the plaintiffs, who sued them for trespass thereon: held, that a slight divergence in the construction of the canal from the original line, after the plaintiffs' location and appropriation, both lines running equally through the plaintiffs' claim, was no trespass in constructing the ditch on the new line, and if the plaintiffs suffered no actual injury by the change, it was *damnum absque injuria*. *Ib.*

24. The natural water in a dry ravine used to conduct water belongs to the first

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appropriator thereof, and for either a diversion or appropriation thereof an action will lie. *Hoffman v. Stone*, 7 Cal. 49.

25. Merely cutting a ditch for a dam and using the water for no useful purpose gives no priority; but where the ditch is made for the purpose of using the water, the right thereto dates from the commencement of the work, and the mere change in the use of the water from one locality to another does not forfeit the right. *Maeris v. Bicknell*, 7 Cal. 263.

26. Where a ditch was cut by the grantors of the plaintiffs for the purpose of drainage simply, and not with the bona fide intention of appropriating the water thus diverted to some useful object, and the ditches of defendant were built for the express purpose of taking said water, and did do so: held, that thereby they gained a priority over the grantors of plaintiffs and all persons holding under them. *Ib.*

27. Where a party stands by and sees a ditch owner appropriate the water of a creek to his own use at a great expense, and does not inform him of his claim to the water, he and his vendees are estopped from afterward claiming the water. *Parke v. Kilham*, 8 Cal. 79.

28. The line where a ditch is actually intended to be dug, should be run within a reasonable time after the line of preliminary survey has been run, in order to make the right of the ditch owner date back to the survey. What is a reasonable time must depend upon the circumstances of the case. *Ib.*

29. Rights to the use of water become fixed after five years adverse enjoyment of the same. *Crandall v. Woods*, 8 Cal. 144.

30. A notice of intention to appropriate the waters of a certain stream is evidence of possession, but of itself alone is not sufficient. Taken with other acts it amounts to sufficient evidence. *Thompson v. Lee*, 8 Cal. 280.

31. The first appropriator of water for mining purposes is entitled to have the water flow without material interruption in its natural channel. *Bear River and Auburn W. and M. Co. v. New York Mining Co.*, 8 Cal. 330.

32. He is entitled to the water so undiminished in quantity as to leave sufficient to fill his canal or ditch as it existed at the time of subsequent appropriations of the stream above him. *Ib.* 332.

33. But as to the deterioration in the quality of the water by reason of being used for mining purposes before it reaches the ditch of the prior locator, it must be deemed *damnum absque injuria*. *Ib.* 333.

34. The right of the first appropriator of water is equally protected from damage occasioned by subsequent locators above him as well as below. *Hill v. King*, 8 Cal. 336.

35. Where parties have appropriated the prior right to the use of the water of a stream by the commencement and partial completion of a ditch and flume, they have the right to use so much of the waters of the stream as are necessary to preserve their flume from injury while in the process of construction. *Weaver v. Conger*, 10 Cal. 238.

36. Where parties projecting a ditch to convey water, give notice to the world of their intention to dig such ditch and appropriate such water in the usual manner, and mark out and designate the line of such ditch by the usual marks and indications, and pursue the work on the ditch with a reasonable degree of diligence until the same is completed so as to receive the water, they are entitled to such water as against all persons subsequently claiming or locating it. *Kimball v. Gearhart*, 12 Cal. 49.

37. Possession or actual appropriation is the test of priority in all claims to the use of water, where such claims are dependent upon the ownership of the land through which the water flows. *Ib.*

38. In appropriating unclaimed water on the public lands, only such acts are necessary and such indications and evidence of appropriation required as the nature of the case and the face of the country will admit of, and are under the circumstances and at the time practicable; surveys, notices, stakes and blazing of trees, followed by work and actual labor, without abandonment, will, in every case where the work is completed, give title to the water over subsequent claimants. *Ib.*

39. The title to the water conveyed through a ditch constructed in such manner will, on completion of the work, date back from the beginning of the work as against subsequent appropriators. *Ib.*

40. The mere act of commencing a ditch with the intention of appropriating the water, is not sufficient of itself to give a

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party exclusive right to the water of such stream. The notice of the intention to appropriate the water must be sufficient to put a prudent man on inquiry. *Ib.*

41. The doctrine of relation in the appropriation of water, only applies when the first acts from which the party appropriating seeks to date his right to indicate the intention of appropriating such water. *Ib.* 50.

42. Where parties commence the construction of a ditch who have not at the time the pecuniary means to complete the same in a reasonable time, and they project the work and claim the water with a full knowledge of their pecuniary inability to complete the same within a reasonable time, they cannot urge such want of means as an excuse for not prosecuting the work. *Ib.*

43. Any contract executed which passes the equitable right to a ditch and the use of the water appurtenant to or connected with the ditch as the property of the grantee is enough to insure to him the rights for which he stipulated as against an adverse claimant. *Ortman v. Dixon*, 13 Cal. 36.

44. A prior appropriator of the water of a stream for mill purposes is entitled to it to the extent appropriated, and for those purposes, to the exclusion of any subsequent appropriation of it for the same or any other purpose. *Ib.* 38.

45. The extent of the right depends on the nature and uses of the appropriation. If he suffers a portion of the water or the body of it, after running through the mill, to go on down its accustomed course, persons below may appropriate this residuum so as to make it a vested right. *Ib.* 39.

46. No distinction can be drawn between a mill owner and a miner as to their rights in appropriating water. *Ortman v. Dixon*, 13 Cal. 391; *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 233.

47. Whether plaintiffs—who had posted notices claiming the water of a certain river, and stating their intention to construct a ditch or flume, and appropriate the water for mining purposes—began their surveys, etc., and prosecuted their work to completion with due diligence, as against parties attempting subsequently to appropriate the water, is a question for the jury, and their verdict, on conflicting

testimony, will be conclusive. *Weaver v. Eureka Lake Water Co.*, 15 Cal. 273.

48. Suit by plaintiffs as prior appropriators of the waters of Middle Yuba river, for damming up and diverting the water of three lakes situated one above the other, opening into each other, and discharging their water into the Middle Yuba river through the same channel, which is about a mile long, and is called "lake stream." The quantity of water varies with the seasons. Sometimes the stream is a torrent, and sometimes it is almost or quite dry. Defendants, to create a supply for their ditch during the summer, erected a dam at the outlet of each lake, converting it into a sort of a reservoir, from which the water was drawn as needed, contending that the circumstances justified the erection of the dams, and that the great value of the lakes as reservoirs justified the injuries resulting to plaintiffs: held, that there is no law for such position; that if the injuries to plaintiff were trivial, they would be *damnum absque injuria*, but that the legal superiority of conflicting rights cannot be determined by a comparison of their value. *Ib.* 274.

49. To render valid a claim of water by appropriation, the claim must be for some useful or beneficial purpose, or in contemplation of a future appropriation for such purpose by the parties claiming it. A claim for mere speculation will not answer. *Ib.* 274.

III. DIVERSION OF WATER.

50. If the water of the stream A be diverted by C and used by him, and then flow into stream B, it is lost to its first possessor, and he has no right to the increase of the stream. *Eddy v. Simpson*, 3 Cal. 251.

51. Justices of the peace have no jurisdiction to try a cause where there is an alleged injury arising out of a diversion of water from the natural or artificial channel in which it is conducted. *Hill v. Newman*, 5 Cal. 445.

52. Possession of pueblo land gives the right to use the water flowing through it for natural wants, but does not confer the right to divert it, and prevent its running upon the adjoining land of another who

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has taken the same up subsequently, but before the attempt to change the course of the water. *Crandall v. Woods*, 8 Cal. 141.

53. In an action for damages for the diversion of water from the plaintiff's ditch, the defendants denied the diversion, and alleged that the water used by them was used by agreement between the Volcano Water Co. and themselves, and that the water came from the reservoir of the Volcano Water Co. On the trial, after the plaintiffs had introduced in evidence the judgment wherein the right to the use of the water had been adjudged between the plaintiffs and the Volcano Water Co., and offered to prove by oral testimony that the water used by defendants is the same water that was in controversy in that suit: held, that such evidence was proper and should have been admitted, as there was no other means than by parol of establishing this fact. *Walsh v. Harris*, 10 Cal. 392.

54. The policy of the State, as indicated by her legislation, in conferring the privilege to work the mines, equally confers the right to divert the streams from their natural channels. *Irwin v. Phillips*, 5 Cal. 145.

55. At common law the diversion of water courses could only be complained of by riparian owners who were deprived of the use, or those claiming directly under them. *Ib.*

56. Miners are to be protected in their rights in the possession of their selected localities, and the rights of those who by prior appropriation have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. *Ib.* 146.

57. If a miner locates upon a stream, the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection. *Ib.* 147.

58. A general allegation in a complaint for the diversion of water, that plaintiffs

were entitled to all the water flowing into the cañon at the head of their ditch, entitles them to prove a diversion of water from the smaller branches of the cañon supplying water to that point. *Priest v. Union Canal Co.* 6 Cal. 171.

59. Where the complaint alleged that the defendants had dug a mining ditch above one previously constructed by defendants, and had thereby diverted the water of the stream from plaintiff's ditch, but did not aver that the injury was continuing, or threatened to be continued, or likely to be continued: held, that it was sufficient for the recovery of damages, but not to sustain an injunction. *Coker v. Simpson*, 7 Cal. 341.

60. To turn aside a useful element from premises is as much a nuisance as to turn upon them a destructive element. *Parke v. Kilham*, 8 Cal. 79.

61. Actions for the diversion of the waters in ditches are in the nature of actions for the abatement of nuisances, and may be maintained by tenants in common in a joint action. *Ib.*

62. A ditch to convey off water rightfully flowing to a mining claim is as much a nuisance as a dam to flood it. *Ib.* 80.

63. A complaint alleging that plaintiffs are the owners and in possession of certain mining claims on a certain stream, which had been diverted, to their injury, by defendants, sets forth a sufficient cause of action. It is not necessary that the complaint should further allege an appropriation of the water, or an ownership thereof. *Leigh Co. v. Independent Ditch Co.*, 8 Cal. 323.

64. A complaint alleging plaintiffs had for a long time conveyed water from a stream for mining purposes by means of a ditch, and had thus acquired a prior right to the enjoyment and use of the water, and were in the peaceable possession thereof when defendants wrongfully diverted the same and deprived plaintiffs thereof, and were continuing so to do, is sufficient to maintain a prayer for an injunction. *Tuolumne Water Co. v. Chapman*, 8 Cal. 397.

65. The allegation in the complaint that defendants wrongfully claim some pretended or fictitious right to the use of the water, does not prejudice the right of the plaintiffs to the injunction. *Ib.*

66. No equitable remedy can be had for

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a mere past diversion of a water course; but when the injury is continuing, relief may appropriately be sought in equity. *Ib.* 398.

67. Where the defendants had constructed a ditch for mining purposes, and the plaintiffs had subsequently constructed another, taking its water from the same stream, and brought suit for damages sustained by reason of an enlargement of defendants' ditch, made after the commencement of plaintiffs' ditch, causing a diversion of a great quantity of water, and praying for an injunction: held, that defendants are not limited to the quantity of water turned into their ditch in the first instance, unless by the general plan, size and grade of the ditch it was not capable of carrying more water than was then diverted. *White v. Todd's Valley Water Co.*, 8 Cal. 444.

68. If by reason of obstructions in the ditch, or irregularity in the grade at that time, it was not capable of diverting as much water as its general size would indicate, the defendants would have a reasonable time to adjust the grade and remove such obstructions, and then fill the ditch to its capacity. *Ib.*

69. But if they continued to divert only the original quantity of water long enough to indicate that they only intended to divert that amount, or failed for an unreasonable length of time to remove the obstructions or adjust the grade, they would be limited to the amount thus diverted, and plaintiffs would be entitled to the residue. *Ib.*

70. Where a suit is brought to test the question as to the priority of appropriation of water, a prayer for an injunction to prevent future injury is proper. *Marius v. Bicknell*, 10 Cal. 224.

71. In an action to try the right to the use of water and for damages for diverting it, where the amount for which judgment is given is less than two hundred dollars, it will carry costs. *Ib.*

72. In an action for diverting water from the plaintiff's ditch, and where both parties claimed in part the waters of the same stream: held, that the following instruction was properly given by the court: "That defendant is not liable for any deficiency of water in plaintiff's ditch, unless he was diverting from Rabbit Creek more water than he was entitled to at the pre-

cise time that such deficiency existed." *Brown v. Smith*, 10 Cal. 511.

73. So where the court instructed the jury that if they believed that defendant's ditch was so filled with tailings during the period of the alleged injury, that it was incapable of diverting the waters of the creek, then plaintiff cannot recover. *Ib.*

74. The first appropriator of the water of a stream passing through the public lands in the State, has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purposes of its appropriation. To this extent his rights go, and no further. In subordination to those rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle its waters with other waters and divert an equal quantity as often as they choose. *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 153.

75. In an action for damages for the diversion of water from the plaintiff's ditch, the deposition of one of the owners in the ditch was taken by the plaintiff, and subsequently, and before the trial, the witness conveyed by deed his interest in the ditch to plaintiff: held, that such deed of conveyance did not pass the witness' right to the damages, and hence he was an incompetent witness. *Kimball v. Gearhart*, 12 Cal. 46.

76. The subsequent deed to plaintiff, though it carried the property and the future use of the water, did not retract and carry the right to damages for the past illegal use of it, any more than a deed of land carries the remedies for past trespass. *Ib.* 47.

77. The mere right to water is a sort of incorporeal thing, but the water itself is substantial and tangible, and as the right gives the control and possession of this commodity, and entitles the party to damages for its diversion by another, we do not see why this right may not be acquired by two or more acting together, or why, when they do acquire it, they do not hold it as other property, and may not sue as such for any unlawful interference with it. *Ib.*

78. Where parties go to issue in actions for the diversion of water upon general averments and denial of title, anything

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that legally supports or attacks the title is admissible in evidence. *Ib.* 49.

79. In an action of damages for diverting the water of a river from plaintiff's mill, an averment in the complaint of possession of the land and mill is sufficient against a trespasser, without averring riparian ownership or prior appropriation of the water. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230..

80. V. erects a mill and acquires a water right in 1850. In 1851 defendants appropriate for ditch purposes water from the same stream, forty miles above the mill. In 1854, plaintiffs, M. & B., succeed to the possession of V.: held, that plaintiffs may possibly recover damages for the diversion of water in their possession without connecting themselves with the title of V. back to 1850; that defendants' appropriation in 1851 could only be of the water not appropriated by V., there being no abandonment, and that M. & B. can jointly maintain an action for damages accruing after they came into possession. *Ib.* 236.

81. In an action for diverting water from plaintiff's ditch, plaintiff and defendants both having ditches supplied from the same stream, the plaintiff's rights being prior and paramount, defendants asked the court to instruct the jury, that if defendants had brought water from foreign sources, and emptied into the stream with the intention of taking it out again, they had the right to divert the quantity thus emptied in, "less such amount as might be lost by evaporation, and other like causes." The instruction was given, with the explanation, that they could not so reclaim the water as to diminish the quantity to which plaintiff was entitled as prior locator: held, that the explanation was proper, the concluding words of the instruction being too general and indefinite. *Burnett v. Whitesides*, 15 Cal. 37.

82. The jury having found plaintiff entitled to the use of so much of the water flowing in the stream as would run in a ditch of a certain capacity, a judgment was entered, following the verdict: held, that the judgment is not erroneous as not distinguishing between the water ordinarily flowing in the stream and the water from foreign sources emptied in by defendants. The law regulates the rights of the parties in this respect, and the judg-

ment must be construed with reference to such law. *Ib.*

83. Plaintiffs file their bill in equity to enjoin the defendants from diverting a certain quantity of the water from Bear river, alleging that their right to one thousand inches of the water of that stream, as against defendants, was adjudicated in a former action. In that action, which was trespass for the diversion of the water, it was alleged that this quantity of the water of the stream had been appropriated by the plaintiffs for mill purposes; that such quantity was necessary for their use, and that defendants had diverted the same, to their damage, etc. Plaintiffs had verdict and judgment for \$21,800 damages: held, that the averments are insufficient to entitle plaintiffs to an injunction; the scope of the bill being simply to enforce in equity plaintiff's alleged right to one thousand inches of water, on the sole ground that it was adjudged as their right in the former suit. *McDonald v. Bear River and Auburn Water and Mining Co.*, 15 Cal. 148.

84. Held, further, that plaintiffs should be permitted, if they desire, so to amend their complaint as to present for determination their legal rights, otherwise the complaint should be dismissed. *Ib.*

85. Running water, so long as it continues to flow in its natural course, cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property, but this right carries with it no specific property in the water itself. *Kidd v. Laird*, 15 Cal. 179.

86. The owner of a ditch has the exclusive and absolute power of control, and right of enjoyment of the water diverted by and flowing in his ditch; but whether such water be his private property, it is not necessary to decide. *Ib.*

87. A person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others be not injuriously effected by the change. *Ib.*

88. This right so to change the point of diversion does not depend upon how the right to use the water was acquired, whether by express grant or by prescription; or whether it rests in the parol license, or the presumed consent of the

Abandonment of Water.—Injuries caused by Water.

proprietor. The difference as to the source of the right relates to the mode of determining its existence and extent, and not to the manner of its exercise and enjoyment. *Ib.* 180.

89. In this case, the rights of both parties, as fixed by the priority and extent of their respective appropriations, though not founded on the legal title, are as perfect and absolute as if acquired by prescription, or express grant from the riparian owner. *Ib.* 183.

IV. ABANDONMENT OF WATER.

90. Where water from an artificial ditch is turned into a natural water-course, and mingled with natural waters of that stream to conduct it to another point to be used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural streams to the injury of rights previously acquired therein. *Hoffman v. Stone*, 7 Cal. 49; *Merced Mining Co. v. Fremont*, 7 Cal. 325; *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 151.

91. A ditch company who avail themselves of a dry ravine to conduct their water a portion of the distance to their dam where they use it, do not abandon the water thus carried by them, and are entitled to the same enjoyment of it as if conducted through an artificial ditch. *Hoffman v. Stone*, 7 Cal. 49.

92. We will not presume an abandonment of property in a dam and ditch for mining purposes from the lapse of time. *Patridge v. McKinney*, 10 Cal. 183.

93. Where water from an artificial ditch is turned into a natural water-course and mingled with natural waters of the stream for the purpose of conducting it to another point to be there used, it is not thereby abandoned, but may be taken out and used by the party thus conducting it, so that he do not in so doing diminish the quantity of the natural waters of the stream to the injury of those who have previously appropriated such natural waters. *Butte Canal and Ditch Co. v. Vaughn*, 11 Cal. 151.

94. The burden of proof devolves on the party thus mingling the water belonging to

him with that appropriated by others. He can only claim such quantity to which he establishes his right by decisive proof. The enforcement of his right must leave the opposite party in the use of the full quantity to which he was originally entitled. *Ib.* 152.

95. The prosecution of the purpose to appropriate water for mining uses is a necessary element of title; and the negation of this, the abandonment of the purpose, is not so much matter of avoidance in title as it is matter showing that no title was ever obtained. *Kimball v. Gearhart*, 12 Cal. 50; *McGarrity v. Byington*, 12 Cal. 431.

96. The mere fact that a party chose to apply water which he had a right to use in mining, in whole or in part, if he so chose, in sawing timber and grinding wheat, is no abandonment of his title to it. *McDonald v. Bear River and Auburn W. & M. Co.*, 13 Cal. 237.

V. INJURIES CAUSED BY WATER.

97. A prior locator of a mining claim on the bank of a stream has a right to use the bed of the stream for the purpose of fluming or working his claim, and any subsequent erection, dam or embankment, which will turn the water back upon such claim or hinder it being worked with flumes, or other necessary means or appliances, is an encroachment upon the rights of said party, and he is entitled to recover the damages consequent upon such obstructions. *Sims v. Smith*, 7 Cal. 150.

98. Where the plaintiff sued for an injury to his mining claim, by the breaking of defendant's canal, which was constructed prior to the location of plaintiff's claim, neither party claiming ownership of the soil, and no negligence in fact being shown other than that which the law would presume from the breaking of the ditch: held, that the rights of the parties were acquired at the dates of their respective locations, and that rule of coming to a nuisance may be applied. *Tenney v. Miners' Ditch Co.*, 7 Cal. 339.

99. There is no doubt that the ditch owners would be responsible for wanton injury or gross negligence, but they are not liable for a mere accidental injury,

Injuries caused by Water.

where no negligence is shown, to a miner locating along the line subsequent to the construction of the ditch. *Ib.* 340.

100. A complaint which alleges that the plaintiffs were on a certain day owners and proprietors of a certain valuable water ditch, for the purpose of conveying water, and at which time and place the defendants were also the owners of a certain other water ditch, for the purpose aforesaid, and that afterwards on the same day and year, at, etc., aforesaid, the said defendants' ditch was so badly and negligently constructed and managed, that the water therein flowed over and upon the ditch of plaintiffs, greatly damaging and injuring the same, and carrying down therein and thereon great quantities of rock, stone, earth and rubbish, and breaking said plaintiffs' ditch to the damage of \$3,000, and thereof they bring suit, is sufficient. *Tuolumne County Water Co. v. Columbia and Stanislaus Water Co.*, 10 Cal. 195.

101. In an action for damages for breaking of defendants' dam and flooding the plaintiffs' mining claim, where the complaint is in one count and charges "that the defendants' said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of said defendants, broke away," etc.: held, that the complaint is sufficient. *Hoffman v. Tuolumne Water Co.*, 10 Cal. 416.

102. Whether such negligence arose from the want of care in constructing the dam, or want of care in letting off the water, is not sufficiently material, under our system of pleading, to require separate counts. *Ib.* 417.

103. In such a case, where the court instructed the jury "that if they believe that the dam was improperly or artificially constructed, or that defendants could have constructed it in a better or more substantial form so as to prevent its breaking, then they are liable:" held, that such charge is too broad, and the court erred in giving the same. The question is not what the plaintiffs could have done, but what discreet or prudent men should do, or ordinarily do in such cases, where their own interests are to be affected. *Ib.*

104. If the dam were to break without any negligence, or through inevitable accident, it would be the duty of the party to

repair it and stop the injury as soon as practicable. *Ib.* 418.

105. The mere fact that the rock upon which the timbers of the dam lay presented outwardly a solid appearance, etc., does not necessarily show due diligence in making it a foundation, since many other circumstances, such as the knowledge by the defendants, or the builder, of the character or qualities of such rock, or a knowledge of it from testing it, etc., might still show it was unsafe for this purpose. *Ib.*

106. The owner of a ditch is bound to use that degree of care and caution in its construction and management, to prevent injury to others, which ordinarily prudent men use in like instances when the risk is their own. *Wolf v. St. Louis Independent Water Co.*, 10 Cal. 544.

107. The question of negligence in the management of such property, and the degree of it, must necessarily depend in a great measure upon the surrounding facts, such as the existence and exposure of property below the dam, and the like, for what under one state of facts would be prudence, might under a different condition of things be gross or even criminal negligence. *Ib.* •

108. In an action for injuries to a mining claim, a claim for damages to the plaintiff by reason of the breaking away of the defendants' dam, and the consequent washing away of the pay dirt of the plaintiff, may properly be joined with a claim for damages in the preventing plaintiff from working his claim. *Fraler v. Sears Union Water Co.*, 12 Cal. 558.

109. Action for damages to a mining claim by overflow and leakage from defendants' ditch. To question by plaintiff to one of his witnesses, "Did you see water splashing over the flume?" he answered "yes." Defendant, on cross-examination, proposed to ask, "whose water was that you saw splashing over the flume?" held, that the question was proper, even though it went to the ownership of the water. *Jackson v. Feather River and Gibsonville Water Co.*, 14 Cal. 23.

110. Each person, mining in the same stream, is entitled to use, in a proper and reasonable manner, both the channel of the stream and the water flowing therein. Where, from the situation of different claims, the working of some will necessarily

result in injury to others, if the injury be the natural and necessary consequence of the exercise of this right, it will be *damnum absque injuria*, and will furnish no cause of action to the party injured. The reasonableness in the use is a question for the jury, to be determined by them upon the facts and circumstances of each particular case. *Esmond v. Chew*, 15 Cal. 142.

111. Plaintiffs owned certain mining claims in the bed or channel of a stream. Defendants owned claims in the same stream, above and adjoining the claims of plaintiffs, defendants' claims being located first. Defendants constructed a flume, running from their own claims to and upon plaintiffs' claims, and through this flume a large quantity of the tailings was deposited on plaintiffs' claims, to their great damage. The flume was constructed for the purpose of working defendants' claims; was proper and necessary for that purpose, and the deposit of tailings was occasioned by the ordinary working of the claims. The court instructed the jury, that a person first locating a mining claim in the bed of a stream is entitled to the channel below as an outlet, and that when such outlet, from the usual mining operations above, becomes obstructed, he may open the same; and if he can do so by no other means, may construct a flume down the channel as far as necessary, and as far as it can be constructed without considerable damage to the claims subsequently located: held, that the instruction was wrong; that the defendants were not entitled, as matter of strict legal right, to an easement upon plaintiffs' claims for the purposes mentioned; that the doctrine that, under certain circumstances, one person may have a right of way by necessity over the land of another, does not apply to this case; and further, that this court does not recognize the doctrine, that one person can go on the land of another and erect thereon buildings or other structures; and that mining claims stand on the same footing in this respect as other property; that if the acts of defendants were authorized by any local custom or regulation, its existence should have been averred and proved. *Ib.*

WATER LOTS.

1. In the plan of the city of San Francisco, the survey into blocks, lots and streets extended into the tide waters in front of the city, the object of which was to reach a sufficient depth of water on the land line for the convenience of shipping, and it necessarily anticipated that the water lots would be filled up to a level, suitable for building and land carriage. *Eldridge v. Cowell*, 4 Cal. 87.

2. The act of March 26th, 1851, which requires the city of San Francisco to deposit in the office of secretary of State a map of the water lot property granted to the city by the act, does not make such map conclusive evidence of the extent of said property: as the boundaries are completely specified in the act, the question of what was the water line of the city at the date of the act is one of fact. *Cook v. Bonnet*, 4 Cal. 398.

3. Alcalde grants of beach and water lots in San Francisco, not recorded on or before the third of April, 1850, in some book of record in the possession or under the control of the recorder of San Francisco, are void. *Chapin v. Bourne*, 8 Cal. 294.

4. The act of the twenty-sixth of March, 1851, granted to the city of San Francisco certain beach and water lot property in San Francisco for ninety-nine years. The sale by the State board of land commissioners under the act of May 18th, 1853, passed nothing but the reversionary interest of the State. *Ib.*

5. The pueblo regulation, forbidding grants within two hundred varas of the bay to be made, had reference only to a portion of the present city front. *Norton v. Hyatt*, 8 Cal. 540.

6. The proviso in the act of March 26th, 1851, granting certain beach and water lot property in San Francisco to the city, that the city shall pay into the State treasury, within twenty days after their receipt, twenty-five per cent. of all moneys arising in any way from the sale or other disposition of the property, is not a condition either precedent or subsequent annexed to the grant. *Holladay v. Frisbie*, 15 Cal. 634.

7. Nor does the proviso create a trust in the city in favor of the State, so far as

Water Lots.—Way, Right of.

the property itself is concerned; that is to say, the estate granted is not, by force of the proviso, held in trust partly for the benefit of the State. The interest of the city in the property is a legal estate for ninety-nine years. When the property is once sold or disposed of by the city, it is not charged with the payment of the percentage in the hands of the grantee or purchaser. That is a duty devolving on the city, with which the grantee or purchaser has no concern. *Ib.*

8. If there be any trust created by the proviso, it is only a trust in the one-fourth of the proceeds which the city may receive, amounting only to a covenant on the part of the city, which in no wise qualifies the grants or affects the legal estate of the city in the premises. *Ib.*

9. The beach and water lot property mentioned in the act is not devoted by the grant to any specific public purposes, or made subject to the performance of any trusts by the city. The interest of the city is absolute, qualified by no conditions and subject to no specific uses. It is a leviable interest, subject to sale under execution. *Ib.* 635.

10. The proviso to the act operates only as a covenant on the part of the city, that if she make any sale or other disposition for any moneys, twenty-five per cent. of the same shall be paid into the State treasury. On the other hand, if the property be disposed of without the receipt of any moneys by the city, no obligation arises in favor of the State. *Ib.* 636.

11. *Smith v. Morse*, 2 Cal. 524, deciding that the city's interest in this beach and water lot property can be sold on execution against the city, not to be disturbed; but any rights which "the commissioners of the funded debt of the city of San Francisco," under the act of May 1st, 1851, may possess in the property, are not passed on. *Ib.* 637.

12. Whatever interest the city of San Francisco, as defined by the charter of 1851, had in her beach and water lot property on the first day of January, 1755, was transferred to and vested in the parties who were in the actual possession thereof on that day, provided their possession was continued up to June 20th, 1855, or if interrupted by an intruder or trespasser, had been or might be recovered by legal process, by virtue of the Van Ness ordinance

and the act of March 11th, 1858, ratifying and confirming the same; and such parties can defeat the claim of plaintiff, who holds under a conveyance by the president and two members of the board of land commissioners, created by act of May 18th, 1853, providing for the sale of the State's interest in the property within the water line front, as defined by the act of March 26th, 1851. *Ib.*

13. The interest of plaintiff derived from a conveyance of the commissioners under the act of May 18th, 1853, is only to the reversion after the ninety-nine years designated in the act of March 26th, 1851. *Ib.* 638.

14. A purchaser of beach and water lot property at a sheriff's sale, in August, 1851, on execution issued upon a judgment recovered in January, 1851, against the city of San Francisco, acquired a title, if a judgment became a lien upon the property sold, previous to the act of May 1st, 1851, and the conveyance from the commissioners of the sinking fund to the commissioners of the funded debt. *Wheeler v. Miller*, 16 Cal. 125.

15. In this case, as the record does not show that the judgment ever became such lien, the decision, giving title to the purchaser, must be taken without reference to any rights which the commissioners of the funded debt may possess. They are not parties, and as to their rights no opinion is here expressed. *Ib.*

WAY, RIGHT OF.

1. The owner of a building leased a portion of it, there was access to the part reserved without going through the part leased: held, that the lessee had no implied right of way to the part reserved through any portion of the lessee's premises. *Ramirez v. McCormick*, 4 Cal. 246.

WEIGHTS.

1. Where a county is already in possession of a set of weights and measures according to law, it cannot be held liable for a new set purchased by the deputy sealer of weights and measures. *Lery v. Supervisors of Yuba County*, 13 Cal. 636.

WHARF.

1. A mere right to collect wharfage and dockage for a certain term of years is neither real estate nor personal property, but a franchise or incorporeal hereditament, an uncertain profit issuing out of a realty, and this property is not taxed by the revenue law of 1851. *Dewitt v. Hays*, 2 Cal. 468.

2. Where a municipality have the right to erect, repair and regulate wharves and the rates of wharfage, and the banks of the river in front of the city are dedicated to the public, it follows that the right to collect wharfage devolves on the corporation. *City of Sacramento v. Steamer New World*, 4 Cal. 43.

3. Wharfage is applied to a charge for landing goods, whether upon an artificial bank or a natural landing. *Ib.*

4. An action for wharfage can be maintained, although the law imposing it speaks only in terms of a charge for arrivals. *City of Sacramento v. Steamer Confidence*, 4 Cal. 45.

5. The proprietor of a wharf may insist on compensation for the use made of his wharf above the line of low water, but no compensation can be obtained for that part of the wharf below the line of low water. *Gunter v. Geary*, 1 Cal. 469.

6. The premises in dispute are leased for six years. The provisions of the lease were that the lessees should build a wharf on the land, but stipulated for no particular time: held, that the lessor, before the expiration of the term, could have no legitimate cause for complaint. *Chipman v. Emeric*, 5 Cal. 51.

7. A wharf company is bound to keep

its wharf in proper condition, and is liable for losses sustained by reason of its neglect to do so. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 256.

8. Under the act of 1852 incorporating the town of Oakland, the corporate and municipal powers were lodged in a board of trustees. The board had power "to lay out, make, open, widen, regulate and keep in repair, all streets, bridges, ferries, public places and grounds, wharves, docks, piers, slips, sewers and alleys, and to authorize the construction of the same." Under this clause the board, by ordinance, gave defendant the exclusive privilege of laying out, establishing, constructing and regulating wharves, etc., within the city, for thirty-seven years: held, that the ordinance was void as being a transfer of the corporate powers of the board; and that the present city of Oakland being the successor in law of the town of Oakland, can come into equity to have the ordinance declared void, and the wharves, etc., held by defendants thereunder delivered up. *City of Oakland v. Carpentier*, 13 Cal. 549.

9. Bill for an injunction to restrain defendants from taking possession of certain real estate—a warehouse and wharf. Complaint avers plaintiff's title to the property and their possession; that defendants have conspired together, and are threatening to take by force the property from plaintiffs, and are making preparations, and are using violent means to drive plaintiffs and their workmen from the premises; that plaintiffs are in possession of teams, carriages, etc., for transporting goods from said warehouse and wharf to Los Angeles, as a business connected with said premises, and that, unless defendants are restrained from executing their threats, plaintiffs will be ruined in their business, and their property be destroyed: held, that these allegations are insufficient to authorize an injunction—there being no averment of insolvency of defendants, and the complaint not showing that there is no adequate remedy at law, and that in such case, forcible entry and detainer would be a speedy mode of regaining the possession, if taken by defendants, and for other damages the usual proceedings at law would suffice. That the premises are used in connection with the transportation business, which would be interrupted by the

threatened trespass, is not alone a ground for equitable interference. *Tomlinson v. Rubio*, 16 Cal. 206.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. Where a will was executed in 1846, by a Mexican citizen in California before the judge of the place, who certified at the foot of the will that the testator was possessed of his entire judgment and understanding, and retained his perfect memory, it was held that the person contesting the will must establish the contrary. *Pa-naud v. Jones*, 1 Cal. 498.

2. Evidence may be offered to prove a custom that no more than two witnesses were necessary to the validity of a will. *Ib.* 500.

3. Wills, under the Spanish law, were divided into open and nuncupative, and sealed or written wills. *Ib.* 501.

4. The law, wisely, does not require the same formalities and strictures of proof in respect to an open will as in the case of a sealed testament, for there would not be the same danger of forgery and imposition. *Ib.* 502.

5. A nuncupative will may be made viva voce and dictated, and need not be signed by the testator. *Ib.* 503.

6. An executor named in a will, who is neither heir nor legatee, may be a witness to the execution of a will. *Ib.* 505.

7. A will is valid although one of the subscribing witnesses was an alcalde of the place. *Ib.*

8. The formalities and necessity of opening and publishing a sealed will, considered. *Ib.* 507.

9. The observance of formalities in respect to proving an open or nuncupative

will seems to be a useless ceremony where the will has been made openly, and published by the testator during his lifetime. *Ib.* 508.

10. Where two executors are named in a will, both must necessarily join in the execution of the powers conferred therein but the testator may confer upon each of his executors all the powers necessary, and he who first enters upon the administration shall proceed to its conclusion. *Ib.* 511.

11. A husband, during his life time, and after the death of the wife, may, although there have been children of the marriage, dispose of the gananciales for any honest purpose when there is no intention to defraud the children, and may, by will, direct their sale to pay his debts. *Ib.* 512.

12. The taking of a legacy by the wife under her husband's will does not prevent her from contesting the validity of the will, so far as it disposes of her half interest in the common property to others. *Beard v. Knox*, 5 Cal. 256.

13. The fact that a will was begun on one day, and finished several days afterward, the delay being for the purpose of procuring a competent person to direct the manner of drawing it, it seems is no ground for invalidating a will under a Mexican law. *Castro v. Castro*, 6 Cal. 160.

14. The strictness of the rules of the civil law, requiring five, or at least three, witnesses to a will, was relaxed expressly in favor of remote districts, and two witnesses were sufficient to a will by the custom of California. *Tevis v. Pitcher*, 10 Cal. 477.

15. A will takes effect on proof of its execution, in the absence of a statute requiring it to be probated. *Ib.* 161.

16. After twenty years acquiescence in the terms of a will, an heir should not be allowed to dispute his own acts, or to contest the will on abstract points of law, which had never any force in California. *Ib.*

17. The will of a testator dying before the organization of the State government did not require to be probated under the then existing laws. *Grimes v. Norris*, 6 Cal. 624.

18. Our statute of wills not only fails to require the probate of wills executed before its passage, but it must from its terms be concluded that the legislature actually

Will.

intended to exclude such wills from the operation of the statute altogether, leaving their validity to depend upon the laws under which they were made, and not disturbing rights which had grown up under the former system. *Ib.* 625.

19. A will only becomes executed upon the death of the testator, and therefore this construction does not affect wills made before the passage of the statute, where the testator did not die till after its passage. *Ib.*

20. Property in this State acquired by the husband after marriage, but before the passage of the act of April 17th, 1850, is common property under the Mexican law, as that so acquired subsequently is by the statute, and cannot be disposed of by will. *Estate of Buchanan*, 8 Cal. 509.

21. A posthumous child, for whom no provision is made in the will of the father, is entitled to one-half of the separate and common property, where no express intention of the testator to the contrary appears. *Ib.*

22. The several statutes of this State relating to wills do not apply to wills executed previous to their passage. There is no provision for the probate of such wills, and they must rest for their validity upon the laws under which they were made. *Tevie v. Pitcher*, 10 Cal. 477.

23. Under the Mexican law, as enforced in California, such a proceeding as the probate of an open will was unknown. The will took effect as a conveyance upon the death of testator. It was valid if made in the presence of three witnesses, and by the custom which prevailed in California and obtained the force of positive law, two witnesses were sufficient. *Ib.*

24. Where a will was attested by two witnesses and made before a person who was a *sindico*: held, the fact that such person signed the instrument as *sindico* did not the less render him a witness. *Ib.*

25. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and of the testator will be sufficient evidence of its due execution. *Ib.* 478.

26. Citation to heirs to show cause against probate of will, etc., not served, is no objection to the jurisdiction of the probate court, if the heirs answer. The want of due service goes only to the service itself. *Abila v. Padilla*, 14 Cal. 106.

27. A will made in Texas, operating upon property there situated, must be interpreted by the law of that State. To that law reference must be had, to determine the capacity of the testator, the extent of his power of disposition, and the condition upon which the power of alienation vested in the guardian of his children, appointed by the will, is to be exercised. *Norris v. Harris*, 15 Cal. 254.

28. In the absence of proof as to the laws of Texas, the courts of this State, in interpreting a will made in that State, will presume its laws to be in accordance with the laws of California. *Ib.*

29. D., a resident of Texas, and possessed of property situated in that State, makes a will, giving all his estate, real and personal, to his wife and children, in equal interest, one with the other, and investing his wife with the sole and entire control of the whole estate during her life, for the benefit of herself and children, free from the control and guidance of the courts of law in that or any other State where she may happen to reside at the time of his death, with full and complete power in her own name, and as guardian of his children, to sell and convey, or exchange, any portion of all his estate, and to give title to the same, and purchase with the proceeds such other property as she might deem best for her own interest, and that of her children, "without the intervention or interposition of any court whatever," and appointing her executrix of his will and guardian of his children: held, that, under the will, the wife has power to sell the entire property of the estate; and that, describing herself in a bill of sale, as "executrix," etc., does not limit the estate sold to her interest as such executrix; the designation being intended merely to identify herself as the individual mentioned in the will. The designation does not operate as a limitation upon her power. *Ib.*

30. The statute of this State, relative to guardians, and the disposition of the estate left to wards, only applies when there is no direction by will as to such disposition. *Ib.*

31. Where a will appoints a guardian, there is no necessity for the issuance of any letters of guardianship to authorize the guardian to act. The guardian's authority comes directly from the will. *Ib.*

Will.—Witness in general.

32. In this State there is no limitation upon the power of disposition by will. *Ib.*

33. An order of a probate court setting aside a judgment of that court refusing to admit a will to probate is not an appealable order, because not within section two hundred and ninety-seven of the act to regulate the settlement of the estates of deceased persons. *Peralta v. Castro*, 15 Cal. 511.

WITNESS.

- I. In general.
- II. When a party, or Interested in the Action.
 - 1. When the Assignor of a Party to the Action.
- III. Absent Witnesses.
- IV. Impeaching a Witness.
- V. Experts.
- VI. Witness to a Will.

I. IN GENERAL.

1. Unless the record shows that the interest of the witness is sufficient under our statute to disqualify, the appellate court will deem the parties entitled to the benefit of his testimony. *Johnson v. Car-ry*, 2 Cal. 36.

2. It is the duty of the court to decide upon the admissibility of a witness objected to for interest; and it is error to refer the question to the jury upon the evidence, with instructions to disregard it if they believe the witness interested. *Tabor v. Staniels*, 2 Cal. 240.

3. Where a witness is rejected for incompetency, the record must show the specific purpose for which he is offered to assign error. *Sparks v. Kohler*, 3 Cal. 801.

4. The testimony of a witness must be excluded when he would be benefited by it. *Jones v. Post*, 4 Cal. 14.

5. A survey may be detailed from memory by a witness, as well as defined by a diagram, but must by statute be excluded, unless the witness be the county surveyor, or be introduced to rebut or ex-

plain a survey of the county surveyor. *Vines v. Whitten*, 4 Cal. 230.

6. A book-keeper, as a witness, has a right to refer to books kept by him, to refresh his memory. * *Treadwell v. Wells*, 4 Cal. 263.

7. The code provides that "no Indian or negro shall be allowed to testify as a witness in any action in which a white person is a party:" held, that it is designed to include all races not white, and that the Chinese, as East Indians, are excluded. *People v. Hall*, 4 Cal. 399; *Speer v. See Yup Co.*, 13 Cal. 73; *People v. Elyea*, 14 Cal. 145.

8. Our code authorizes the court to make an order directing a party to produce books and papers into court on a subpoena duces tecum. *Barnstead v. Empire Mining Co.*, 5 Cal. 300.

9. The statement of a witness when sane, in relation to his own condition at the time of sale, ought to be conclusive, and the party introducing this witness is estopped from denying his sanity. *Montgomery v. Hunt*, 5 Cal. 368.

10. The confidential counselor, solicitor or attorney of a party, or his clerk, cannot be required to disclose communications made to him professionally. *Landsberger v. Gorham*, 5 Cal. 451.

11. A party has no right to cross-examine a witness, except as to facts and circumstances connected with the matter stated in his direct examination. *Ib.* 452.

12. In case of lost instruments, where no copy has been preserved, it is not to be expected that a witness can recite its contents, word for word. It is sufficient if intelligent witnesses who have read the paper understood its object, and can state it with precision. *Posten v. Rasette*, 5 Cal. 469.

13. Attendance upon any court as a witness, juror or party, only exempts the person so in attendance from arrest in a civil action, but not from obeying any ordinary process of a court. *Page v. Randall*, 6 Cal. 33.

14. Any witness may be introduced on the trial by consent of the court, notwithstanding he was not before the grand jury, subject only to the rights of the prisoner to a postponement, in case such evidence should operate as a surprise upon him. *People v. Freeland*, 6 Cal. 98.

15. A party committed for refusing to

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answer questions propounded to him as a witness, under an order that he stand committed till he answer the questions, will be discharged on habeas corpus, where it appears that the suit has abated; there being no longer parties or subject matter before the court, there is no longer a case in which the question can be asked. *Ex parte Rowe*, 7 Cal. 176.

16. A commitment for contempt, "in refusing to answer certain questions propounded to the witness by the grand jury, "is not a compliance with the statute, which requires that when the contempt consists in the omission to do an act which it was in the power of the person to perform, "the act shall be specified in the commitment." It does not appear from such commitment whether the questions were legal or not. *Ib.* 183.

17. In such a case the commitment should state that the grand jury were inquiring into a certain question, stating it, that the prisoner was sworn as a witness and certain questions asked him, stating them, that he refused to answer, that the facts were thereupon presented to the court by the grand jury, and the prisoner requested by the court to answer, which being refused by the prisoner, he was committed for contempt. And this rule is based upon the power of an appellate court to review on habeas corpus the proceedings of an inferior court in cases of contempt. The character of the questions need not be made public, as they could be propounded in writing. *Ib.*

18. Where the answer of a witness would subject him to criminal punishment, he is not privileged from answering on the ground that his answer would disgrace him, but solely on the ground that he is not compelled to criminate himself. *Ib.* 184.

19. The amendatory act of 1855 provides that "the testimony given by such witness shall in no instance be given against himself, in any criminal prosecution;" the witness having thus the protection contemplated by the constitution, is bound to answer. *Ib.* 185.

20. The only case where the witness is privileged from answering a question on the ground that his answer would disgrace him is, when it is not pertinent to the issue. *Ib.*

21. In a prosecution for assault with in-

tent to commit murder, where the prosecuting witness was asked on cross-examination if he did not previous to the assault buy a pistol to use upon the defendant, to which he answered in the affirmative; it was competent for the district attorney to ask the witness to state his reasons for so doing; and his answer that he was induced to do so by "what he was informed by a third person the defendant had said," was competent to show the motive of the witness. *People v. Shea*, 8 Cal. 539.

22. The mistake of counsel as to the competency of a witness is no ground for granting a new trial. *Packer v. Heaton*, 9 Cal. 571.

23. There is no precise age in which children are excluded from giving testimony. Their competency is to be determined not by their age, but by the degree of their understanding and knowledge. *People v. Bernal*, 10 Cal. 66.

24. If over fourteen years of age, the presumption is that they possess the requisite knowledge and understanding; but if under that age, the presumption is otherwise, and it must be removed upon their examination by the court, or under its direction and in its presence, before they can be sworn. *Ib.* 67.

25. Where to a certificate of proof, by a subscribing witness, of the execution of a deed, the witness adds his signature and the officer adds the usual jurat to an affidavit, such additions do not vitiate the certificate, if without them it shows a substantial compliance with the requirements of the statute. The signature of the witness and the jurat may be rejected as surplusage. *Whitney v. Arnold*, 10 Cal. 532.

26. A subscribing witness to a written instrument, if within the jurisdiction of the court, must be produced, or some sufficient reason given for his absence. *Stevens v. Irwin*, 12 Cal. 308.

27. The knowledge of an agent in the course of the agency is the knowledge of the principal, and the agent cannot be forced to disclose it. But if the agent acquires information apart from or independent of such course, he is not protected from disclosing it. *Hunter v. Watson*, 12 Cal. 377.

28. Where a subscribing witness to a bill of sale is out of the State, and the proof is that witness saw subscribing wit-

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ness put his name to it, and saw grantor sign it, and recognizes the paper from hearing it read, not being able to read himself, and another witness testifies that the signature of the subscribing witness is in his hand writing; this is sufficient evidence to identify the paper and authorize it to be read in evidence. *Mc Garrity v. Byington*, 12 Cal. 430.

29. A subscribing witness who is called to prove the execution of the instrument, who testifies that it was signed in his presence "to the best of his recollection," is sufficient to allow it to be read in evidence. *Id.*

30. To make the copy of an unrecorded deed evidence, the loss of the original being shown, the testimony of the subscribing witnesses to the deed, if such there be, should be had, at least to the fact of the execution of the paper, unless they are shown to be without the jurisdiction of the court. *Smith v. Brannan*, 13 Cal. 115.

31. An answer responsive to and denying the charges in a bill in equity is not evidence for the defendant, though the bill be sustained by one witness only. *Goodwin v. Hammond*, 13 Cal. 169; *Bostic v. Love*, 16 Cal. 72.

32. On motion by defendant to change the place of trial, on the ground that he is sued in the county in which he does not reside, if plaintiff resist the motion because of the convenience of witnesses, the evidence as to the convenience should be as full and particular as that which is required upon an application, for this cause, to transfer the trial to another county. The affidavit must state the names of the witnesses. *Loehr v. Latham*, 15 Cal. 420.

33. As a matter of practice, where defendant moves to transfer the cause to the county of his residence, plaintiff may resist by a counter motion to retain the cause on account of the convenience of witnesses, notwithstanding the residence of defendant, and then defendant can reply to the allegations as to the convenience of witnesses; or plaintiff, instead of a counter motion, may simply resist the motion of the defendant; but reasonable time should be allowed defendant, if desired, to meet the matter set up in opposition to the original motion. *Id.*

34. A court may reject the most positive testimony, although the witness be not discredited by direct testimony impeaching

him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief. *Blankman v. Vallejo*, 15 Cal. 645.

35. The equity rule requiring two witnesses to controvert an answer under oath does not prevail in this State. The answer is only a pleading, and is not evidence for defendant. *Bostic v. Love*, 16 Cal. 72.

II. WHEN A PARTY, OR INTERESTED IN THE ACTION.

36. Our statute allowing persons to testify in their own cases is in derogation of the common law rule, and opens a wide door to perjury, and cannot be too strictly construed by the court, and when the interest of a codefendant is so inseparable that the testimony of either must necessarily enure to the other's benefit, the evidence must be rejected. *Hotaling v. Cronise*, 2 Cal. 63; *Sparks v. Kohler*, 3 Cal. 301; *Buckley v. Manife*, 3 Cal. 442; *Johnson v. Henderson*, 3 Cal. 369.

37. A defendant may be examined on behalf of his codefendants, if their interests are divisible. *Beach v. Covillaud*, 2 Cal. 239.

38. Where a codefendant is called generally as a witness, and he was clearly incompetent on one of the issues, the court should properly reject him, unless he is examined on the specific point, as to prove his codefendant was not his partner. *Sparks v. Kohler*, 3 Cal. 301.

39. Where an accomplice or codefendant in a criminal action, under the statute of this State, elects to be tried separately, he is a competent witness for the other defendants charged with the same offense, the credibility of his testimony being left to the jury. *People v. Labra*, 5 Cal. 184.

40. Under our statute no person can be excluded as a witness on account of interest in the event of the action, unless he may be a party, or one for whose immediate benefit the action is prosecuted or defended. *Tomlinson v. Spencer*, 5 Cal. 293.

41. An endorser not a party to an action on the note is a competent witness for the plaintiff, where it does not appear that the suit is prosecuted for his immediate benefit. *Id.*

When a Party, or Interested in the Action.

42. An agent is a competent witness to testify as to his authority in the performance of acts for his reputed principal, though he be a secret partner. *Ib.*

43. A person who gave bond to the sheriff to save him harmless in holding the identical property which is the subject of the action, is not competent as a witness in the action. He must be treated as one for whose immediate benefit the suit is brought. *Landsberger v. Gorham*, 5 Cal. 452.

44. Where the clerk of a court is called as a witness to prove the records of which he is clerk, it is no objection that he is interested in the result of the suit. *Price v. Dunlap*, 5 Cal. 485.

45. A defendant who had suffered default is not competent as a witness to prove that he was authorized by his codefendant to sign his name to a note, as by so doing he would reduce the amount of judgment against himself. *Washburn v. Alden*, 5 Cal. 464.

46. A broker whose commission depends upon his principal's recovery is incompetent as a witness, on the ground that he is directly interested in the event of the suit. *Shaw v. Davis*, 5 Cal. 466.

47. In an action against a corporation, a witness who was a member of the corporation when the liabilities were incurred on which the action is brought, but who had sold out before the commencement of the action, is incompetent, for interest. *McAuley v. York Mining Co.*, 6 Cal. 81.

48. In an action against the endorser of a note, where demand and notice are not averred, but where it is averred that the maker paid the endorser the value of the note, and that the endorser agreed to pay it, the maker of the note is not a competent witness to prove these facts. *Palmer v. Tripp*, 6 Cal. 83.

49. A defendant who has not been served with process is not a competent witness for his codefendant in an action of trespass. *Gates v. Nash*, 6 Cal. 194.

50. The maker of a note after judgment against him is a competent witness for the endorser, because his interest is equally balanced. *Vance v. Collins*, 6 Cal. 439.

51. An endorser of a note is incompetent as a witness to establish the lien of a holder of a note upon the property of the maker, being directly interested to have the lien established. *Soule v. Dawes*, 6 Cal. 475.

52. A witness in an action for a disputed mining claim, who was in the employ of the party in possession at fixed wages, to be paid, however, from the proceeds of the claim, is not incompetent when his wages are not dependent upon the sufficiency of such proceeds. *Live Yankee Co. v. Oregon Co.*, 7 Cal. 42.

53. A defendant or plaintiff cannot testify in behalf of his codefendants or co-plaintiffs. *Lucas v. Payne*, 7 Cal. 96; *Turner v. McIlhane*, 8 Cal. 579.

54. In an action where the defense set up is the negligence of the servant of plaintiff, the servant is not a competent witness for his employer. *Finn v. Vallejo Street Wharf Co.*, 7 Cal. 256.

55. Where the defeat of plaintiff would inevitably result in S. obtaining the fund in controversy: held, that S., although not a party to the suit, was incompetent as a witness. *McEwen v. Johnson*, 7 Cal. 260.

56. A party who calls on an adverse party to testify, makes him a witness, and waives his incompetency to be heard for himself, or for his codefendants or co-plaintiffs. *Turner v. McIlhane*, 8 Cal. 580.

57. The liability of a witness to either party, in case of a certain result of the suit, must be legal, and not moral, and the consequent interest present, certain and vested, in order to exclude the witness. *Jones v. Love*, 9 Cal. 69.

58. Where a party is called as a witness by the other side, and on his cross-examination testifies to new matter, his opponent may be called on his own behalf in rebuttal of this new matter. *Ib.*

59. If a party be improperly joined as defendant, the court or jury, upon application, should first pass upon his case, and after he is discharged he could then be examined as a witness for the other defendant. *Domingo v. Getman*, 9 Cal. 102.

60. In an action by a company of miners to recover possession of a mining claim and damages for its detention, a person who was a member of the company at the time of the alleged detention, and who, prior to the commencement of the suit, in consideration of unpaid assessments, sold his interest to his copartners in the claim, without warranty, is not a competent witness, as he is interested in the damage sought to be recovered. *Packer v. Heaton*, 9 Cal. 570.

When a Party, or Interested in the Action.

61. Where L., a commission merchant, sued out an attachment against H., and had certain goods seized as the property of H., but which were claimed by C., and L. gave the sheriff an indemnity bond, which he accepted, and held the goods under the attachment, and subsequently sold the same to satisfy the attachment, C. brought suit against the sheriff for the value of the goods, the sheriff having released L. from all actions arising out of the seizure and sale of the goods, and having also released him after the commencement of the suit: held, that L. was a competent witness in the suit of C. against the sheriff. *Perlberg v. Gorham*, 10 Cal. 124.

62. A person who has been a stockholder in an incorporated company, but ceased to be such holder before suit was brought, is a competent witness in an action in the name of such company. *Tuolumne County Water Co. v. Columbia and Stanislaus River Water Co.*, 10 Cal. 195.

63. The lessor of plaintiffs is a competent witness in an action for a trespass to the leased premises, when the lease does not bind him to protect the plaintiffs against trespassers. *McCormick v. Bailey*, 10 Cal. 232.

64. On the trial of a cause where defendant calls the plaintiff as a witness, after the examination in chief he has a right to testify on his own behalf generally as to the matters in issue. *Drake v. Eakin*, 10 Cal. 312; *Tuolumne County Water Co. v. Columbia and Stanislaus River Water Co.*, 10 Cal. 396.

65. A vendor by a quit claim deed is a competent witness in an action of ejectment by the vendee against a third party to recover possession of the premises. *Johnson v. Parks*, 10 Cal. 448.

66. To make the testimony of a witness admissible he must be competent at the time of taking his deposition. It is the effect of the interest on the witness at the time his testimony is taken that disqualifies him. *Kimball v. Gearhart*, 12 Cal. 46.

67. In an action of trespass for entering upon the mining ground of plaintiff and digging the same up and converting the gold bearing earth, the vendor of plaintiff is a competent witness, although a part of the purchase money is still due him. *Rowe v. Bradley*, 12 Cal. 230.

68. In an action of foreclosure of a

mortgage brought by the administrator upon a note and mortgage given to the intestate in his lifetime, a witness whose wife is a sister and heir of the deceased is incompetent upon the ground of interest. *Lisman v. Early*, 12 Cal. 283.

69. Where the vendee of a lot of wheat released his vendor from all damages by reason of any implied warranty of the title to the wheat, which was then in litigation between the vendee and a third party, such release made the vendor a competent witness. *Paige v. O'Neal*, 12 Cal. 486.

70. In a suit against the maker of a note, or the acceptor of a bill, the endorser is a competent witness for either party. *Bryant v. Watriss*, 13 Cal. 87.

71. Generally a vendor with warranty of title is not a competent witness for his vendee in a controversy concerning the title. *Blackwell v. Atkinson*, 14 Cal. 471.

72. If the action concern the title to personal property, the vendor is a competent witness for a second or any subsequent vendee, the objection going only to his credibility. *Ib.*

73. In real estate the covenant of warranty runs with the land, and the vendor is directly liable to the person evicted, and is not a competent witness for plaintiff. *Ib.*

74. In suit on an account for services rendered and materials furnished in the course of his trade, and for articles furnished from his farm by plaintiff, who was a blacksmith and farmer, he is a competent witness to prove to the court his book of original entries, as preliminary to the introduction of the book in evidence. And having testified that the book was kept by himself; that it was his book of original entries in which he kept his accounts; that the entries were made by him at the time they purport to have been made; that he kept no other books; and had no clerk—the book was sufficiently proved to be admitted in evidence. *Landis v. Turner*, 14 Cal. 574.

75. And being admitted, its entries, accompanied with proof of the party's reputation in the neighborhood of keeping correct accounts, by persons who had dealt with him, were sufficient prima facie evidence of the specific services rendered and of their value, and of the specific materials furnished and their price; it not appearing that any higher evidence was attainable. *Ib.* 575.

When a Party, or Interested in the Action.—When the Assignor of a Party.

76. The fact that the charges are first made on a slate and then transferred to the book does not affect the character of the book as one of original entries—the charges on the slate being mere memoranda, not intended to be permanent. *Ib.*

77. But the transfer must not be long delayed, otherwise the book will be rejected, unless the delay be satisfactorily explained. A delay of three days is not unreasonable. *Ib.* 576.

78. A party who permits himself to stand on the books of a water company, incorporated under the statutes of this State, as a stockholder, and holds the office of secretary—to which no person but a stockholder is eligible—is not a competent witness for the company, in an action against it for overflowing plaintiffs' mining claim. He is liable for the debts of the company, and therefore interested. *Wolf v. St. Louis Independent Water Co.*, 15 Cal. 320.

79. The fact that the stock was held in his name in trust for another—the transfer having been made simply to enable him to become an officer of the company—does not relieve him from responsibility. *Ib.*

80. Von S., deputy United States surveyor, was called as a witness, on behalf of plaintiffs in ejectment on a patent, to prove that the premises in controversy were within the calls of the patent, and in the occupation of defendant, and on his voir dire stated that he was married to a daughter of plaintiffs, and had about two years previously, and after the patent was issued, purchased, in his own name, land covered by the grant, upon the confirmation of which the patent issued. Defendant objected to the witness, as interested in the grant as part owner, and on the ground that his wife was interested, and hence, that he was disqualified: held, that the ownership of the witness in parcels of land covered by the grant, other than the premises in controversy, did not disqualify him; that he could not, from such ownership, gain or lose by the direct legal operation and effect of the judgment, nor could the judgment be legal evidence for or against him in any other action. *Mott v. Smith*, 16 Cal. 556.

1. When the Assignor of a Party to the Action.

81. Where the plaintiff was the assignee of a claim, the written contract upon which it was founded having been destroyed by the assignor, before the assignment, it was error to admit the assignor as a witness to prove the contents of the written paper thus destroyed by him. *Smith v. Truebody*, 2 Cal. 347.

82. The assignor of a chose in action is incompetent as a witness for the assignee. *Jones v. Post*, 4 Cal. 15; *Griffin v. Alsop*, 4 Cal. 408; *Allen v. Citizen's Steam Nav. Co.*, 6 Cal. 402; *Adams v. Woods*, 8 Cal. 321.

83. A substantial and formal assignee stand upon the same ground; neither can introduce the assignor as a witness. *Adams v. Woods*, 8 Cal. 321.

84. As a general rule, the vendor of goods is not a competent witness to impeach the sale made by himself, but where evidence tending to show a collusion between the vendor and purchaser to defraud the creditors of the former is introduced, the declarations of the vendor are admissible, and a fortiori his sworn statement. *Howe v. Scannell*, 8 Cal. 327.

85. An assignor of an agreement to pay a certain sum of money to a defendant, if he would withdraw his defense to a suit, may be a witness for the assignee in an action on the agreement, as it is not for an unliquidated demand. *Gray v. Garrison*, 9 Cal. 328.

86. If in any case one partner can assign to another partner his interest in a firm claim, and then become a witness for him, he cannot when the claim is for goods sold and delivered, because this is an unliquidated demand within the practice act. *Cravens v. Dewey*, 13 Cal. 42.

87. Where goods are seized by the sheriff on an execution against G., and the owners of the goods, so in the sheriff's hands, assign them to plaintiff, who replevins them on the ground of fraud in the original sales, the assignors are competent witnesses for plaintiff. This is not assigning a chose in action, but a sale of specific goods. *Coghill v. Boring*, 15 Cal. 218.

88. A witness is not disqualified, because of a mere expectation of deriving, from a suit, some advantage, to which he is not legally entitled. *Ib.*

III. ABSENT WITNESSES.

89. Affidavits upon which a motion is founded to continue a criminal cause should show due diligence in endeavoring to procure the attendance of witnesses and in preparing for trial. *People v. Baker*, 1 Cal. 404.

90. On a motion for new trial on the ground of surprise at the trial by the non-attendance of witnesses, the affidavits, in endeavoring to procure the attendance of the witnesses, should set forth that reasonable diligence has been used in endeavoring to procure the attendance of the witnesses, and should set forth particularly and distinctly the facts which the party expects to prove by the witnesses. *Rogers v. Huie*, 1 Cal. 432.

91. A defendant applied for a continuance to enable him to take the deposition of a witness whose evidence would be of no avail in his defense, and in which he showed no diligence: held, that the application was properly rejected. *Hawley v. Stirling*, 2 Cal. 473.

92. An affidavit for a continuance on the ground of the absence of a witness, should state that the testimony wanted is merely cumulative and cannot be proved by others, and that the application is not made for delay. The character of the diligence used in trying to obtain the attendance of the witness, whether by exhausting the process of the law or otherwise, should also be stated. *People v. Thompson*, 4 Cal. 241.

93. Affidavits for a continuance should show that the facts expected to be proved by the absent witnesses cannot otherwise be proved. *People v. Quincy*, 8 Cal. 89; *Pierce v. Payne*, 14 Cal. 420.

94. A new trial not granted on the affidavit of the attorney of record that he, as well as his client and witnesses, were absent on the trial of the case because of a verbal agreement by opposing counsel to give notice on the day of trial, when such affidavit is met by counter affidavits of the opposing counsel, and when an attorney did appear and contest the case on the trial. *McDonald v. Bear River and Auburn W. and M. Co.*, 13 Cal. 230.

95. An affidavit for continuance, on the ground that a witness is absent, when the opposite party admits that the witness

would testify to the facts set forth, is evidence, but not conclusive proof, of its contents: it must be regarded only as a deposition. *Blankman v. Vallejo*, 15 Cal. 645.

IV. IMPEACHING A WITNESS.

96. Where one who had acted as interpreter and attorney, in relation to the execution of a deed, on being called as a witness testified that he had read the deed to the grantor, and what had passed at the time of the execution: and he subsequently received a conveyance of a part of the land from the plaintiff, it was held that the defendant might prove that this witness had made to other persons a different statement of the facts as testified to by him. *McDaniel v. Baca*, 2 Cal. 338.

97. A witness who is called to impeach another may answer that he would not believe such other witness on oath. This last has been the uniform practice in this State, and no injury has resulted from such practice. *Stevens v. Irwin*, 12 Cal. 308.

98. Where a witness is sought to be impeached by proof of contradictory statements alleged to have been made by him, the precise matter of these contradictions, and the time and place of the contradictory statements must be brought to the knowledge of the witness on cross-examination. *Baker v. Joseph*, 16 Cal. 178.

99. And this rule, as to evidence of contradictory statements, applies equally to evidence of declarations or acts of hostility or ill feeling on the part of the witness. There is no distinction between admitting declarations of hostility of witness, by way of impairing the force of his testimony, and admitting contradictory statements, so far as this rule is concerned. *Id.*

100. Where the objection to such impeaching evidence was general, and the court excluded the testimony without assigning any reason, the supreme court will presume in favor of the correctness of the action of the court below; and the appellant must show error to his prejudice, by putting his exception in the proper shape. *Id.*

101. To impeach the testimony of F., a witness for plaintiff, by showing that on a former occasion he had sworn different-

Impeaching a Witness.—Experts.—Witness to a Will.—Words.

ly, defendant offered in evidence a statement on motion for a new trial and on appeal, in a former suit between the parties, purporting to contain all the evidence, and agreed to as correct by the attorneys therein, in which statement there appeared the testimony of F. on the trial: held, that the statement was not admissible; that it was made for a particular purpose, and was not proof except for that purpose—certainly not to impeach F., who neither made nor signed it. *Payne v. Treadwell*, 16 Cal. 239.

V. EXPERTS.

102. In an action to recover the value of services as attorney in a certain suit, it is incompetent to prove the value of plaintiff's services by a witness who is not an attorney. *Hart v. Vidal*, 6 Cal. 57.

103. The opinions as to the value of labor upon a contract, by a person not an expert, cannot be received as evidence. *Reynolds v. Jourdan*, 6 Cal. 111.

104. A stock raiser is a competent witness to estimate the damage done to cattle by falling through a wharf. *Polk v. Coffin*, 9 Cal. 58.

105. The opinions of witnesses are generally admissible only when they relate to matters of science, or art, or to skill in some particular profession or business. *Hastings v. Steamer Uncle Sam*, 10 Cal. 342.

VI. WITNESS TO A WILL.

106. Evidence may be offered to prove a custom that no more than two witnesses were necessary to the validity of a will. *Panaud v. Jones*, 1 Cal. 500.

107. An executor named in a will, who is neither heir or legatee, may be a witness to the execution of a will. *Id.* 505.

108. On the trial of an issue of fact involving the validity of a will, a subscribing witness thereto is not rendered incompetent as a witness by holding lands devised therein in trust for a devisee and without having any interest himself therein. *Peralto v. Castro*, 6 Cal. 357.

109. And where such trustee had issued

a covenant of warranty to a purchaser of a portion of such lands, but was fully indemnified against loss thereby, by the cestui que trust, and also held what he thought a sufficient portion of the purchase money so received as further indemnity, he is a competent witness. *Id.* 358.

110. Where a will was attested by two witnesses and made before a person who was a *sindico*: held, the fact that such person signed the instrument as *sindico*, did not the less render him a witness. *Tevie v. Pitcher*, 10 Cal. 477.

111. Where the testator and the witnesses to a will are dead, proof of the signatures of the witnesses and testator will be sufficient evidence of its due execution. *Id.* 478.

See EVIDENCE, DEPOSITION.

WORDS.

1. No words of reproach how grievous soever, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter. *People v. Butler*, 8 Cal. 441.

2. To support the condition of a bond, the court will transpose or reject insensible words, and construe it according to the obvious intent of the parties. *Swain v. Graves*, 8 Cal. 551.

3. "Actual"—The word "actual," in the statute of frauds, was designed to exclude the idea of a mere formal change of possession, and the word "continued," to exclude the idea of a mere temporary change of possession. But it was never the design of the statute to give such extension of meaning to this phrase, "continued change of possession," as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. *Stevens v. Irwin*, 15 Cal. 506.

4. "Agent"—Appended to a name has always been held to be merely descriptive personæ, and in no respect affects his liability. *Sayre v. Nichols*, 5 Cal. 487.

5. "Agent"—All attorneys in fact are agents, but all agents are not necessarily attorneys in fact. Agent is the general

term which includes brokers, factors, assignees, shipmasters, and all other classes of agents. *Porter v. Hermann*, 8 Cal. 624.

6. "Agent"—The words "agent, trustee, guardian, administrator," and the like, added to the name of the signer, do not qualify the terms in the body of the obligation, when those terms impart a duty of payment by such signer. *Haskell v. Cornish*, 13 Cal. 47.

7. "Annually"—Does not mean a measure of time, but a succession of calendar years. *People v. Brenham*, 3 Cal. 488.

8. "Appurtenances"—Is too vague a term to comprehend in its meaning any personal property as the subject of levy, in a sheriff's sale. *Monroe v. Thomas*, 5 Cal. 471.

9. "Bailment"—A proper understanding of the word "bailment" justifies us in the conclusion that the legislature intended to use the word in a limited sense, as designating bailees to keep, to transfer, or to deliver. *People v. Cohen*, 8 Cal. 43.

10. "Belief"—The word "belief," as used in the statute, in verification, is to be taken in its ordinary sense, and means the actual conclusion of the defendant drawn from information. *Humphreys v. McCall*, 9 Cal. 62.

11. "Black, Indian and White Person"—Are generic terms, and refer to the great types of mankind. *People v. Hall*, 4 Cal. 402.

12. "Special cases"—Are confined to such new cases as are the creation of statutes. *Parsons v. Tuolumne County Water Co.*, 5 Cal. 44.

13. "Conscience"—It will not do to say that conscience and principle are used in common parlance as synonymous; we have shown that they have a distinct and separate meaning, well recognized, and we are bound to suppose that the legislature employ words with reference to their correct legislation. *People v. Stewart*, 7 Cal. 144.

14. "Conveyance"—In the act of April 16, 1850, is made to embrace mortgages. *Call v. Hastings*, 3 Cal. 184.

15. "Exclusive of costs"—Is used in the judiciary act of 1789, *ex industria*. *Gordon v. Ross*, 2 Cal. 157.

16. "By matter in dispute"—In section four, article six of the constitution, is meant the subject of litigation. It is the matter

for which the suit is brought, upon which issue is joined, and in relation to which the witnesses are examined, juries are called and the verdict is rendered. *Dumphy v. Guindon*, 13 Cal. 30.

17. "Cumulative"—In the act creating the board of supervisors for the counties in this State, was intended to bear such a signification as to give the board of supervisors of San Francisco county the same powers that were conferred upon the boards created in other counties, and where additional powers were given to other counties, the same were also to apply. *Dewitt v. City of San Francisco*, 2 Cal. 389.

18. "Good and sufficient deed"—Only refers to the form of conveyance. *Brown v. Covillaud*, 6 Cal. 573.

19. "Duration"—By a reference to lexicographers it will be found that the word "duration" signifies "extent, limit, or time." When, therefore, the time of holding is not fixed, the tenure of the office is at the pleasure of the appointing power. This power of removal cannot be divested or taken away except by limiting the term. *People v. Hill*, 7 Cal. 102.

20. "Next election by the people"—Means the next election after the vacancy happens. *People v. Mott*, 3 Cal. 506.

21. "Fiador"—Means a guarantor or endorser. *Lightstone v. Laurencel*, 4 Cal. 277.

22. "All intents and purposes whatever"—In the statute of Queen Anne, relative to gaming debts, made the statute apply to notes in the hands of third persons. *Haight v. Joyce*, 2 Cal. 66.

23. "Heirs"—Though a deed was made to a party who is dead, and "his heirs," the word "heir" is not a word of purchase carrying title to the heirs, but only qualifying the title of the grantee. *Hunter v. Watson*, 12 Cal. 376.

24. "Prescribed by law"—Looks to actual legislation upon the subject matter, and in no just sense extends the exercise of the power to others. *Exline v. Smith*, 5 Cal. 113.

25. "May and shall"—In the construction of the law are convertible terms. *Cooke v. Spears*, 2 Cal. 412.

26. "Mortgage"—The term "mortgaged" is very definite and certain in itself, but the parties have added, "as security for the payment of the monthly rent

Words.—Work and Labor.—Writs.

herein stipulated," thus giving an express definition of the sense in which the term is used. *Barroilhet v. Battelle*, 7 Cal. 452.

27. "Mortgage"—No particular words are necessary to create a mortgage. The words "we mortgage the property," when accompanied by a provision for the sale of it in case the money, recited in the instrument as being thus secured, be not paid, are clearly sufficient. *De Leon v. Higuera*, 15 Cal. 496.

28. "Opinion"—The terms "opinion" and "decisions" are often confounded, yet there is a wide difference between them. A decision of the court is its judgment; the opinion is the reasons given for that judgment. *Houston v. Williams*, 13 Cal. 27.

29. "Or"—This word is substituted for "on" in the printed copies of the constitution, in the fourth section of the sixth article. It should be "and in criminal cases amounting to felony on questions of law alone." *People v. Applegate*, 5 Cal. 295.

30. "Original"—Is a general term of limitation, contradistinguished from the term appellate. *Reed v. McCormick*, 4 Cal. 343.

31. "Powder magazine"—Contradistinguished from house, place or building. *Harley v. Heyl*, 2 Cal. 482.

32. "To purchase any property"—And "to erect or lease" public buildings, used in separate and distinct sentences in a municipal charter, give the power to purchase lands to the municipality. *De Witt v. City of San Francisco*, 2 Cal. 296.

33. "With absolute powers to dispose of"—Ought not, in the statute of husband and wife, to be extended to a disposition by devise. *Beard v. Knox*, 5 Cal. 256.

34. "Shall reside and acquire property"—In the act of husband and wife, does not confer upon wives actually being or residing in the State, greater privileges than to those abroad. *Ib.* 257.

35. "Shipped"—It cannot, in a contract, be construed to mean a warranty that the goods had been shipped. It is rather used to describe and ascertain the property. *Middleton v. Ballingall*, 1 Cal. 417.

36. "Supervisors"—The word "supervisors," when applied to county officers, has a legal signification. The duties of the officer are various and manifold—

sometimes judicial, and at others legislative and executive. *People v. Supervisors of El Dorado County*, 8 Cal. 62.

37. "Transport"—Under its generic and common meaning, would include towing another vessel. *White v. Steam Tug Mary Ann*, 6 Cal. 470.

38. "Use"—The provision in the agreement for a reconveyance upon the payment of the precise amount of the consideration of the conveyance, and three hundred dollars a month for the use thereof, is a circumstance favoring the conclusion that the debt subsisted. The term "use," in this instance, means interest. *Hickox v. Lowe*, 10 Cal. 207.

39. "Vacancy"—Defined to be the absence of an officer from his office. *People v. Wells*, 2 Cal. 223.

40. "Wagon"—Is intended to mean a common vehicle for the transportation of goods, wares and merchandise of all descriptions. *Quigley v. Gorham*, 5 Cal. 418.

WORK AND LABOR.

1. In an action brought to recover the contract price agreed to be paid for work and materials, the defendant will not be permitted to insist at the trial that the work was done in an unworkmanlike manner, unless he has set up such defense in his answer. *Kendall v. Vallejo*, 1 Cal. 372.

See MECHANICS' LIEN.

WRITS.

WRIT OF ARREST, See ARREST.

WRIT OF ASSISTANCE, See ASSISTANCE.

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YUBA COUNTY.

1. Under the Act of April 28th, 1857, authorizing the supervisors of Yuba county to take stock in a railroad company, the stock may be taken in any railroad by which a railway connection shall be formed between Marysville and Benicia, or any point on the Sacramento river at or near Knights' Ferry. The company in which the stock is taken need not be constituted for the express and only purpose of such connection; *provided*, the effect of the work is to make such connection. *Pattison v. Supervisors of Yuba County*, 13 Cal. 189.

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<p><i>Williams v. Covillaud</i>, 10 Cal. 419, p. 180, 189, 447, 566, 845, 971, 1037.</p> <p>— <i>v. Gregory</i>, 9 Cal. 76, p. 517, 791, 939, 1038, 1049.</p> <p>— <i>v. Price</i>, 11 Cal. 212, p. 226, 467, 702, 789, 974.</p> <p>— <i>v. Smith</i>, 6 Cal. 91, p. 521, 679, 715, 897, 930.</p> <p>— <i>v. Walton</i>, 9 Cal. 142, p. 134, 135, 342, 653, 662.</p> <p><i>Williamson v. Blattan</i>, 9 Cal. 500, p. 231, 402.</p> <p>— <i>v. Monroe</i>, 3 Cal. 383, p. 449, 861.</p> <p><i>Wilson v. Berryman</i>, 5 Cal. 44, 491, 665, 918, 1033, 1039.</p> <p>— <i>v. Broder</i>, 10 Cal. 486, p. 280, 921, 928, 972.</p> <p>— <i>v. City of San José</i>, 7 Cal. 275, p. 772, 805, 911, 954.</p> <p>— <i>v. Corbier</i>, 13 Cal. 166, p. 498, 835, 874.</p> <p>— <i>v. Cunningham</i>, 3 Cal. 241, p. 365, 369, 771, 858, 954.</p> <p>— <i>v. Hernandez</i>, 5 Cal. 437, p. 57, 65, 663, 847.</p> <p>— <i>v. Heslep</i>, 4 Cal. 300, p. 136, 627, 813.</p> <p>— <i>v. Lassen</i>, 5 Cal. 114, p. 327, 454, 829.</p> <p>— <i>v. Middleton</i>, 2 Cal. 54, p. 483, 941, 999, 1036.</p> <p>— <i>v. Roach</i>, 4 Cal. 362, p. 265, 328, 416, 443, 454, 598, 658, 660, 663, 847, 922.</p> <p>— <i>v. Spring Hill Quartz M. Co.</i>, 10 Cal. 445, p. 333, 960.</p> <p>— <i>v. Supervisors Sacramento County</i>, 3 Cal. 386, p. 201, 963.</p> <p><i>Winans v. Christy</i>, 4 Cal. 70, p. 99, 390, 427, 430, 434, 437, 488, 489, 644, 813, 832, 995, 1033.</p> <p>— <i>v. Hardenberg</i>, 8 Cal. 291, p. 128, 371, 792, 1048.</p> <p><i>Wing v. Owen</i>, 9 Cal. 247, p. 786, 939, 1049.</p> <p><i>Wingate v. Brooks</i>, 3 Cal. 112, p. 879, 1021.</p>	<p><i>Wolf v. Fleischacker</i>, 5 Cal. 244, p. 153, 574, 770, 989.</p> <p>— <i>v. Fogarty</i>, 6 Cal. 224, p. 50, 316, 381, 872.</p> <p>— <i>v. St. Louis Independent W. Co.</i>, 10 Cal. 541, p. 332, 782, 1063.</p> <p>— <i>v. —</i>, 15 Cal. 319, p. 368, 491, 732, 1006, 1014, 1074.</p> <p><i>Wood v. City of San Francisco</i>, 4 Cal. 190, p. 277, 521, 896, 905, 926, 954.</p> <p>— <i>v. Fobes</i>, 5 Cal. 62, p. 842, 993.</p> <p><i>Woodbury v. Bowman</i>, 13 Cal. 634, p. 112, 477, 608, 650, 1021.</p> <p><i>Woodward v. Payne</i>, 16 Cal. 444, p. 301, 590, 699.</p> <p><i>Woodworth v. Fulton</i>, 1 Cal. 295, p. 88, 426, 434, 443, 557, 832, 905, 995.</p> <p>— <i>v. Guzman</i>, 1 Cal. 203, p. 276, 406, 459, 746, 747, 872, 900.</p> <p><i>Wright v. Levy</i>, 12 Cal. 257, p. 146, 150, 156, 187, 205, 250, 462, 541, 549, 642.</p> <p>— <i>v. Whitesides</i>, 15 Cal. 46, p. 428, 684, 835.</p> <p><i>Yonge v. Pacific Mail S. S. Co.</i>, 1 Cal. 353, p. 212, 305, 365, 498, 621, 668, 786, 819, 1036, 1046.</p> <p><i>Young v. Pearson</i>, 1 Cal. 448, p. 244, 274, 288, 320, 326, 400.</p> <p>— <i>v. Polack</i>, 3 Cal. 208, p. 289, 311, 587, 697.</p> <p>— <i>v. Starkey</i>, 1 Cal. 426, p. 135, 220, 288, 335, 528, 949.</p> <p><i>Youngs v. Bell</i>, 4 Cal. 201, p. 183, 445, 491, 842, 1040.</p> <p><i>Yount v. Howell</i>, 14 Cal. 465, p. 366, 430, 433, 437, 438, 489, 494, 497, 560, 589, 643, 644, 821, 843, 975, 976, 1023.</p> <p><i>Yuba County v. Adams</i>, 7 Cal. 35, p. 154, 403, 525, 627, 982.</p> <p><i>Zander v. Coe</i>, 5 Cal. 230, p. 121, 263, 265, 267, 346, 415, 416, 654, 659, 660, 661, 664, 673, 967.</p> <p><i>Zane v. Crowe</i>, 4 Cal. 112, p. 97, 129, 669, 1048.</p> <p><i>Ziel v. Dukes</i>, 12 Cal. 479, p. 182, 184, 635, 742, 853.</p>

ERRATA.

N. B.—THE PROFESSION ARE REQUESTED TO EXAMINE THE PAGES AND CORRECT THE SAME BY THIS TABLE.

PAGE			PAGE		
46,	2nd column, 10th line,	for "24 Cal." read "14 Cal."	372,	1st column, 2nd line,	for "Corter" read "Porter."
56,	1st "	27th line, for "123" read "125."	494,	2nd "	14th line, for "13 Cal." read "10 Cal."
58,	1st "	48th line, for "267" read "367."	507,	1st "	6th line, for "action denied" read "answer denied."
62,	2nd "	50th line, for "10 Cal." read "16 Cal."	520,	1st "	50th line, for "jurisdiction" read "justification."
88,	1st "	21st line, for "305" read "414."	521,	2nd "	29th line, read "Hart v. Burnett, 15 Cal. 616," and 30th line, for "616" read "634."
88,	1st "	24th line, for "119" read "199."	524,	2nd "	27th line, for "sufferer" read "sufficient."
88,	2nd "	12th line, for "5 Cal." read "3 Cal."	524,	2nd "	31st line, for "536" read "563."
93,	1st "	39th line, for "cases" read "causes."	573,	1st "	24th line, for "mortgagee" read "mortgagor."
93,	2nd "	22nd line, for "6 Cal." read "9 Cal."	574,	1st "	11th line, for "147" read "417."
103,	1st "	44th line, for "responsible" read "responsive."	574,	2nd "	37th line, for "13 Cal." read "7 Cal."
127,	2nd "	24th line, for "23" read "213."	598,	1st "	37th line, for "Bell" read "Belloc."
154,	1st "	18th line, for "mortgagee" read "mortgagor."	599,	2nd "	31st line, for "3 Cal." read "4 Cal."
154,	2nd "	33rd line, for "collection" read "correction."	602,	2nd "	14th line, for "injunctions" read "questions."
155,	1st "	43rd line, for "8 Cal. 80" read "15 Cal. 80."	603,	1st "	12th line, for "presumptive" read "preventive."
166,	1st "	47th line, for "renewed" read "reviewed."	608,	1st "	14th line, for "Hoffman v. Sanders" read "Heyman v. Landers."
188,	2nd "	33th line, read "Judson v. Atwill, 9 Cal. 478."	631,	1st "	42nd line, for "232" read "132."
192,	2nd "	16th line, for "2 Cal." read "3 Cal."	636,	1st "	28th line, for "10 Cal." read "11 Cal."
217,	2nd "	41st line, for "6 Cal." read "7 Cal."	652,	1st "	47th line, for "15 Cal." read "16 Cal."
221,	1st "	25th line, omit "10 Cal."	830,	2nd "	26th line, for "302" read "320."
221,	2nd "	41st line, for "1 Cal." read "11 Cal."	831,	2nd "	7th line, for "48" read "98."
239,	2nd "	47th line, for "2 Cal." read "3 Cal."	849,	2nd "	15th line, read "It had power."
234,	2nd "	56th line, for "6 Cal." read "9 Cal."	849,	2nd "	23rd line, for "sufficient" read "insufficient."
238,	2nd "	41st line, for "16 Cal." read "15 Cal."	849,	2nd "	41st line, for "truth" read "proof."
262,	2nd "	17th line, for "2 Cal. 38" read "2 Cal. 36."	940,	2nd "	18th line, for "61" read "161."
312,	1st "	53rd line, for "7 Cal." read "8 Cal."	987,	1st "	12th line, omit "3."
330,	1st "	33rd line, for "4 Cal." read "3 Cal."	996,	2nd "	29th line, for "8 Cal." read "9 Cal."
337,	2nd "	48th line, for "23" read "213."	998,	1st "	28th line, for "3 Cal." read "2 Cal."
340,	2nd "	30th line, for "7 Cal." read "8 Cal."			
344,	2nd "	48th line, for "8 Cal." read "7 Cal."			
354,	1st "	14th line, for "7 Cal." read "1 Cal."			

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